

In The Matter of the Trial Board Hearing:

Dallas Area Rapid Transit (DART)

And

ATU (Union)  
Anuska Wafford

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<b><u>Representatives:</u></b>	For DART:	Ms. Tammy Barrow Senior Assistant General Counsel
	For the Union:	Ms. Evelana Garrett Executive Vice President ATU Local 1338

**Introduction:**

The grievance was heard on October 14, 2010 in Dallas, Texas. The hearing was transcribed. The parties stipulated that the matter was properly before arbitration.

DART contends Grievant is a short-term employee who started employment in 2008 and then was terminated approximately one year later on June 23, 2009 for violation of the Attendance and Loseout policy TD-27. Transportation is a time sensitive business and Grievant repeatedly failed to report for work timely and failed to notify the station manager at least 30-minutes prior to her scheduled work time. DART contends the loseout policy is no fault-no excuses and Grievant had an 8<sup>th</sup> loseout occurrence in a rolling 12-month period so she was terminated consistent with policy. DART contends the policies are clear, reasonable, and applied consistently. DART relies on the following (HEM/Joint Exhibit 1) :

No. of Absence Occurrences	No. of Loseouts	Action Taken
1 thru 3	1 thru 3	Informal Counseling
4	4	1 <sup>st</sup> Written Warning
5	5	2 <sup>nd</sup> Written Warning
6	6	3 <sup>rd</sup> Written Warning
7	7	Decision Making Leave Day (DMLD) / Final Written Warning with Corrective Acton Period [see (2) and (3) below].
8	8	Discharge

2. Absence occurrences and loseouts will be tracked and accumulated separately; however, an Operator may not be granted more than one DMLD in any 12-month period.
3. After being granted a DMLD, the Operator will be expected to return to work with a written plan of action for improvement for a period of not less than 90 calendar days. If the Operator is then charged with a 7<sup>th</sup> absence occurrence or a 7<sup>th</sup> loseout following the DMLD, a second DMLD will not be granted. Instead, the Operator will be reminded, in a final written warning, that discharge will occur if an 8<sup>th</sup> absence occurrence or an 8<sup>th</sup> loseout is charged.

Grievant filed a grievance (Joint Exhibit 2) in accordance with HEM 8.8 (2) (Joint Exhibit 1) as follows:

**8.8. Purpose**

2. Present individual grievance and appeals asserting that the Grievant has been adversely affected by a violation, misinterpretation, or inequitable application of the existing law, ordinance, resolution, policy, rule, or regulation as it applies to the conditions of employment, or regarding disciplinary action without just cause other than those involving discharge or demotion.
3. Present other individual grievance or appeals regarding disciplinary action without just cause resulting in discharge or demotion of the grievant.

Because Grievant received a 7<sup>th</sup> and 8<sup>th</sup> loseout on the same day, the Union argues she did not receive a DMLD opportunity. Grievant contends she called in on the day she

was given the 8th loseout and requested time off but the station manager denied that request. She contends that her request was more than 30-minutes prior to her report time so if her request had been granted, the time would have been considered as an Absence Occurrence instead of a loseout.

DART claims that Grievant was discharged for just cause and asks the Hearing Officer to sustain the discharge. Grievant claims the discharge lacks just cause and asks to be restored to her previous position with full back pay and benefits and without penalty. The Hearing Officer frames the questions before him as follows:

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

**Salient Evidence:**

Leonard Hatcher, Manager East Dallas Bus Operations, was Grievant's supervisor. He defined a loseout as an occurrence when an employee fails to notify 30-minutes before the scheduled report time or fails to report. The Grievant's attendance was recorded in the Trapeze system (DART Exhibit 1). On June 1, 2009 Grievant failed to report and was given a loseout. She got a second assignment for that evening but she was also late for that scheduled time so she was given a second loseout for that day and an 8th overall for that 12-month rolling period. Grievant resumed working between receiving her 8<sup>th</sup> loseout on June 1<sup>st</sup> and being placed on administrative leave on June 8th. Mr. Hatcher reviewed the history of the eight loseouts and the Notice of Proposed Discharge that he sent on June 11, 2009. (Joint Exhibit 2) The Grievant met with Ms. Brooks but did not grieve any of the loseouts. Some of the Attendance Reports and warnings were signed by Grievant and some were not. (DART Exhibit 1) Mr. Hatcher testified that he attempts to get an employee to sign the Attendance Report but that he is not always successful; however, he timely sent discipline warnings to Grievant's home of record and he received back the green cards. A Grievance and Hearing Request Form (DART Exhibit 2) was produced that Mr. Hatcher had not previously seen. Grievant received her 7<sup>th</sup> and 8<sup>th</sup> loseout on June 1<sup>st</sup> but was not told between her 7<sup>th</sup> and 8<sup>th</sup> that she was going to receive a decision make leave day. That day came four days later on June 5<sup>th</sup>. Mr. Hatcher states that the DMLD is to allow the employee to take time to think about what to do to correct the attendance problem. He admits that Grievant was going to be terminated no matter what she submitted in her DMLD statement. Mr. Hatcher admits that Grievant was not given an opportunity to show how she could correct her behavior which is the intent of the HEM as a step of corrective action. (Tr. Pg. 9)

