IN ARBITRATION

In the Matter of the Arbitration Between:
SOUTHWEST AIRLINES COMPANY

and

Grievance of [redacted]
Challenge to Assessment of Attendance Points
Case No. HNL-R-1217/22

TWU LOCAL 555
Before M. David Vaughn, Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to the arbitration provisions of the collective bargaining agreement ("CBA" or the "Agreement") in effect between Southwest Airlines Company ("SWA" or the "Company") and Transport Workers Union Local 555 ("TWU" or the "Union") (together the Company and Union are the "Parties" to the proceeding) to resolve a grievance filed and progressed on behalf of Ramp Agent Darrell Gibson ("Grievant") to resolve the Company's assessment of attendance points against him. The Parties were unable to resolve the dispute through the negotiated procedure, including a deadlock at the System Board of Adjustment; and the Union invoked arbitration. From a panel of arbitrators maintained by the Parties, I was selected to hear and decide the grievance.

A hearing was convened in person at Dallas, Texas on November 2, 2022 at which the Union and Grievant were represented by District 8 Representative Abilio Villaverde and the Company by Manager, General Counsel-Labor Phillip Stachowski. The Parties stipulated at the outset of the proceeding that the matter is properly in arbitration and before me. They were each then afforded full opportunity to present witness testimony and documentary evidence and to cross-examine witnesses and challenge documents offered by the other Party. For the Union testified Mr. Villaverde, who was examined by Oscar Camara, Ramp and Operations Agent [redacted], Ramp Agent [redacted] Union Representative/Board Member Nicole Salinas, District 6 Representative Tyler Cluff and Grievant, who was present throughout the hearing and testified on his own behalf. For the Company testified Manager, General Counsel-Labor Vance Foster and Ramp Supervisor Jazzery Kauhiedsell. Offered and received into the record were Joint Exhibits 1 and 2 ("Jt.

Exh.__"), Union Exhibits 1-10 ("U. Exh. __") and Company Exhibits 1-6 ("Co. Exh.__"). A court reporter was present at the hearing; by agreement, the transcript she produced constitutes the official record, page references to which are designated as "T. __". At the conclusion of the hearing, the evidentiary record was complete.

The Parties elected to close by written briefs. Page references to the briefs are designated as UPHB __ and CoPHB __, respectively. On December 15, 2022, upon receipt of the last brief, the record of proceeding closed. This Opinion and Award is based on the record and considers the arguments of the Parties. It interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The Parties agreed that the issues for determination are:

> Were the attendance points assessed against Grievant for April 30, 2022 in accordance with the Agreement and/or Company policy; and if not, what shall be the remedy?

APPLICABLE PROVISIONS OF THE AGREEMENT

ARTICLE TWO
SCOPE OF AGREEMENT

> **A. Recognition.** The Union is recognized by the Company as the sole and exclusive bargaining agent for the Employees of the Company based in the United States, its territories and possessions, who comprise the class and craft of Ramp, Operations, Provisioning, and Freight Agents. The Union reserves the right to defend and protect any covered Employee.
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> **C. Reasonable Work Rules.** Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which

have been made available to covered Employees and the Union Office prior to becoming effective.

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

ARTICLE TWENTY
GRIEVANCE - SYSTEM BOARD
ARBITRATION DISCHARGE and DISCIPLINE

SECTION ONE PROCEDURES

A. Purpose. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

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C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

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L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement ("Contractual Grievances"), or in the event of a grievance involving disciplinary action other than discharge ("Disciplinary Grievances"), the following steps shall apply. However, in the event of a grievance involving discharge or a Union grievance concerning a change in Work Rules ("Discharge/Work Rule Grievances"), it shall proceed to sub- paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company. ***

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> **15. Arbitration/Function and Jurisdiction.** The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application

of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrators authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

ARTICLE TWENTY-THREE
ATTENDANCE

A. Purpose. The Company and the Union recognize that habitual absenteeism and tardiness adversely affect operations and morale. The purpose of this program is to control the attendance of Employees in a constructive manner and within the framework of progressive disciplinary procedures. In order to avoid the accumulation of occurrences, it is recommended that, in the event Employees require time off, they should, to the degree possible, secure trades with other Employees, request vacation time, or, where appropriate, request a leave of absence. Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick leave or sick pay shall warrant immediate termination.

