

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

between

Amalgamated Transit Union,
Local Division 1338 (ATU)

and

Dallas Area Rapid Transit
(DART)

AAA Case No: 71 390 L 00522 10

Group Questioned Grievances:
Tovera Little, Constance Marie Jones,
Tiffany Harper, Sharon Harris, Kesha
Alexander, Monique Luna, and Sandra
Tinsley

Subject: DART Board Jurisdiction

BEFORE: Edward B. Valverde, Esq. - Arbitrator

APPEARANCES:

For ATU: Joseph H. Gillespie - Attorney, Gillespie, Rozen & Watsky, P.C.
3402 Oak Grove Ave., Suite 200, Dallas, TX 75204

For DART: Peter Brannan, Senior Assistant General Counsel, P.O. Box 660163
Dallas, TX 75266-7255

Place of Hearing: Dallas, TX.

Date of Hearing: November 5, 2010

Date Hearing Closed: December 7, 2010¹

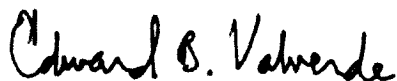
Date of Award: January 3, 2011

Relevant Hourly Employment
Manual (HEM) Provisions:

Award: Grievance sustained.

Award Summary

The Trial Board has jurisdiction to hear the grievances of Tovera Little, Constance Marie Jones, Tiffany Harper, Sharon Harris, Kesha Alexander, Monique Luna, and Sandra Tinsley pertaining to Employer's alleged misuse of the vacation policy.



Edward B. Valverde, Esq.-Arbitrator

¹ The record was closed upon receipt of the last brief filed (ATU's Reply Brief).

STATEMENT OF PROCEEDINGS

The arbitration proceeding commenced as scheduled on November 5, 2010 at the DART offices in Dallas, Texas. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence on the issues and to present oral arguments. Post hearing briefs were received and the record was closed on the date the last brief was received.

Issue

Does the Trial Board have jurisdiction to hear the grievances of the grievants identified above?

BACKGROUND SUMMARY²

ATU represents hourly wage employees employed by DART, including the Customer Service (CS) employees that are involved in this proceeding. Terms and conditions of employment for hourly employees are set forth in a document identified as the Hourly Employment Manual (HEM) and its supplements.

On February 12, 2010 the Dallas/Fort Worth metroplex had a record snowfall. This inclement weather notwithstanding, DART, whose business is to provide public transportation services to the public, remained open and endeavored to provide those services to the best of its ability. However, due to the inclement weather a number of employees were not able to arrive to work as scheduled; some arrived late and others did not make it to their jobs at all that day. A number of CS employees including Tovera Little, Constance Marie Jones, Tiffany Harper, Sharon Harris, Kesha Alexander, Monique Luna, and Sandra Tinsley (collectively referred to as "grievants" hereinafter) were not able to come to work that day. Each of them called and reported to CS management their inability to come to work.

HEM Supplement for Customer Service Employees (HEMCS)

Several DART departments maintain HEM supplements that contain terms and conditions of employment unique to their department. In the case of CS employees the supplement addresses, among other matters, attendance and vacation.

² This is a summary of the evidence (testimony and documents) presented at hearing of facts not in dispute. Only necessary detail relevant to the issuance of the award is included.

The CS department has a specific attendance policy that includes disciplinary procedures applicable to CS employees. In general, each employee is required to come to work as assigned. Except for absences that have been scheduled and previously approved by management, every other kind of absence is subject to a level of discipline. A point system is utilized to determine the level of discipline an employee should receive for each absence. (HEMCS1.E) In addition to the assessment of points, the supervisor is required to issue a "corrective action," that is a written record of the level of discipline issued to an employee being assessed points. These corrective actions are progressive, i.e., the more points an employee accumulates in any 12-month period the greater the level of corrective action issued. For example an employee with 4-5.5 points in any 12-month period can receive a verbal warning while an employee with 15 or more points in the same period will receive a notice of proposed discharge. (HEMCS1.F)

HEMCS provisions pertaining to vacation include "Vacation Mark-up" that requires employees to sign up for their vacations during the beginning of the calendar year and "Scheduling Vacation" that addresses the scheduling of vacation time after the initial vacation mark-up. (See, HEMCS3.A. & B.) In both vacation situations (during mark-up and thereafter) approval of vacation time is based on operational needs. Thus, scheduling of vacation time involves employee selection and management concurrence.