Cynthia Brooks, Customer Service Manager, testified that Grievant was discharged for accumulating an 8th loseout in a rolling 12-month period. She indicated that having two

loseouts, particularly a 7th and 8th, on the same day was extremely unusual. She contends Grievant was given a DMLD consistent with policy. Ms. Brooks testified that Grievant did not get the DMLD in the usual fashion because Grievant was allowed to work after her 8th loseout. At the 7th loseout, Grievant could have been given the DMLD instead of returning to work. Ms. Brooks clarified that a date on one of the loseouts was incorrect, the result of a clerical error. Ms. Brooks testified that she was looking at both a decision-making leave day and a termination in accordance with the policy. The appropriate action was to afford the DMLD and to proceed with discharge. (Tr. Pg. 108) When Ms. Brooks met with Grievant and her union rep., Grievant complained that she did not get a DMLD and worked after receiving the 8<sup>th</sup> loseout.

Ms. Anuska Wafford, Grievant, testified that she was a bus operator for one year and one month. She reviewed the Attendance Reports and warnings some of which she signed and some she did not. On June 1, 2009 Grievant contends she called in at 10:00 am and asked to be off because she had an appointment at the Dallas Housing Authority. The station manager denied her request and told her to report at 12:00. DART was adamant that she report since she was not there for the scheduled morning run. Had her request been granted she would have received an Absence Occurrence instead of a loseout. When she was given the DMLD she gave thought to how she could improve her attendance and she thought DART would consider it. She contends she should not have been able to come back to work on June 4<sup>th</sup>.

Mr. Kenneth Day, Union President, testified that Grievant should have been taken off the clock for the DMLD instead of being put on duty. He states that Grievant was not given a true opportunity to have a DMLD and to provide a written plan that was seriously considered. He contends that the supervisor should discuss a written warning with an employee as required by HEM 8.6 F (2b) and if a supervisor wants to see an employee they will prevent an employee from clocking in. Consistent with HEM 8.6 F (2f) at the completion of the corrective action period the employee's supervisor and the ER manager will meet to determine if the employee achieved the performance improvement. He believes that Grievant was not afforded these opportunities and therefore was denied due process and that her discharge lacks just cause. He believes there was no true consideration and the intent was to discharge her.

#### Discussion and Conclusions:

DART is right to vigorously pursue employee issues of time and attendance. The transportation industry is time sensitive and it is in everyone's best interests (DART, Union, and Public) that trains and busses run on time. There is little contest in this case that Grievant had an attendance problem. Her loseout record is abysmal in her short tenure with DART. The Attendance Reports (DART Exhibit 1) and the Grievance

Packet (Joint Exhibit 2) demonstrate eight loseouts in a rolling 12-month period albeit there was a clerical error in one of the dates. Although not all Attendance Reports or warnings are signed by the Grievant, there is evidence that she was given proper notice. Evidence shows DART's efforts to notify Grievant by mailings to her home of record. Grievant's loseout record is so bad over such a short period of time that DART could reasonably question whether Grievant is suited for the transportation business; none-the-less, the HEM affords her a hearing that places a heavy burden on DART to prove just cause for their action to discharge her.

The seminal work in labor relations regarding just cause is the early work by arbitrator Carroll Daugherty. (Grief Bros. Cooperage Corp., 42 LA 555, 557-59; 1964) He attempted to give meaning to the definition of just cause by asking seven independent questions. If the answer to any of them was "no," in Daugherty's view, just cause did not exist for discipline. One such question is relevant in the instant case. Question # 6: Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Both Mr. Hatcher and Ms. Brooks testified as to the unusual nature of the applied discipline in this case. Grievant was given a 7th and 8th loseout on the same day. Both of these managers acknowledge that the Decision Making Leave Day granted to Grievant was perfunctory, (i.e., negligent, superficial, performed lacking interest, care or enthusiasm; indifferent or apathetic. <http://dictionary.reference.com/browse/perfunctory>)

The HEM is replete with employee safeguards regarding due process notice requirements and time limits and, most notably, a well articulated corrective and progressive discipline policy. Section 8.6 thoroughly describes a four step corrective action process where each successive step advances the severity of the discipline and imposes progressively more onus on management. As an example, the final written warning includes specific actions or performance levels and suggestions for improvement. These requirements are not present in the lower progressive discipline steps. In the case of a transportation employee, such as Grievant, the more specific TD-27 section even imposes additional employee protections. TD-27 E(3) "After being granted a DMLD, the operator will be expected to return to work with a written plan of action for improvement for a period of not less than 90 calendar days. If an operator is then charged with a 7<sup>th</sup> absence occurrence or a 7<sup>th</sup> loseout following the DMLD, a second DMLD will not be granted." In TD-27 E (1) the action taken at the 7<sup>th</sup> loseout is "Decision Making Leave Day (DMLD)/Final Written Warning with Corrective Action Period." The above language is clear. An employee at the 7<sup>th</sup> loseout is to be afforded a corrective action period and there is an expectation that the employee engage management in a corrective plan for a period not less than 90 days anticipating a return to work after a DMLD. The Grievant in this case was afforded no such progressive

discipline/corrective action which is a lack of due process. She was put to work on the same day she received her 7<sup>th</sup> loseout whereupon she incurred an 8<sup>th</sup> loseout and discharge. She was not afforded an opportunity to submit to an improvement plan that would receive a real and sincere review by management. As Mr. Hatcher and Ms. Brooks testified, the DMLD was given with the full intent of discharging Grievant. Ms. Barrow argued that the DMLD was perfunctory (Tr. Pg. 197) with no intent of doing anything but discharging her.

