



**Section 27. Attendance and Loseout Policy (Revised Jan. 1, 1998)**

**E.1 Shown below are the actions that will be taken for absence occurrences or loseouts accumulated in any 12-month period.**

<b>No. of Loseouts</b>	<b>Action Taken</b>
1 - 3	Informal Counseling
4	1 <sup>st</sup> Written Warning
5	2 <sup>nd</sup> Written Warning
6	3 <sup>rd</sup> Written Warning
7	Decision Making Leave Day / Final Written Warning
8	Discharge

DART reviewed Grievant's loseout record as follows:

<b>Dates</b>	<b>Reason Given</b>	<b>Action</b>
03-28-08	Overslept	2 <sup>nd</sup> WW
05-13-08	Overslept	3 <sup>rd</sup> WW
05-23-08	Stopped by Police	FWW / DMLD
06-25-08	No Call	2 <sup>nd</sup> WW
07-02-08	Overslept	3 <sup>rd</sup> WW
08-15-08	Other	DMLD / FWW
11-12-08	Overslept	FWW / DMLD
02-04-09	Car Problem	Discharge

Grievant was issued a Decision Making Leave Day on August 26, 2008 for a previous seventh loseout in a twelve month period so a second DMLD was not granted. DART met with him on February 13, 2009 to hear Grievant's reply to the proposed discharge. DART asks that the grievance be denied.

Grievant appealed the discharge on March 3, 2009. (Joint Exhibit 2) Grievant contends the discharge was not for just cause and violated HEM Section 8.8A(2); 8.8A(3); and TD-27. Grievant is a 25-year employee. Grievant contends that HEM Section 8.8(3) is an exception to DART's assertion that a loseout is a loseout (no excuses). Grievant interprets the definition of a loseout in TD-27 differently from DART. Grievant asks to be reinstated with back pay and benefits and without any loss in seniority.

The Hearing Officer frames the issues as follows:

**Is there just cause to discharge Grievant? If not, what is the appropriate remedy?**

**Salient Testimony:**

Wanda Schafer, Senior Manager of N.W. Bus Operations, defined a loseout as occurring when an operator does not report to work or fails to notify management at least 30 minutes prior to the scheduled report time. Ms. Schafer states that the loseout policy indicates that both failure to report and notify are part of the policy but that for her 13 years' experience the practice has been to define loseouts as occurring when there is a failure to report or failure to notify within 30 minutes of scheduled time. She differentiated between report time and pull-out time. Each operator is given 15 minutes to pre-trip their bus before pull-out. She reviewed the corrective action and discipline associated with the schedule of loseouts as noted in TD-27. She emphasized that an operator may not get more than one DMLD in a 12-month period and that there are no exceptions to a loseout unless DART makes an administrative error. Grievant was in her chain of command and she reviewed the actions taken and correspondence provided over the eight loseouts. (DART Exhibit 1) Grievant was afforded informal counseling, written warnings, Decision Make Leave, and he met with Ms. Schafer before being discharged. Grievant signed some of the correspondence but not others. Ms. Schafer reviewed the certified mail receipts indicating that the notices were sent to Grievant's home of record. She noted Grievant's DMLD response. (DART Exhibit 1) Grievant questioned the loseout from May 2008 when he conferred with Ms. Schafer stating that he was stopped and detained by the police on his way to work. Ms. Schafer reiterated that a loseout is a loseout without regard to the reason for it. Grievant appealed the loseout he received on August 15, 2008. (Union Exhibit 1) Ms. Schafer testified that Grievant was late and received a loseout on that day but that he made his run because there was a shortage of bus operators due to the severe weather. She reviewed the swipe-in receipt for the August 15, 2008 run (Union Exhibit 2) and stated that a supervisor can swipe in for an operator when the operator is missing their ID card. Ms. Schafer reviewed the Daily Work Report (DART Exhibit 2) that indicated the list of stand-by operators that were available on August 15, 2008.

Ms. Schafer contends that any one reason given by an employee for a loseout may seem reasonable but they are still not excused because there are eight opportunities for loseouts before discharge. Ms. Schafer believes that HEM Sections 8.3 and TD-27 work together but that departments can manage their own attendance problems. She cites Special Notes in HEM 8.3 as providing that authority.

Alan Jackson, Grievant, testified that he was employed as a bus operator for 25 years. He stated that it was not necessary to give a reason or excuse for receiving a loseout because "if you loseout, you lostout" (Tr. Pg.85) He reviewed the loseouts he received. He stated that the loseout in May, 2008 was due to a police officer detaining him. For the loseout of August, 2008, he contends the dispatcher allowed him to clock in and start his run but that he was called back when he got to the gate. He believes he was on

time although the supervisor had to clock him in. When he arrived to clock in, another employee, named Brandon, was arguing with the dispatcher. Mr. Jackson filed a grievance on this loseout. (Union Exhibit 1)

Findings and Conclusions:

DART's legal counsel states that this case is straight forward. The Hearing Officer agrees. Grievant had excessive loseouts in a 12-month period. Grievant was afforded the requisite counselings, written warnings, and Decision Making Leave Day, and he met with Ms. Schafer. He was provided a proposed and a final discharge notice and evidence shows that he either signed for or had sent to his home of record the appropriate notices. Grievant knew of should have known of his standing.