Using the supplement, CS manager Lijo George determined that these employees' absences from work on February 12 were unscheduled occurrences³ and issued each of these employees a corrective action consisting of two points for missing the entire workday. Additionally, George charged each of these employees with a vacation day, ostensibly so that these employees would receive compensation for their one day of absence on February 12. All the grievants herein filed grievances challenging the discipline issued.

Grievance Process⁴

With the assistance of Evelana Garrett, Vice President for ATU, grievants timely

³ An unscheduled occurrence is identified as an absence from work that is not requested and approved in advance. (HEMCS1.B.2)

⁴ Although grievants filed individual grievances, each grievance received substantially the same treatment throughout the grievance process. Accordingly, the summary deals with them as collectively filed.

filed substantially identical grievances. Each charged the Employer with violations of the HEM as well as the HEMCS and the catch all, "...any other applicable policies, practices, or procedures." (See p. 1 of U Ex. 1 – 7) Management conducted grievance hearings at each step of the grievance process (Steps 1- 3). Management issued a response after each hearing; the response included a summary of the arguments (reasons) the Union and/or grievant made at the hearing, the management decision (denial of the grievance) and the procedure to appeal the decision.

In the third step response Sue S. Bauman, Vice President, Marketing & Communications found that the absences were handled in accordance with agency policy as noted in HEM Section 6.2.D.2.a and HEMCS1.B.2. Bauman also found that grievants had no further appeal rights per HEM8.6.E that states:

"As provided, eligible employees may utilize the Authority's Grievance and Appeal Procedure to appeal a correction action decision, except that an appeal to the Trial Board is prohibited unless the corrective action was used in the issuance of a suspension, demotion or discharge. Such corrective actions, heard in conjunction with a suspension without pay, demotion or discharge will be heard denovo."

Despite Bauman's conclusions, the Union continued to pursue the grievances and timely submitted them to the Trial Board's (TB) Secretary, Nancy K. Johnson. Johnson returned the grievances to the Union based on the earlier findings that the grievances were improper and/or outside the jurisdiction of the Trial Board. However, Johnson's letter also notified the Union of the right to appeal the decisions. Thereafter, the Union timely appealed the grievances pursuant to the provisions of HEM8.11.

HEM8.11

HEM8.11 provides the Union a unique process to address matters that the Employer deems are improper or outside the jurisdiction of the TB. When the TB secretary determines, in good faith, that a grievance appealed to the TB is improper and/or outside the jurisdiction of the TB, the grievance (which thereafter is identified as a "Questioned Grievance") will be returned to the grievant and/or employee representative. The grievant and/or employee representative then has the right to appeal that decision. (HEM8.11.2.a). The section goes on to describe the selection process to decide on an arbitrator to hear the matter and specifically sets forth the extent of authority the

arbitrator shall have. That authority is limited to the determination of, "*Whether the Trial Board has jurisdiction to hear the grievance.*" Here, Johnson in good faith adopted Bauman's conclusion that these grievances were corrective actions that did not include suspension, demotion or discharge and therefore were not appealable to the TB. Thus, the questioned grievances were returned to ATU. Notwithstanding this conclusion, ATU appealed the grievances to the TB. The undersigned was selected in accordance with the provisions of HEM8.11 and has authority limited to deciding whether the TB has jurisdiction to hear the grievances.

DISCUSSION

The arbitrator finds the TB has jurisdiction to hear these CS employee grievances because their grievances relate to an alleged management violation, misinterpretation, or inequitable application of an existing law, ordinance, resolution, policy, rule, or regulation as it applies to the conditions of employment. Specifically, these grievances allege that management improperly used the HEM and HEMCS policies, rules or regulations pertaining to vacation when it charged grievants with a vacation day for the unscheduled occurrence due to their failure to appear at work on February 12. The basis for this finding follows.

