TWU-IAM ASSOCIATION &
AMERICAN AIRLINES
SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration between TWU-IAM ASSOCIATION and AMERICAN AIRLINES, INC.	OPINION and AWARD (Attendance Guidelines)

BEFORE SYSTEM BOARD OF ADJUSTMENT:
Bonnie Siber Weinstock, Neutral Chairperson
Jonathan W. Oliff, Esq. - Company designee
Sean Ryan - Union designee

APPEARANCES:

For the Union: Phillips, Richard & Rind, P.A., by Christina S. Gornail, Esq.

For the Employer: O'Melveny & Myers LLP, by Aparna B. Joshi, Esq. and Lorenzo d'Aubert, Esq.

BACKGROUND

In 2013, American Airlines, Inc. (hereinafter, "Legacy AA" or "LAA") merged with US Airways (hereinafter, "Legacy US Airways" or "LUS"). Prior to the merger, the Transport Workers Union of America ("TWU") represented the following five work groups at LAA, and the International Association of Machinists & Aerospace Workers ("IAM") represented these work groups at LUS: Mechanic & Related Titles ("M&R"), Maintenance Control Technicians ("MCT"), Material Logistics Specialists & Planners ("MCS"), Maintenance Training Specialists ("MTS") and Fleet Service Employees ("Fleet"). Following the merger, the TWU and the IAM became the TWU-IAM Association ("Union") and negotiated

together with American Airlines, Inc. ("American" or "Company") to reach a Joint Collective Bargaining Agreement ("JCBA" or "Agreement") with each of the five work groups.

The Company and the Union appeared before the undersigned System Board of Adjustment ("Board") on September 21, December 14 and 15, 2022 for a hearing conducted on the Zoom platform pertaining to the grievance described below.[1] The hearing was transcribed.[2] The parties had full and fair opportunity to present evidence and argument, to engage in the examination and cross-examination of sworn (or affirmed) witnesses, and otherwise to support their respective positions. The record was declared closed upon the Board's receipt of the parties' closing Briefs. Thereafter, the Board conferred in executive sessions.

ISSUE

At the hearing on September 21, 2022, the parties agreed to submit the following issue to arbitration (T:7-8):

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[1] The Union filed a grievance under the contract for each work group challenging the Attendance Guidelines implemented by the Company. On a non-precedential basis, the parties agreed to have this Board hear and decide all of the grievances in this consolidated hearing, since the contract language in issue is substantially the same in each of the five contracts. (Transcript at p.37).

[2] Reference to the transcribed record of hearing appears herein as "T:-". Joint exhibits are cited as "J-", Company sponsored documents are labeled "C-" and Union proffered documents are denominated "U-." Some documents were offered by both parties. No significance should be attached to whether the Board cites the Company's document or the Union's.

Whether the Company has violated the M&R, MCT, MLS, MTS and Fleet Joint Collective Bargaining Agreements through its implementation and/or application of the November 15, 2021 Attendance Guidelines covering employees represented by the TWU-IAM Association? If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE JCBA

ARTICLE 24 - SICK LEAVE (from M&R contract; J-5A)

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F. An employee unable to report for duty will, unless prevented by reasons beyond his control, notify his immediate supervisor, or other central point set up for reporting purposes by the Company, as far in advance of the scheduled starting time of his shift as possible.

G. The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness, and the Company reserves the right to require, when in doubt of a bona fide claim, a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Company.

ARTICLE 24 - SICK LEAVE (from Fleet Service contract; J-5E)

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E. An employee unable to report for duty will, unless prevented by reasons beyond his control, notify his immediate supervisor or other central point set up for reporting purposes by the Company as far in advance of the scheduled starting time of his shift as possible.

F. The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness, and the Company reserves the right to require, when in doubt of a bona fide claim, a physician's certificate to confirm such sick claim. Abuse of sick leave privileges may subject the employee to disciplinary action up to and including termination.

DISCUSSION

The enormity of the task of combining two airlines is exemplified by the fact that it took the TWU, the IAM and the Company more than four years to negotiate the JCBA.[3] The Legacy AA and Legacy US Airways contracts covering the five work groups had sick leave provisions and there were some variations among the contracts at each legacy carrier. Further, LAA and LUS had an attendance control policy covering each work group.