The parties disagree about the definition of a loseout. The Union is correct that the language at TD-27 states that a loseout is recorded when an operator does not report to work and fails to notify management at least 30 minutes prior to the scheduled report time. However, as Wanda Schafer testified, the long standing practice (13 years in her experience) has been to substitute the word "or" in place of "and". It would be an unreasonable and harsh interpretation on DART and the travelling public to require both an operator not reporting and failing to notify within 30-minutes of the scheduled time before imposition of corrective or disciplinary action. Consider an operator who habitually fails to report to work but always provides timely notice that he or she will not make it in. Consider an operator who always reports to work a few minutes before the assigned pull-out time but never calls to give timely notice. Relying on the Union's interpretation, those circumstances would not be a loseout because they did not include both a failure to report to work and a failure to notify within 30-minutes of the scheduled report time. Such an interpretation and practice would wreak havoc on busses and trains running on time and the travelling public. The language in the HEM should never be construed to have a nonsensical or perverse meaning. "When one interpretation of an ambiguous contract would lead to harsh, absurd or nonsensical results, while an alternative interpretation, equally plausible, could lead to just and reasonable results the latter interpretation will be used." [(Elkouri & Elkouri, How Arbitration Works (BNA, 2003), 470-471)] DART and the Union have a vested interest in having a policy and procedure that provides enough time to adequately schedule operators and allow standbys to substitute for late or no show operators. Ms. Schafer described the very reasonable practice of the extra board to provide standby operators and the need for operators to be present at the report time in advance of the pull-out time to conduct pre-trip functions.

There is often contention in these types of cases about whether the HEM allows exceptions to a loseout. DART's mantra is that "a loseout is a loseout". The Hearing Officer finds no language in the HEM that either provides for exceptions or excludes

them. Taken by themselves, the circumstances such as in the instant case of an operator being detained by the police or severe weather, might seem like reasonable exceptions to a loseout. However, the operator is not being discharged for that single event. Rather, the discharge is invoked because the operator failed eight times in a 12 rolling month period to report or give notice as required. That is reasonable by any measure and allows an operator an abundance of opportunity to meet his or her work responsibility. The Hearing Officer notes that the Grievant in this case knew that the policy was one of 'no excuses'. He stated that he did not have to give a reason for his loseouts because "if you loseout, you lostout". (Tr. Pg.85) When this is the understanding of a 25-year employee, it is even more testament to the fact that the literal language in the HEM defining a loseout (not report and failure to notify) has been eroded and replaced by a long and well understood practice (not report or failure to notify).

The Hearing Officer finds TD-27 to be the appropriate section of the HEM on which to adjudicate this and similar cases. The HEM provides for the special and specific language in the context of the general language of the manual. Chapter 1, Section 1.1 provides the following: "Due to the varied tasks performed by employees in the various departments, supplements to this manual are provided for Maintenance, Transportation, Materials Management, Planning and Development, Paratransit and Customer Service Departments. Chapter 8 Special Notes provides the following: "In addition to these rules because of the varied tasks performed by employees throughout DART, organizations may establish supplemental guidelines which employees will be required to observe." It is reasonable to expect the Transportation Department to have very specific guidance related to operator loseouts because the very essence of the service offered to the travelling public is timeliness. DART, and all the employment it provides, could not survive if the public could not reasonably rely on the bus and train schedule. The Hearing Officer also notes that it is usual in contract interpretation to give priority to specific or special language when placed in the context of general language. "Where there is conflict between specific language and general language in an agreement, the specific language will govern." [(Elkouri & Elkouri, How Arbitration Works (BNA, 1985), 356)] Ms. Schafer correctly asserts that Section 8 and the TD Supplement work in tandem but TD-27 provides the specific language to be relied upon in the case of loseouts.

In conclusion, the Hearing Officer finds that **there is just cause to discharge Grievant.** Grievant exceeded the loseout provisions stated in TD-27.

The Union provided two cases for the consideration by the Hearing Officer-Crew v. DART (2843-U-ATU) and Craddox v. DART (0926-U-ATU). This Hearing Officer agrees with the decision in those cases that a loseout is a loseout but respectfully disagrees with those hearing officers who then regard as an excuse, an exigent (such as the

operator's car vandalized) or other circumstances (such as the operator ran their route despite reporting late). It is a slippery slope to begin evaluating a loseout on the basis of the type or severity of an event that is causing an operator not to report or timely notify. Applying subjective judgment to loseouts would geometrically increase the number of grievances and result in a confused policy that would be difficult to comply with or administer. This Hearing Officer believes it is in the best interests of all parties to abide by the long standing practice that a loseout is a loseout, no fault, no excuses. The Hearing Officer would add the caveat that such a belief presumes that DART has not committed a material administrative error or failed to provide the requisite just cause protections afforded employees in the HEM.

Both parties stipulated that they had no other proofs or witnesses to offer. The parties to the hearing were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence bearing on the case. Based upon the entire record, observation of the Grievant and other witnesses, examination of the exhibits, previous Trial Board awards, and study of the arguments set forth during the hearing, the Hearing Officer awards as follows:

Award:

The grievance is denied.



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Bill Detwiler, Ph.D.  
Hearing Officer  
February 7, 2011