Grievances involve Vacation Policy

The grievances alleged the Employer violated several specific provisions of the HEM (Sections 1.3 (Executive Director authority), 6.2.D.2 (Inclement Weather policy), 8.3.A.3 (Unacceptable Conduct-Unsatisfactory attendance-excessive amounts of time off the job) and HEMCS Section 1.C (Non-chargeable Occurrences). Regarding Non-chargeable occurrences, that section identifies vacation time as a non-chargeable absence from work. Thus, if an employee is off work on vacation time the employee cannot be disciplined for that absence. Here, the grievants, because of their failure to come to work on February 12 were charged with an unscheduled occurrence (UO) and received two points for that UO. However, they were also charged with a day of vacation time. At Step one of the grievance process the grievants made a number of arguments including that the supervisor should have given them the option to use leave without pay or administrative leave without pay and, as an alternative argument, that because they were

charged with a vacation day they should not have been charged with an UO and points.⁵

George rejected all of grievants' arguments on the basis of his finding their absences were an UO (HEMCS1.B.2) and because they had the responsibility to make appropriate arrangements in inclement weather situations to arrive to work as assigned (HEM6.2.D.2.a). At Step 2 of the grievance process grievants made essentially the same arguments and management denied the grievances on the same basis. (See management's Step Two response dated April 12). The same arguments were made at Step 3 and rejected by Bauman at that level. Bauman further stated that her decision was final and that grievants had no further appeal rights because the discipline being grieved were corrective actions not involving a suspension, demotion or discharge and therefore were not appealable to the TB pursuant to HEM8.6.E. Thus, throughout the grievance process grievants complained about management's discipline that included a unilaterally imposed vacation day.

Grievants have Right to Grieve Alleged Violations of Vacation Policy

Grievants relied on HEM8.8.A.2 as authority to file the grievances. That provision states an employee can:

Present individual grievance and appeals asserting that *the grievant has been adversely affected by a violation, misinterpretation, or inequitable application of an 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. (Italics added.)

The arbitrator finds this provision allows employees to file grievances under two separate circumstances: (1) when an employee is alleging a violation, misinterpretation, or inequitable application of an existing law, ordinance, resolution, policy, rule or regulation as it applies to the conditions of employee or (2) when an employee is asserting disciplinary action without just cause. Through the discipline issued, management affected grievants' vacations that presumably had already been scheduled (assuming vacation markups had already been completed). Thus, as vacation involves policy, grievants had the right to file grievances complaining about the alleged violation, misinterpretation or inequitable application of that policy.

⁵ See March 15 Step One response letter (items 2 and 4) from George for actual language.

TB has Jurisdiction to decide alleged Violations of Policies

Once employees have filed grievances over policy violations they have the right to appeal their grievances to the TB for final resolution (if they are not resolved through the grievance process at Steps 1, 2 or 3). (HEM8.9). The only limitation on an employee's ability to appeal a grievance to the TB is an appeal that falls within HEM8.6.E. Stated differently, corrective actions that do not involve suspensions, demotions or discharge are outside the jurisdiction of the TB. However, the limitations in HEM8.6.E do not directly address grievances alleging corrective actions that also include policy actions.

The matter that makes this a case of first impression (as admitted by the parties) is the fact that when management took its disciplinary action against these grievants (charging them with two points for an UO) it included a policy action as well, i.e., it unilaterally charged each employee with a vacation day. Because the TB has jurisdiction to hear and decide employee grievances alleging management violations of policies, rules and regulations, the arbitrator is constrained to find the TB has jurisdiction of these grievances that allege violations, misinterpretation or inequitable application of the vacation policy. To find otherwise would enable the Employer to simply attach a policy, rule or regulation action to a corrective action to thereby preclude an employee's exercise of the right to grieve and appeal such action. If this were to be allowed, then "the exception would swallow the rule," i.e., by linking a policy, rule or regulatory action to a corrective action that does not involve a suspension, demotion or discharge, an employee would be prohibited from appealing to the TB an alleged violation of the policy, rule or regulation. Such a finding is clearly contrary to HEM8.8.A.2.

In this matter, as in all arbitrations, the arbitrator is required to consider the various provisions of the parties' agreement (here, the HEM stands in equivalent position) and should endeavor to give those provisions an interpretation that makes them compatible with each other. Here, the HEM provides employees the right to file grievances over alleged policy, rule and regulation violations and provides employees the right to grieve disciplinary actions but limits employees from grieving discipline (corrective actions) to the TB that do not involve suspension, demotion or discharge. Thus, by issuing a corrective action not involving suspension, demotion or discharge,

management can properly limit employee access to the TB. However, the grievance the ATU asserts it has a right to present to the TB is one that involves the vacation policy.