The sick leave provisions in the JCBA were the subject of negotiations between the parties. All entities had highly skilled, sophisticated negotiators representing their interests during the JCBA negotiations. Therefore, an examination of the proposals from each side and the language that ultimately appeared in the JCBA is instructive, because the Attendance Guidelines ("Guidelines"; C-25) implemented by the Company on November 15, 2021 must be assessed for compliance with the JCBA. The Union grieved the Guidelines claiming they violate the JCBA and are an unreasonable exercise of managerial rights.

The Company, on the other hand, contends that it acted within its managerial prerogative to establish the Attendance Guidelines. The Company further insists that there have been attendance control policies for each work group for decades.

The record reveals that there were three passes of contract proposals by each side during negotiations with the

[3] Negotiations began in December 2015 and the JCBA was ratified on March 26, 2020. (T:12, 19, 63, 234).

Union on behalf of all the units except Fleet, that ultimately led to Article 24 of the JCBA, quoted above.[4] The first pass from the Union was on March 24, 2016 (C-7; U-15) and it stated, in pertinent part:

> G. *The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim.* [Red print in original; here, italics = IAM][5]
>
> H. <u>The Company acknowledges the right of an employee to use his sick leave benefit for the purpose intended in this Agreement. Accordingly, no employee will be disciplined for the use of his sick leave benefit for such purpose.</u>
> [Blue print in original; here, underlined = TWU]

On April 12, 2016, the Company passed its proposed sick leave language which rejected all of paragraph H quoted above, and added the last sentence to paragraph G which mentioned discipline. The Employer's proposed Paragraph G then stated, in pertinent part (C-8):

> G. The employees and the Union recognize their obligation of being truthful and honest in preventing

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[4] The Fleet Service negotiations followed the same pattern as the proposals described herein but there were fewer passes before a tentative agreement was reached. (<u>See</u> C-15 [April 14, 2016], C-16 [April 27, 2016], C-18 [April 27, 2016] and C-19 [a tentative agreement on February 13, 2018].) As indicated in the quoted "Relevant Provisions of the JCBA" section, the Fleet Service language ends with the statement that the employee may be subject to disciplinary action "up to and including termination."

[5] The parties explained that red typeface (here, italics) was an IAM proposal that came from its LUS agreement, and the blue typeface (here, underlined) was TWU language from its LAA agreement. (T:44, 66).

> unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Company.

On April 12, 2016, the Union passed its second demand regarding sick leave which again would have provided that no employee would be disciplined for the use of sick leave. The Union's demand stated (C-9):

> G. *The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges.* <u>The Company acknowledges the right of an employee to use his sick leave benefit for the purpose intended in this Agreement. Accordingly, no employee will be disciplined for the use of his sick leave benefit for such purpose, however, an</u> *employee may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim.*

On April 14, 2016, the Company responded with its second demand regarding sick leave which deleted the Union's reference to no employee being disciplined for the use of sick leave and it reinserted the last sentence from its first pass. The Company's proposal stated, in pertinent part (C-10):

> G. The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Company.

On April 20, 2016, the Union passed its third proposal regarding sick leave which eliminated the Company's last sentence regarding discipline and reinserted its prior demand that no employee would be disciplined for the use of sick leave. The Union's proposal stated, in pertinent part (C-11):

> G. *The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges.* The Company acknowledges the right of an employee to use his sick leave benefit for the purpose intended in this Agreement. Accordingly, no employee will be disciplined for the use of his sick leave benefit for such purpose, however, an *employee may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim.*

On April 21, 2016, the Company passed its third proposal regarding sick leave which again deleted the Union's language that no employee would be disciplined for the use of sick leave, and again reinserted the last sentence it had proposed from the beginning of the discussions that an abuse of sick leave may result in discipline. The Company's proposal, which was identical to its second pass (C-10), stated (C-12):

> G. The employees and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Company reserves the right to require, when in doubt of a bona fide claim a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Company.

This last pass (C-12) was signed by the parties as a tentative agreement on April 21, 2016. (C-13).

Throughout the negotiations, the Company had the goal of standardizing the contract language to the extent possible. In essence, the Company wanted the language it had in the LUS contract to be included in the JCBA, and the Union continually proposed language that stated the bona fide use of sick leave would not count as an "occurrence" under the Company's policy. Jerrold Glass, the Company's Chief Negotiator, testified that he repeatedly stated at negotiations that the Company "...would not enter into an agreement where we could not discipline employees for being out of work, being sick." (T:244). In the end, the Employer negotiated the LUS language into the JCBA. Thus, the Union's repeated demand that no employee would be subject to discipline for the appropriate use of sick leave was not included in the contract language agreed upon.