SECTION I
ATTENDANCE PROGRAM
DEFINITIONS

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C. Reported Illness. (Non Chargeable). Four (4) doctor statements per calendar year shall be allowed for any Employee calling to report that he shall not report to work because of his personal illness/injury. No more than one (1) doctor statement shall be accepted for any Employee during the period from November 1 through and including January 3.

1. Non Chargeable Occurrence. If an Employee becomes ill and fails to complete his shift after

working at least four (4) hours thereof, no charge shall be made to his record; however, he shall be charged for any similar failure within the succeeding six (6) month period.

D. Reported Illness. (Chargeable). Any Employee calling to report that he shall not report to work because of his personal illness/injury and who does not provide a doctor's statement on his first day back, shall be charged with a Reported Illness (Chargeable). An Employee who has utilized his allowable number of doctor's statements under paragraph C. above shall also be charged with a Reported Illness (Chargeable).

Section Two – Attendance Program

A. Recorded Occurrences. Absences and tardiness on scheduled workdays, overtime, training, trades, or holidays shall be recorded in the following manner:

No-Show (Unreported Absence)	2	
Reported Personal Absence (Personal Business)	1	
Reported Illness (Non Chargeable) Four (4) doctor's statements per calendar year, but no more than one (1) November 1 - January 3	0	
Reported Illness (Chargeable) (No doctor's statement or after utilizing allowable number of doctor's statements for Non Chargeable Reported Illness	1	on the first day and ½ for the 3rd consecutive day, and ½ point for each day thereafter, to a Maximum of 2 per single continuous illness
Unreported Tardy	1	
Reported Tardy	½	

COMPANY COVID POLICIES

OPS UPDATE (01/07/22) - Changes to COVID-19 Isolation Requirements

How can you help

As always, we ask Employees to take personal responsibility and adhere to these policies because safe and healthy behavior is one of the best safeguards we can employ to maintain a healthy work environment and get through this pandemic together.

. Employees who are COVID-19 positive or have COVID-19 symptoms, should not come to work, follow isolation guidance and notify their leader.

OPS UPDATE (09/30/22) COVID Isolation Pay Program Ending

As COVID-19 continues to evolve and move from a pandemic (emergency) situation to an endemic (ongoing) illness, we, as a business, must adapt how we navigate the dynamic situation. After careful consideration, we have made the decision to deactivate the Infectious Disease Control Policy (IDCP). As a reminder, the IDCP was enacted in March 2020 due to the COVID-19 outbreak. When it is activated, it provides guidance for Employees related to limiting the spread of an infectious disease, guidelines for quarantine, and staying at home when ill.

The deactivation of the policy means **Employees are no longer required to notify their Southwest Leader when they test positive for COVID-19, unless required by state or local law.** The IDCP also gave us the ability to pay Employees who had tested positive for COVID-19, and we are grateful we were able to provide that benefit while the pandemic surged and affected all of us. As a result of deactivating the policy, we will also **end our isolation pay program effective Oct. 16, 2022**, subject to any applicable collective bargaining obligations.

Effective Oct. 16, pay for time off from scheduled work for Employees who are COVID-positive will come from the Employee's sick or PTO bank, and regular attendance rules will apply to all COVID-related absences. This process is in line with procedures for other illnesses that would require an Employee to call in sick.

FACTUAL BACKGROUND AND FINDINGS

The Company is an airline providing scheduled service to the public. The Union represents a unit of Ramp, Operations, Provisioning and Freight Agents employed of the Company. The Company and Union are Parties to the Agreement.

Grievant is employed by the Company as a Ramp Agent. He has 34 years of SWA service, 30 at the Company's Phoenix station and four at Honolulu. At times relevant to the dispute at issue, he was assigned to Honolulu.

Grievant suffers from disabilities (asthma, diabetes) recognized under the Americans with Disabilities Act ("ADA"). For his asthma he has FMLA protection. The details of his accommodations are not part of the record. He testified that he regularly suffers from symptoms from his medical conditions, which he does not regularly report. However, Grievant also testified that the manifestations of his conditions do not include vomiting.

On April 30, 2022, Grievant was scheduled to work 1430-2200 hours. He was assigned to work as a Lavatory Driver. While on the tarmac, and after working more than four hours, Grievant vomited into a bucket (T. 78-79), an event specifically confirmed by the Company. T. 20. Vomiting can be a symptom of COVID, for which there was at the Honolulu Station at the time a surge, as well as a manifestation of other medical conditions, some of which are communicable and some of which are serious. Sometimes there is no apparent medical cause.