Corrective Actions involved Suspensions

The arbitrator also finds the TB has jurisdiction to hear these grievances because the Employer's discipline issued to grievants was a corrective action that included a suspension – in these cases it was a one-day paid suspension. This finding is based on the fact that vacation time is a benefit that the Employer provides to employees. Generally speaking, an employee is allowed to select when he/she will take vacation time so long as the time requested is within the requirements set forth in each department, (e.g. the CS department has its own vacation requirements). (HEMCS3). Here, management's discipline included a unilateral imposition of a vacation day for each of the grievants. This unilateral imposition interfered with the employees' ability to participate in the selection of their vacations. Because of this interference, the arbitrator finds this unilateral imposition is equivalent to a one-day paid suspension for it denied grievants the right to choose their day of "rest and relaxation." (HEM7.11.A.8). As a result of this finding, and because the corrective action was used with the issuance of this suspension, the TB has jurisdiction to hear these grievances.

Employer arguments rejected⁶

Employer argued that the grievants were not arguing about their vacation time but were arguing about the two points they was charged with because of the UO they received. However, as stated above, grievants raised Employer's use of vacation in this grievance when it cited HEMCS1.C from the outset. Thus, the vacation policy was an aspect of this grievance from the beginning and throughout the grievance process. Accordingly, Employer's arguments as to waiver and timeliness (i.e., that the ATU failed to timely raise the vacation argument) are also rejected.

Employer also argued that the use of the vacation policy argument made in arbitration lacked the sufficiency requirements of the HEM. HEM8.8.C requires that a grievance be in writing and that it must contain:

⁶ The issue of who had the burden of proof is considered moot based on the discussion above. The discussion above also moots the argument that ATU presented no evidence on whether application of vacation leave is properly an individual grievance. Finally, all other arguments not specifically addressed herein are summarily rejected.

1. A brief explanation of the incident causing the appeal and the date of occurrence.
2. A brief statement showing how or why the incident harmed the employee in a grievable manner,
3. The remedy or solution sought.
4. The signature of the grievant and/or employee representative.

Here, review of the grievance reveals that it satisfies these four criteria. Specifically, the grievance references the inclement weather day (February 12) that adversely affected their ability to come to work that day; the fact that they were disciplined (“issued 2 points”) for being absent; as a remedy they wanted the two points removed and made whole and for DART to “enforce policies equitably and reasonably”; and the grievances were signed by the grievant and/or Garrett.

The arbitrator agrees with management counsel that the grievance does not specifically reference the alleged misuse of the vacation policy that has become the main focus of the grievance in arbitration. However, the provision pertaining to vacation as a non-chargeable occurrence (HEMCS1.C) was specifically identified in the grievance. Further, the argument that if employees were going to be charged with a vacation day – a non-chargeable occurrence – then they should not be issued two points for a UO, was made throughout the grievance process as reflected by the management’s responses at Steps 1, 2 and 3.

Finally, it is up to the Union to decide what arguments it wants to make based on the grievance that it files. So long as those arguments are reasonably based on the language and/or contents of the grievance those arguments will be considered proper. For the reasons already stated above, the Union’s arguments are considered proper. Accordingly, the grievance satisfies the requirements of HEM8.8C and Employer’s arguments to the contrary are rejected.

CONCLUSION

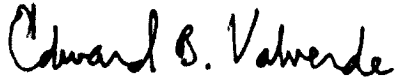
The arbitrator has found that the TB has jurisdiction to hear these grievances because the discipline issued herein involved a policy action that grievants have the right to grieve and that discipline issued (corrective action) did in fact include a suspension (i.e., loss of vacation day equivalent to one-day paid suspension). These two decisions were necessary to determine the issue before the arbitrator – whether the TB has jurisdiction to hear these grievances. This award does not address whether

management's actions were "[A] violation, misinterpretation, or inequitable application of an 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." HEM8.8.A.2. That decision is left for the TB. Also, this award does not decide the appropriateness of management linking a policy, rule or regulatory change to a corrective action – only that when it does so it provides the Union the ability to appeal a grievance related thereto to the TB.

AWARD

The TB has jurisdiction to hear the grievances of Tovera Little, Constance Marie Jones, Tiffany Harper, Sharon Harris, Kesha Alexander, Monique Luna, and Sandra Tinsley.

Date of Award: January 3, 2011



Edward B. Valverde, Esq.-Arbitrator