Accordingly, a majority of the Board finds that the Company does not violate the JCBA by assigning a point to an absence in order to track employees' dependability. However, as indicated infra, several aspects of the Guidelines, as written, violate the JCBA.

Thomas Regan, one of the Union's Chief Negotiators, explained that he inquired what an attendance policy might look like (T:79-81), and Mr. Glass stated that "...in all likelihood" the Company would move toward a policy like the LUS policy which was referred to as the "Seymour Policy." (T:93-94, 96, 244). According to Mr. Regan, the discussions across the table in negotiations confirmed that the Company's proposal, which was the

LUS language and policy, was a "may" policy, and he was able to persuade the TWU contingent that this meant there was an analysis of the bona fides of the absence before discipline would be imposed. (T:93-94). Gary Peterson testified similarly that the discussions during negotiations convinced the TWU that the JCBA language in the Company's last pass would be implemented with the Seymour Policy with which the IAM had a great deal of experience. (T:186-87). According to Mr. Peterson, it was explained that the Seymour Policy did not have additional points for critical work periods nor was there any compounding of points. (T:202-03, 211).

The final language in the JCBA states that employees who abuse sick leave may be subject to disciplinary action. The sick leave provision in the Fleet Service Agreement ends with the admonition that the employee may be subject to disciplinary action "up to and including termination." Even without the phrase "up to and including termination," it is clear that the Employer's authority to impose discipline may include the imposition of termination as the penalty.

A majority of the Board finds that when the parties agreed to incorporate the LUS sick leave language into the JCBA, the parties knew the long history of how this language was applied. As the Company acknowledged in its Brief (at p. 13), "The IAM language adopted by the parties in the JCBA sick leave articles came with a history of interpretation and application that permitted discipline for accumulations of sick leave

absences." It is likewise true that the LUS language came with the understanding that supervisors and managers spoke with the employee to discuss the employee's use of sick leave. (T:111-12, 138-39). Based on the Company's representations that it would likely use an attendance policy similar to the Seymour Policy, the Union had every reason to expect that the Guidelines would provide for the type of regular discussions with employees that occurred under the Seymour Policy. As indicated infra in Section E (Due Process), this has not been occurring with regularity under the Guidelines.

In all of the JCBAs, an employee may be required to present confirmation of illness for his/her use of sick time, and an employee who abuses sick leave privileges may be subject to disciplinary action. Therefore, as the Union argued in this proceeding, it bargained for a "may" sick leave provision in the Agreement and not a "will" or a mandatory assessment of discipline. Put another way, the JCBA language mandates that before taking disciplinary action for abuse of sick leave, the Employer must evaluate an employee's use of sick leave and determine whether the employee is using sick time for the purpose it was intended: to protect an employee's pay when the employee is legitimately ill. To borrow from cases the Neutral Chairperson has had over the course of her career, an employee who calls out sick in order to go hunting on the first day of hunting season is misusing sick leave, as is the employee who called out sick and is seen on the jumbotron of a televised

baseball game.[6] There can be no question that sick leave is not a "free day" to be used at the employee's discretion unrelated to illness.

The Union's and the Company's witnesses agree that during negotiations, the Company referred to the "Seymour Policy," which had guided sick leave usage at LUS, as the policy it intended to use post-JCBA.[7] The Seymour Policy (U-22), named after the Chief Operating Officer at LUS who promulgated it (T:200), was effective from 2010 until the Guidelines were implemented in 2021. Under the Seymour Policy, an employee received a counseling when four occurrences were recorded in a 12 month period. A Verbal Warning "may occur when five (5) occurrences...are recorded in the 12-month period" from the most recent occurrence. A Written Warning "may occur when 2 additional occurrences are recorded within 12 months of issuance of a Verbal Warning." A Final Written/Suspension Warning "may occur when 1 or more occurrence is recorded within 12 months of issuance of a Written Warning." Finally, termination "may occur when 1 additional occurrence is recorded within 12 months of issuance of a Final Written Warning." (U-22). The Seymour Policy ends with this sentence: "Discipline may be applied outside of these guidelines when an employee falsifies or abuses

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[6] Apparently, the jumbotron example was mentioned during negotiations. (T:215).

[7] Mr. Glass testified that he said, "We were in all likelihood moving to the LUS Seymour Policy for everybody. It would be a no-fault policy." (T:250).

sick leave or in other circumstances that warrant individual consideration." The Union argued that under the Seymour Policy, an employee could have nine occurrences before termination, and under the Guidelines, an employee could suffer termination at four occurrences. (T:23-24, 221-22).