In response to the COVID spike, the Company issued an April 29th email (U. Exh. 8), the day before, notifying employees of an upcoming deep clean spraying of Company areas to disinfect them. A memo from the day at issue confirms the COVID surge. (U. Exh. 9) as does U. Exh. 10. On April 30th, the Company's OPS update of January 7th 2022 (U. Exh. 1, U. Exh. 2) remained in effect. That policy was not rescinded until September 30th.

Grievant's work that evening was being supervised by Ramp Supervisor Jazzery Kauhiedsell. He completed servicing the aircraft to which he was assigned, left the tarmac, found Supervisor Kauhiedsell and told her that he had vomited. He testified that he did not tell her at any time that he was ill but testified that he reported to her that he had vomited because of the Company-imposed obligation to self-declare any symptoms of COVID - which vomiting is. Grievant testified that, earlier in the day, he had a COVID test, for which the result had been negative.

Grievant testified that he also told Supervisor Kauhiedsell that he could finish his shift. He testified, in addition, that he asked at that time that his temperature be taken, which was taken, with the reading in the normal range, and that he be given a COVID test, of which there were none on hand. T. 79-80. Ms. Kauhiedsell denied that Grievant asked for a temperature check or a COVID test. Without finding the Supervisor to be not credible, I credit Grievant's testimony and find it more likely than not that he requested a temperature check - for which the result was normal - and a COVID test, which was not administered.

Grievant testified that he then told Ms. Kauhiedsell that he could "finish the job," but told her that he understood if she might need to send him home. He presented her with the alternative of staying at work, in the break room, and told her that he could potentially infect other employees. Grievant testified that he never told his Supervisor that he was sick or that he was requesting to go home. She confirmed that he never said he could not complete his shift. T. 149-150. He simply declared his symptom, as he asserted was required.

The Supervisor then left the break room. Grievant testified that he remained in the break room close to an hour. When Ms. Kauhiedsell returned, she told Grievant to "go home". Grievant testified that he confirmed to her that "the Company is sending me home". T. 82-83. He denied that he was specifically told he was

being sent home sick (T. 153-154), although the supervisor testified at hearing that was the reason.

Grievant testified that he told the Supervisor that he knew she had consulted with someone more senior to reach the decision to send him home and asked her who made decision, to which he testified she replied that it was Christina Leilua, the Station Manager. Grievant testified that he had a hostile relationship with Leilua. Jazzery testified that she had talked with Assistant Station Manager Toni Oyao, not with Christina, and had so advised Grievant. Grievant testified that, as he left, he said to Ms. Kauhiedsell "I am not getting points for this, right?" In response, he testified that she shrugged.

Grievant was assessed an attendance point for his absence for part of his shift. The entry made by Ms. Kauhiedsell indicates that Grievant was sent home sick.

The Union filed a grievance on Grievant's behalf. It protested the Company's action sending him home ill and requested that the point be removed and that he be made whole for the time lost.

Grievant testified that he had been sent home previously during COVID and told as for points, "don't worry about it". He testified that Honolulu Management had been flexible. He also described having been sent home based on contact tracing, when he came in close contact with an Operations Agent who tested positive for COVID shortly after they were in class together. Grievant testified that he told Management he was going home sick for that day, but received a call later that evening saying that the Company was quarantining employees; he testified that he was off work 10 days, but received no points. Grievant also testified that when he and other employees call in sick, they must specifically say they are missing work because they are sick.

Grievant testified that he has never reached a point level where he received an attendance letter. He only discovered that he

received a point for April 30th, the day he was sent home, because he checked his records.

The Parties were unable to resolve the grievance. At the SBA, Grievant testified similarly to his testimony at hearing. Company presented no witnesses. The Board deadlocked. The Union invoked arbitration. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at hearing and in their respective post-hearing briefs. They are summarized as follows:

The Union argues that the grievance must be sustained because, although there are consequences under the attendance policy when an employee elects to go home sick, in the instant matter, Grievant did not state that he was sick and he did not request to go home. Instead, it contends, all he did was notify his supervisor, as he was required to do by the Employee Self-Declaration policy, that he had experienced a symptom - vomiting - he did not ordinarily have.