The purpose of DMLD is clearly defined in TD-27 B (4):

#### B. Definitions

4. Decision Making Leave Day (DMLD) – A paid Administrative Leave day given to an Operator in lieu of disciplinary action. It is designed to allow Operators time off to decide on their future at DART. Operators who accumulate seven absence occurrences or seven loseouts in a 12-month period will receive a final written warning with a corrective action period from their immediate supervisor. Upon return to work they are required to provide their immediate supervisor with a written plan of action for improving their attendance for a period no less than 90 calendar days...

In the instant case, the paid leave day was not given in lieu of discipline but rather was discipline because of the cavalier way the process was handled by management. The process afforded to Grievant was not designed to allow her to decide on her future at DART. Her future was already predetermined by management. She was to be discharged. The above language is commanding, not permissive... "Operators...will receive...a corrective action period..." Grievant received no such corrective action period.

In her closing statement, DART Counsel argues that getting two loseouts on the same day for a 3<sup>rd</sup> and 4<sup>th</sup> loseout is no different than receiving two loseouts as the 7<sup>th</sup> and 8<sup>th</sup> loseouts. (Tr. Pgs. 198) The Hearing Officer disagrees. The HEM requires more onerous actions by management as the employee comes closer to discharge. That is the essence of progressive discipline/corrective action. At the 7<sup>th</sup> and 8<sup>th</sup> loseout, management is obliged to provide a corrective action period and an opportunity for the employee to provide a written plan for improvement. No such requirement is placed at the 3<sup>rd</sup> or 4<sup>th</sup> loseout.

Due process violations do not always warrant the reversal of an employer imposed discharge. It is best where possible to decide a case purely on the merits of the alleged violation. However, as in this case, the failure to follow the procedural requirements of

the HEM has deprived the Grievant of fundamental fairness. As one arbitrator noted, "The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair. The arbitrator must find in order to overturn the employer's action on procedural grounds that there was at least a possibility, however remote, that the procedural error may have deprived the Grievant of a fair consideration of his case." (Cameron Iron Works, 73 LA 878, 881-82 (Marlatt, 1979))

The Hearing Officer concludes that DART, when confronted with an unusual circumstance of discipline wherein a 7<sup>th</sup> and 8<sup>th</sup> loseout occurred on the same day, decided to subordinate the clearly articulated procedural safeguards afforded Grievant in the HEM for an expedient, automatic, no fault discharge. In doing so, DART violated the due process afforded Grievant. The Hearing Officer must respond "no" to arbitrator Daugherty's test of just cause in that the answer to Daugherty's sixth question is that DART did not apply its rules evenhandedly and without discrimination to Grievant. Grievant was denied the usual DMLD procedure and a chance at rehabilitation afforded to other employees just because her 7<sup>th</sup> and 8<sup>th</sup> loseout occurred on the same day. Therefore, there is not just cause to discharge Grievant. The Hearing Officer also notes that it was uncontested that Grievant requested time off to attend to personal business but she was denied. Her request was more than 30-minutes before her scheduled report time. She gave notice of her need to be away and her unavailability but, none the less, she was ordered to work thus resulting in a loseout instead of an absence occurrence. DART could have met the technical requirements of the HEM and the Grievant's due process safeguards by simply not putting her back to work immediately after the 7<sup>th</sup> loseout and giving her time to draft a DML that was seriously entertained by management with a corrective action period.

In support of its position, DART presented two other Trial Board decisions. However, these prior cases are materially distinguishable from the instant case and not applicable here. One case, Scott v. DART (2649-UATU), did not involve two loseouts on the same day or a similar treatment of the DMLD. The prior case of Dunbar v. DART is also not on point with the instant case in that it does not deal with TD-27 policy. For the most part, the previous awards provided by the Union are also not on point (2206U-ATU; 2924; 9908; 2763). One award however, (Williams v. DART 9908-U) does show that grievant was afforded a DMLD about one week before receiving her eighth loseout. So presumably Williams would have had time to author her decision make leave statement and management would have time to consider it and Williams would have had an opportunity to start her corrective period. Williams was accorded different and more favorable treatment than Grievant Wafford in the instant case as is any employee whose 7<sup>th</sup> and 8<sup>th</sup> loseouts do not occur on the same day.

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 witnesses, examination of the exhibits including the HEM, transcripts, previous Trial Board awards, and study of the arguments set forth during the hearing, the Hearing Officer awards as follows:

Award:

The grievance is sustained. The employee is to be reinstated and made whole.



Bill Detwiler, Ph.D.  
Hearing Officer  
December 9, 2010