A majority of the Board finds that the Company committed during negotiations to a policy that would be similar to the Seymour Policy with which the IAM had substantial experience. The Guidelines are significantly different in the number of absences that could trigger termination, and this is a meaningful deviation from what the Company asserted it would do, and which was an essential component of the discussion on which the Union relied that enabled the parties to reach a tentative agreement on the sick leave article of the JCBA.

Another important provision in the Seymour Policy is the following language: "....numerical thresholds are considered to assist in the determination of the appropriate level of discipline for sick leave which is considered as 'occurrences' when an employee's absenteeism is excessive." (U-22, p. 6). A majority of the Board finds that this quoted language unmistakably indicates that there is discretion whether to impose discipline. The Seymour Policy stated the following under the heading "Supervisor Action":

> As absences are recorded, the supervisor will analyze the causes and quantity of absences to determine if action should be taken. Action should be taken when:
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> • A clear pattern of absences is established. A pattern of absence can be absences in conjunction with

> scheduled days off, absences on shift swaps, absences on particular days of the week or absences on holidays or other annual events
>
> •Absence occurrences reach a numerical threshold
>
> •Abuse or fraud of the sick leave benefit occurs
>
> Employee attendance records should be reviewed after every absence occurrence and may include a conversation with the employee to let them know that their health and attendance are important.

(U-22, p. 4).

An absence control policy imbued with discretion in its application is the essence of the policy the Employer committed to the Union it would be implementing, and that was essential to securing the Union's agreement to the language now in the JCBA. Accordingly, if managers implement the Attendance Guidelines mechanically and fail to have discussions[8] with employees to assess whether there are extenuating circumstances for the absences, they are acting in violation of the stated intent in the Guidelines and the JCBA by converting a "may" policy into a non-discretionary, "will" policy. That is not what was represented to the Union as the Employer's intent when they reached agreement on the sick leave provision in the JCBA.

For the reasons fully described below, a majority of the Board finds that various aspects of the Attendance Guidelines, when implemented literally, would violate the terms of the JCBA.

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[8] An employee cannot evade discipline by making himself unavailable for these discussions.

A. Attendance Guidelines - General Provisions

First, as to the general existence of the Attendance Guidelines, the Union acknowledges, as it must, that the Employer has the managerial prerogative to control attendance abuse as part of its need to provide appropriate staffing to ensure on-time flights, to the degree possible.[9] (T:96). The Board finds that the Employer also has the right to try to standardize its policies across its various work groups to ensure consistent application of its rules and fairness to all employees.

The Guidelines assess points for absences and for failing to call out sick with sufficient time before the start of the employee's shift. Points can accumulate quickly, according to the Union, based on the length of the illness and whether any of the absences occur during times the Employer has designated as "critical operations periods," which include most holidays and some other times.

The Attendance Guidelines (C-25) aggregate points into Levels as indicated below:

> **H. Progressive Review Levels**
> The chart below outlines the guidelines for levels based on points assigned. The guidelines are not intended to be all-inclusive and cannot identify all possible situations. Levels issued for an infraction may vary from the stated guideline based on individual circumstances and/or applicable laws. Once a team member reaches a Level 3, an attendance discussion is required and documented after each occurrence.

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[9] Clearly, severe weather and air traffic control decisions may impact on-time flights, even if no employee is absent.

Point Total	Coaching/Level
Less than 4 Points within 12-month period of Active Service (prior to and including the 1st date of last occurrence)	Coaching
4 Points within 12-month period of Active Service (prior to and including the 1st Date of last occurrence)	Level 1
3 Points within the Level 1 Effective Period (12-month period of Active Service)	Level 2
2 Points within the Level II Effective Period (12-month period of Active Service)	Level 3
2 Points within the Level III Effective Period (12-month period of Active Service)	Termination

The question in this proceeding is whether the Guidelines violate the terms of the JCBA. The essence of the Union's argument in this case is that the policy implemented by the Employer across the work groups has gone from a "may" policy (i.e., one where discipline "may" result) to a "will" or mandatory policy in violation of the JCBA. The Union urges that the Guidelines penalize employees by accumulating points that ultimately lead to discipline even if all the absences were based on legitimate illness. The Union further maintains that employees are denied due process under the Guidelines because the employee is not always counseled before discipline is imposed. Each of the Union's objections to the Guidelines is discussed below.