TWU argues that evidence establishes that Grievant has disabilities and exhibits regular symptoms, for which he is not sent home. It asserts that Grievant is treated differently than other employees not suffering from a disability, who have been sent home sick but were not assessed attendance points. The Union also protests that the Company could have sent Grievant home in Leave without Pay ("LWOP") status, as it has for some employees, but in Mr. Stachowski's statement at the SBA, it expressly denied Grievant that option.

The Union argues that the Company presented no evidence that it assessed employees points when sending them home, either pre-COVID or during COVID, thereby failing to prove its assertions. TWU maintains that Grievant never stated he could not complete his shift and that, in advising his supervisor of his symptom, he

simply complied with Company policy, as well as asking for temperature check and COVID test.

TWU points out that the Company never introduced evidence why the decision was made to send Grievant home, who made the decision to do so and what the procedure was with respect to assessing attendance points to employees sent home during COVID. It points out that Grievant's supervisor testified that Grievant was sent home because of COVID concerns at the Station and that she was not aware of anyone having been assessed points in such circumstances. It maintains that the Company's later (October 16th) memo that attendance rules would be applied means that such rules did not apply earlier, during COVID, including the date of Grievant's incident.

The Union disputes that employees directed by the Company to go home can properly be assessed points under the negotiated attendance policy; but it asserts that even assuming such a result, Grievant was not properly assessed points because he had worked more than four hours into his shift and could have taken his Article 23, Section 1 C. 1. Non-Chargeable Occurrence (also "NCO"), for which no point would have been assessed. It asserts that the Supervisor should have explained that Grievant would be assessed a point so that he could have invoked his Non-Chargeable Occurrence.

TWU asserts that, if the Company was allowed to send employees home at its initiative and then assess them points for having done so, the potential for targeting employees would be unchecked. It points out that Grievant experiences symptoms from his disability on a daily basis, notwithstanding which he still does his job. If the Company were able to send Grievant home for such symptoms and then assess him points, Grievant could be quickly divested of his job.

The Union urges that the grievance be sustained and the assessment of the attendance point rescinded.

The Company argues that the Union failed to meet its burden to prove the Company's action to have been in violation of the Agreement or policy. It points out that the negotiated attendance policy is "no fault." SWA asserts that the essential facts are undisputed: Grievant vomited at work and reported it to his supervisor. It maintains that, once the Company became aware of Grievant's illness, it had an obligation to send him home and that "when an Employee leaves work sick, the Employee is assessed one point under the attendance policy." The Company maintains that is what happened here.

The Company argues that the Union provided only scant and inaccurate testimony on rebuttal to establish applicability of non-chargeable attendance occurrences. It points to its objections to such rebuttal evidence, as the Union failed to establish the point in its case in chief. Moreover, urges that Company, Grievant was obligated to inform the Company of his desire to use the NCO, which he did not do. It maintains that the Union's evidence introduced on rebuttal should be disregarded or discounted.

SWA argues that the weight of evidence is that it can and does assess employees attendance points when it sends employees home for being sick. It points out that Arbitrator Barnard upheld the Company's position in the [redacted] case and sustained the employee's termination.[1] It points, in addition, to the similar challenge to the Company's assessment of an attendance point to [redacted], which the Union withdrew.[2] Similar assessments supporting SWA's position were made in arbitration awards involving [redacted] (Neumeier, Arb.) and [redacted] (Hill, Arb.).

The Company argues that allowing employees to declare illnesses at work and leave work, but suffer no attendance

[1]This was the case, notwithstanding that Mr. [redacted] went to the hospital at the recommendation of EMTs. The arbitrator concluded that fact that the Company did not make the decision for him to do so was sufficient.

[2]The Union points out that Ms. [redacted] conceded in her grievance that she stated to management that she was sick (T. 133), in contrast to Grievant.

consequences, would create serious and unacceptable operational consequences. It urges that application of the attendance policy to allow the Company to send such employees home and charge them the point appropriate under the CBA is necessary to protect operations as well as other employees.

SWA urges that the Union failed to prove a contract violation and urges that the grievance be denied.

DISCUSSION AND ANALYSIS

In the instant case, the problematic facts include a COVID spike, guidance on disclosure and quarantining which does not directly address the attendance policy, an experienced and street wise employee, an inexperienced supervisor and a triggering event - vomiting - with several possible medical causes - some potentially serious - like COVID - some not so much.