B. Assigning Points To Absences

(1) Duration of Absence

The Union has three distinct complaints about how points are assessed. The first pertains to the duration of the absence. Specifically, an absence of five days or less is assessed one point, while an absence of six or more consecutive days is assessed two points. The Union argues that under the Seymour Policy, absences were measured by occurrences, so that one illness of any duration, was one occurrence. As indicated above, the Union asserts that under the Seymour Policy, it would take nine occurrences for an employee to reach the stage where termination could result, and under the Guidelines, termination could result after four occurrences because each occurrence can compound points. (T:23-24). The Employer's explanation is that longer absences present more of a burden to the Employer for staffing and coverage, so the employee should be assessed more points. (T:366-67). As described below, a majority of the Board finds this distinction based on the duration of the illness to be arbitrary.

First, our recent experience with the COVID pandemic has shown that certain illnesses require more time to get well and to ensure that the employee does not return to work while contagious. The Board takes administrative notice that at the start of the pandemic, the Centers for Disease Control ("CDC") recommended that individuals testing positive for COVID (we are not even discussing those who needed to be quarantined due to

exposure to the illness) had to stay home from work for ten days. The CDC's recommendations changed much later in the pandemic to five days home and then the individual could return to work if asymptomatic, but the individual should remain masked for five days after returning to work. This example demonstrates that the duration of an illness does not automatically mean that an employee is malingering or failing to be dedicated to his/her job. However, the Guidelines' assessment of extra points based on the duration of the illness is imbued with this assumption. A majority of the Board also finds that an employee who calls out sick and doesn't know how long s/he will be out of work, even if the absence ultimately is four days, creates a more difficult problem for the Employer who doesn't know how much coverage is needed for that employee, since it is a day-to-day notification of continuing illness. If the Employer has doubts about the bona fides of the illness based on the duration of leave claimed, the Employer is always free to ask for medical certification.

The Employer also argues that it is not likely an employee with an illness lasting six or more days will actually receive the additional points because an illness of more than four days potentially qualifies for medical leave or Family and Medical Leave Act ("FMLA") benefits, and if one of those leaves is granted, the points assessed for the absence do not count toward discipline. (T:259-60). Of course, the employee must apply for and be granted one of these leaves, so the potential for a leave does not cure the problem of additional points being

assessed for absences lasting six days or more.[10]

For all of these reasons, a majority of the Board finds that the imposition of more points based on the duration of the absence is arbitrary because it penalizes an employee for contracting an illness that requires a lengthier recuperation (or isolation) regardless of the bona fides of the illness.

(2) Pattern Absences

The Union next objects that absences during certain stated "critical operations periods" are assessed two points. The periods which command these extra points are times of holidays or, apparently, times when many people want a day off (e.g., Super Bowl Sunday and Monday). A majority of the Board finds merit in the Union's example that one of the peak periods is Good Friday through Easter Sunday. An employee who calls out sick but does not celebrate those holidays is assessed extra points on the assumption that any absence during those specified times is due to a desire not to work during holiday times. (T:27). A majority of the Board finds that if the Employer had suspicions about an employee's use of sick time during the holiday periods, the Employer can satisfy its concerns by asking the employee to provide a medical certificate to prove the bona fides of the claimed illness. Some supervisors may know their crew so well that a simple telephone conversation will satisfy

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[10] There are several reasons an eligible employee may choose not to request FMLA. For example, the employee with aged parents or a sick family member may "save" FMLA if it is needed to care for family members rather than "using it up" that year on the employee's own illness.

the supervisor whether the employee is ill. (For example, the bronchitis cough heard on the telephone may satisfy the supervisor that the employee's claim of illness is bona fide.)

A majority of the Board finds that the automatic assessment of additional points (above the point for the absence) without a determination whether the employee is misusing sick leave violates the JCBA, because it is based on an unwarranted assumption that the absence is not bona fide. This is not consistent with the JCBA language that "Employees may be required to present confirmation of illness, and the Company reserves the right to require, when in doubt of a bona fide claim, a physician's certificate to confirm such sick claim."

The Company argued that employees are not automatically assessed additional points for absences during critical operations periods. "Rather, each employee's attendance record is evaluated individually to determine whether a higher value is warranted for any given absence." (Brief at p. 36; T:396-97). The Company wrote, "...as stated in the Attendance Guidelines, an absence during these periods only qualifies for an additional point '[o]nce an absence pattern has been identified." (T:370; C-25). Pam Armstrong, an architect of the Guidelines, so testified. (T:396). Ms. Armstrong also testified that if a supervisor automatically issued extra points for absences during the critical operations periods, that would constitute a violation of the Guidelines. (T:398). However, there is nothing in the Guidelines or in the training Ms. Armstrong described that

would inform a supervisor that a pattern must be discerned before the extra points are assessed.

Accordingly, a majority of the Board finds that the Guidelines list the dates that the Company defines as critical operations periods, and there is nothing to inform an employee, a supervisor or manager, or any casual reader of the Guidelines that not every absence on one of the listed dates would be assessed two points. Specifically, a schematic entitled "Points Assessment per Occurrence" (C-25, p. 4) states in the box for which 2.0 points are assessed: "Absence associated with an identified absence pattern <u>or</u> critical operations period." (Emphasis added). A majority of the Board finds that a common sense reading of this sentence provides two situations that could cause two points to accrue, namely, an absence associated with a pattern or an absence associated with a critical operations period. One must read the six single spaced pages of the Guidelines to discern the suggestion that the finding of a pattern is a precondition to assessing two points for absences during critical operations periods. This lack of clarity regarding absences during critical operations periods causes the Guidelines to deviate significantly from the discretion in the Seymour Policy that was represented to be the exemplar of what the Company would implement.

Pam Armstrong testified that the Company expects its supervisors and managers to examine the circumstances surrounding an employee's absences and to try to determine if the employee

needs help with any issues or if there are extenuating circumstances that should cause the manager not to progress an employee on the disciplinary ladder contained in the Guidelines. (T:351-54). Ms. Armstrong testified that discipline at certain levels is not automatic and the system is not programmed to issue notices of levels in the Guidelines when specific points are accumulated (T:371, 373), but she added that it would be unusual not to issue discipline in accordance with the levels in the Guidelines. (T:385). A majority of the Board finds that while Ms. Armstrong testified that the administrators of the Guidelines were "...taught...the importance of having those conversations with a team member..." (T:355-57), she did not testify that the training emphasized to the administrators that they have discretion which they are encouraged to use in determining whether to assess discipline. Instead, Ms. Armstrong points to the language above the chart in the Guidelines (quoted <u>supra</u> at p.14) that levels of discipline may vary. (T:354). Accordingly, a majority of the Board finds it likely that the administrators of the Guidelines do not appreciate the degree of discretion the Company believes they have and are expected to exercise, and it is this discretion upon which the Company vociferously argued that the Guidelines are not a mechanically applied disciplinary system based on points.

In sum, a majority of the Board finds that the sick leave language in the JCBA clearly states that discipline <u>may</u> result for abuse of sick leave; it does not say that every use of

sick leave is an abuse. Yet the Guidelines contemplate discipline once certain levels of points are accumulated, and the Company maintains that the points should be assessed unless there are compelling or extenuating circumstances. (T:280-81). The clear message from the Company is that bona fide absences accrue points and exceptions thereto should not be expected.

A majority of the Board finds that the mechanical application of the Guidelines to assess extra points, without any indication that the absences have been evaluated for a pattern of abuse, would constitute a breach of the Agreement. Put another way, these parties unmistakably negotiated a <u>may</u> policy that expected the Employer to consider the circumstances that caused the employee's absences as part of an assessment of whether the employee was abusing the sick leave entitlements, and whether the employee should be assessed a counseling or a level of discipline. A string of bad luck in which an employee catches every virus his child brings home from day care, including those that occur right before school holidays which, not coincidently, encompass many of the "critical times" in the Employer's policy, may cause that employee to accumulate sufficient points for a termination. But if that same employee is the go-to person when the call-out of other employees necessitates holding him over on his shift for overtime, the Guidelines ask the supervisor to consider whether this same employee is abusing sick leave.

A majority of the Board finds that when this discretion is not exercised and a mechanistic approach to assessing

discipline is applied, the collective bargaining agreement and the Guidelines are being violated, because the discretionary elements that were alleged to be built into the Guidelines are not being exercised.

(3) Stipulation

At the arbitration, the parties entered into a stipulation to resolve another of the Union's objections to the Guidelines as it pertained to the assessment of points under certain circumstances to employees on a shift swap. The stipulation states:

> The parties stipulate that, pursuant to Article 15.C of the M&R, MCT, and MLS CBAs, the Company's Attendance Control Policy references to "shift swap" in rows 1,2, and 4 of the table illustrating "Points Assessment per Occurrence" do not apply to employees in the M&R, MCT, and MLS work groups when they fail to report or are tardy to work but do not call in sick. The Company's Attendance Control Policy will apply to employees in the M&R, MCT, and MLS work groups who call in sick for a shift swap, and the restrictions in Article 15.C will not apply.