The Agreement includes a negotiated no-fault attendance policy. Article 23. The policy specifically recognizes the purpose of the program as controlling the attendance of employees in a constructive manner. The policy contains language in Section 2 which provides to the effect that employees who report chargeable illness (and are absent) will be assessed an occurrence (attendance point), if they exceed allowable numbers of doctor's statements or their Non-Chargeable Reported Illness.

The Attendance Policy does not specifically differentiate between those employees who go home of their own volition as ill and those who might be sent home by the Company. The Policy does not contain language directly contemplating situations where employees are sent home without having declared themselves to be ill.

In this regard, the Company's right, in the exercise of its authority to direct the work force, to send employees home for any reason or no reason at all is clear. The questions are whether and

under what circumstances the Company may, in the exercise of that right, assess the employee points under the no-fault Attendance Policy and whether the Company abuses its managerial discretion in assessing points or granting LWOP to some employees in some situations but not to other employees in other situations.

The policy includes a certain number of non-chargeable illnesses available to each employee. Section I, C. allows four doctor statements per calendar year, subject to a holiday period restriction. To the point here, the Agreement also allows an employee who "becomes ill and fails to complete his shift after working at least four (4) hours thereof" to avoid a charge to his record every six months. Insofar as the record indicates, Grievant had not used an NCO within the previous six months and had it available.

The Union argues that, if an employee can be sent home by the Company involuntarily and in the absence of acknowledged illness, allowing the Company to assess the employee points under the attendance policy would create an unfettered Company right to target employees. The Company argues that allowing employees to be sent home by the Company based on illness and not be assessed points would have dire consequences to Company operations. I note a purpose of the grievance/arbitration process to constrain irresponsible behavior by either Party and to correct it when it does occur. However, the concerns of the Parties are acknowledged.

The precipitating event - Grievant's vomiting while working - is acknowledged by the Company. The event is taken as true for purposes of analysis. Also taken as true is Grievant's testimony that vomiting is not a symptom of his other medical conditions. And finally, taken as true for purposes of the analysis is the proposition that vomiting can be a symptom of COVID (as well as other medical conditions or of no particular medical significance, e.g., bad food).

As indicated, also unchallenged is the Company's right to send employees home. SWA has the management right to manage its operations and direct the work force. That includes directing employees to stop work, clock out and go home. The evidence establishes that the Company issued such a directive to Grievant. The question is what is the contractual consequence of such action and, in particular, whether the Company was within its rights to assess Grievant points under the attendance policy. It was the burden of the Union in this contract case to establish that the Company's treatment of Grievant violated the governing Agreement and/or policies.

The Union's argument in support of Grievant hinges on two premises: first, that Grievant's disclosure that he vomited was not sufficient to cause the Company to conclude that he was sick and thereby justified sending him home. Grievant's testimony is that he never said he was sick; and the Union argues that the Company was not within its rights to conclude that Grievant was ill and send him home based on that conclusion. I am not persuaded. Vomiting is not a normal or healthy condition and is a recognized symptom of illness. It is, in particular, a symptom of COVID, which the evidence establishes was then spiking at the Honolulu Station.

While Grievant pointedly refrained from stating that he was sick, I am persuaded that the Company reasonably and properly concluded that Grievant had been ill, might be contagious and properly sent him home for that reason. Grievant's additional, pointed statement to the supervisor to the effect that he could be sent home or could stay and risk infecting other employees starkly presented a choice of which the Company was already aware. I note, in this regard, that the Supervisor denied Grievant was sent home because of COVID but was forced to leave work because "we didn't want him to infect the rest of the people on the ramp." Tr. 149. However, the primary communicability concern at the time was COVID, and I infer that COVID risk was the reason Grievant was sent home.

The exchange between Grievant and his supervisor also suggests that Grievant - a street-wise 34 year employee - was playing the system, looking to be sent home but to avoid any points. However, I am persuaded that the Company reasonably concluded that Grievant was ill - and potentially COVID contagious - and sent him home for that reason.

The record as to the consequences for purposes of the attendance program of being sent home by the Company as ill is confused. The Company's COVID policy (OPS UPDATE of January 7, 2022) (U. Exh. 1), still in effect at the time of the incident at issue, provides in part that employees who have COVID symptoms should not come to work, follow isolation guidance and notify management. Under that policy, a *fortiori*, employees who develop COVID symptoms at work must tell their supervisors and go home - or be sent home - as ill - and quarantined. To confirm, Grievant's reported vomiting was a COVID symptom.