(Union Brief at p. 3; T:162).

C. Assigning Points To Late Notice of Absences

Both Article 24.F of the M&R JCBA, and Article 24.E of the Fleet JCBA, quoted above, require employees to notify the Employer "as far in advance of the scheduled starting time of his shift as possible." The Guidelines assess one point if the employee gives 59 minutes or less notice of his/her absence.

A majority of the Board finds that a required

notification of one hour before the start of the shift is likely to afford most employees more leeway than the JCBA's directive to notify the Company "as far in advance of the scheduled start time of his shift as possible." For example, if the hypothetical employee becomes ill with the flu at 10:00 PM and is due at work at 7 AM the next morning, the employee probably knows prior to midnight that s/he will not be going to work the next day. Under the JCBA, that employee knew at least seven hours in advance of the start of the shift that they would not be going to work and had a contractual obligation to notify their supervisor at that time, i.e, "as far in advance of the scheduled start time of his shift as possible." The Guidelines would direct the employee to notify the Employer one hour prior to the start of the shift. This is an example of a situation in which the Guidelines are more favorable to the employee than the JCBA language.

By contrast, an employee who becomes ill or experiences an accident on the way to work, or an employee who spent the night in the emergency room are examples of employees who may not call in with at least an hour's notice, yet they called in "as far in advance of the shift as possible." Those employees, like all others, can offer their explanations to the Employer for calling in with less than one hour of notice and, consistent with the discretion the Company states the managers have, the employee should expect that they will not be charged under the Guidelines as they have called in "as far in advance of the scheduled start time of his shift as possible." A majority of the Board finds

that the 59 minute rule in the Guidelines does not violate the JCBA as it is likely to afford the employee a greater window of time from the onset of illness in which to comply with the obligation to call in.

D. No Call/No Show

The Attendance Guidelines assess two and one-half points when an employee does not appear for work and does not call in to advise the Employer of the absence. If the no call/no show is for three or more consecutive scheduled work days, the employee is terminated. A majority of the Board finds that there are very few reasons to be absent from work without calling in. Incapacitating illness is one reason and incarceration is sometimes another. The first one is usually excused, and the second one may not be. In either case, within a very few number of days from the first no call/no show, a friend or family member can be expected to contact the Company and explain the employee's apparent disappearance. The essential point is that the Company cannot appropriately staff its operations if employees do not give notice of their inability to come to work. Assessing points for no call/no show is appropriate, so long as the employee is given the opportunity to explain any extenuating circumstances at a point close in time to the no call/no show. A majority of the Board does not find that assessing points for no call/no show is contrary to the terms of the JCBA.

E. Due Process Issues

As indicated on the chart quoted in section A above, the Attendance Guidelines provide "Once a team member reaches a Level 3, an attendance discussion is required and documented after each occurrence." That chart demonstrates that when an employee is on Level 3, if the employee accumulates two more points, termination is the anticipated penalty. As indicated above in section B, under the Guidelines as currently written, an employee can be assessed two points for one absence if it occurs during one of the Employer's "critical operations" periods, or if the employee is ill for more than five days. Thus, if the employee's first discussion with his/her supervisor is when the employee is at Level 3, the very next absence could produce the employee's termination.

The Union maintains that under prior attendance control policies, employees had meetings with their supervisors before any discipline was imposed. (T:111-121; See discussion of Seymour Policy, supra). In response, the Company contends that supervisors are encouraged to speak or meet with employees at every level of the attendance continuum, though the Guidelines do not state that, and the Employer acknowledges that there is no mandatory training given to supervisors on the Attendance Guidelines. For this reason, the Union urges that the Company should be directed to train its supervisors on the Guidelines.

A majority of the Board finds that the training of supervisors is a managerial function with which the Board will

not interfere. That said, the Employer acts at its peril if those charged with administering the Guidelines are uninformed about the discretion the Company expects them to apply in assessing points under the Guidelines, or progressing an employee to discipline. A majority of the Board finds that if the first discussion a supervisor or manager has with an employee about his/her attendance occurs when the employee is at Level 3, the Employer may have difficulty satisfying its burden of proof at an arbitration that the employee knew about the Attendance Guidelines and the risks of non-compliance therewith.

In sum, a majority of the Board holds that the parties negotiated in the JCBA that "Employees who abuse sick leave privileges <u>may</u> be subject to disciplinary action by the Company." (Emphasis supplied). Extensive discussions at negotiations made clear that the LUS language and policy the Company stated it was adopting was a "may" policy, i.e., one in which discipline may result, not a contract provision or a policy that required discipline at every stated level of accumulated points. This mutual understanding enabled the parties to reach agreement on the language in Article 24.

This Opinion has cited the testimony of the key negotiators of the JCBA and the architects of the Guidelines to indicate that the discretion whether to assess discipline was built into the Guidelines, and that discretion was a key factor in making this a "may" policy which is consistent with the terms

of the JCBA. However, that discretion is not readily discernible in the language of the Guidelines, and that encourages the managers and the employees to believe that discipline <u>must</u> result when certain point levels are reached. For this essential reason, the Guidelines must be rewritten to cure this defect, and to correct for the arbitrary points assessed for absences of six days or more and for absences occurring during the periods the Employer called "critical operations periods," unless there is a predicate finding of pattern absences.

In this consolidated case, the parties have not brought to the Board the cases of employees who were allegedly disciplined without just cause. Accordingly, on the record presented, there are no employees who need to be "made whole" as the Union requested. A determination of whether the discretion in the Guidelines is actually being applied is appropriately determined in the grievance procedure as individual cases arise.

In rendering this Opinion and Award, the Board is not holding that any levels of discipline already assessed under the Guidelines must be rescinded. Instead, this Opinion details that conversations should have been held with employees as they experienced absences, and discretion should have been applied in determining when to invoke discipline. Whether or not these factors have been appropriately applied in any given case is a question for the grievance and arbitration proceedings, applying the just cause standard in the JCBAs.

A majority of the Board finds that, as fully described

in this Opinion, the Company has violated the M&R, MCT, MLS, MTS and Fleet Joint Collective Bargaining Agreements through its implementation and/or application of certain aspects of the November 15, 2021 Attendance Guidelines covering employees represented by the TWU-IAM Association. The Guidelines must be rewritten to cure the defects described in this Opinion and Award.

AWARD

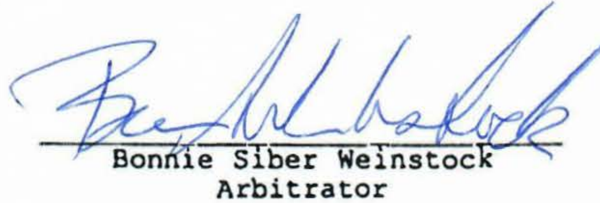
The grievance is sustained in part and denied in part in accordance with the Opinion herein. The Company has violated the M&R, MCT, MLS, MTS and Fleet Joint Collective Bargaining Agreements through its implementation and/or application of the November 15, 2021 Attendance Guidelines covering employees represented by the TWU-IAM Association insofar as: (a) additional points are assessed for absences of six days or more; (b) additional points are assessed for absences during the dates the Company labeled as "critical operations period" without a finding of pattern absence; and (c) the Guidelines do not reflect that there is discretion when deciding whether to assess discipline. Such decisions may benefit from having conversations with employees about their attendance. The Guidelines must be rewritten to cure the defects found in this Opinion and Award.

The Company did not violate the JCBAs to the extent that the Guidelines provided for: (a) assessing a point for a legitimate illness; (b) assessing a point for failing to call out

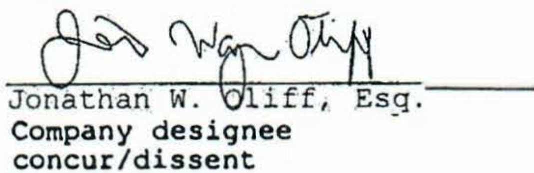
sick with appropriate notice; or (c) assessing points for no call/no show.

Any other claims raised in this proceeding that are not sustained herein are denied.

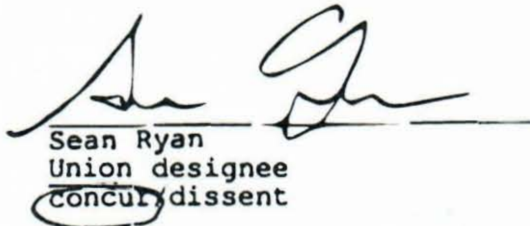
July 27, 2023



Bonnie Siber Weinstock
Arbitrator



Jonathan W. Oliff, Esq.
Company designee
concur/dissent



Sean Ryan
Union designee
concur/dissent

To the extent that this System Board finds that the Company violated the JCBAs, the Company Board Member dissents. I concur with the System Board's findings that the Company did not breach the JCBAs.