While there is evidence that arbitrators have upheld discipline, including termination, when employees have been assessed points while home ill, there is no evidence that Honolulu Station employees who were sent home under the COVID policy based on exhibiting COVID symptoms were assessed points. Grievant testified that he had been sent home twice before under COVID but not assessed points in either circumstance. The Supervisor acknowledged that she was not aware of employees sent home for COVID being assessed points. T. 149. The September 30, 2022 action of the Company updating its COVID policy provides, in part: "Effective Oct. 16, pay for time off from scheduled work for Employees who are COVID-positive will come from the Employee's sick or PTO bank, and regular attendance rules will apply to all COVID-related absences." U. Exh. 3. The announcement effective October 16th "regular attendance rules will apply to all COVID-related absences warrants an inference that, prior to that time, attendance rules did not apply to such absences. Indeed, the Station's actual practice in such cases, if contrary to Grievant's testimony, the

supervisor's recollection and the Company's COVID policy, is unsupported in the record.

The evidence sufficiently establishes that, during the period the COVID policy was in effect, employees sent home for COVID, COVID symptoms or COVID contact were not assessed attendance points. Since, as I infer, Grievant was sent home for a COVID-like symptom and to avoid spreading whatever he had - COVID being the biggest risk at the time, he could not be assessed attendance points under the governing policy; and the Company violated its policy when it did so. The Award so reflects.

Moreover, the evidence is that Grievant worked more than four hours in his shift and had available to him the Article 23, Section 1. C. 1., Non-Chargeable Occurrence. There is no evidence that Grievant had previously used his once-in-six-months exemption.

The Agreement does not state whose burden it is to invoke that benefit; but the Parties appear to agree that "the Employee is required to inform the Company of their desire to inform the Company of their desire to use the NCO." Co. PHB 6. The Union acknowledged that employees "normally state when they want to use this option and sometimes the Company asks the employee if they have one, would they want to use it." UPHB p17-18.

However, in the instant situation, the evidence is that Grievant asked his supervisor whether he would be assessed points for being sent home - an eventuality which might have led him to invoke his NCO - and she simply shrugged. I am not persuaded that the shrug triggered Grievant's obligation to invoke his NCO; if he had been told he would be assessed points, he could have done so; and apparently, would have been obligated to state invocation of his NCO. But I am not persuaded that the ambiguity of the shrug triggered that obligation. Under the unusual circumstances of the exchange, Grievant was within his rights to await the Company's assessment of points before invoking the NCO to which he was entitled. He did so, thereby negating the assessment of points. The

availability of the NCO constitutes an additional basis to roll back the attendance point assessed.

Under both circumstances - the practice of the Company not assessing attendance points to employees absent or sent home for COVID-related reasons and the availability to Grievant of his NCO right - the Company's assessment of points must be rescinded. The Award so reflects.

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A W A R D

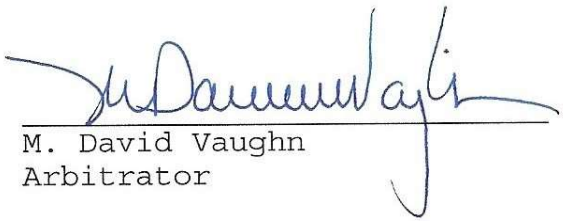
The grievance is sustained. The Company's assessment of attendance points against Grievant was inconsistent with the Agreement and Company policy. It must be rescinded based on the Company's policy and practice of not assessing employees attendance points for COVID-related absences during the period the January, 2022 COVID policy was in effect and, in the alternative, based on Grievant's post-incident invocation of the Article 23, Section 1 C. 1. Non-Chargeable Occurrence. Crediting the NCO against the points assessed without requiring Grievant to invoke the benefit at the time is limited to the specific circumstances presented.

The treatment of the 3.5 hours of work Grievant missed as a consequence of being sent home shall be treated the same as other hours of work missed as a result of COVID - exposure during the period of time the January, 2022 policy was in effect. If he is due money, it shall be paid to make him whole. Grievant's records shall be amended to so reflect.

The Award does not address whether employees involuntarily sent home as ill can be assessed points under the negotiated attendance program at times and in circumstances not covered by the Company's January, 2022 COVID Policy.

Because the grievance is sustained, my fees and charges are payable by the Company, pursuant to Article 20, Section 1 C.

Issued this 18th day of January, 2023, at Clarksville, Maryland.



M. David Vaughn
Arbitrator