

## LABOR &amp; EMPLOYMENT

## Arbitration Decisions



## Labor Arbitration Decision, DHL Express, JC7 D012-19, 139 BNA LA 653

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## Decision of Arbitrator

In re DHL EXPRESS [Fremont, Cal.] and BROTHERHOOD OF TEAMSTERS, LOCAL 70

Case No. JC7 D012-19

May 20, 2019

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**BNA Headnotes****LABOR ARBITRATION****DISCHARGE****[1] Notice of discharge - Timeliness - Theft of time ▶ 118.305 ▶ 118.6486****▶ 118.6488** [\[Show Topic Path\]](#)

Parties agree that the notice of discharge provision in contract means that charge against employee must be dismissed if employer fails to issue notice of discharge within five days of having knowledge that an incident giving rise to discipline has "occurred," and arbitrator finds that in context of grievant's discharge for alleged theft of time, employer "knew an incident occurred" on February 20 when it discovered the pre-shift and unaccounted for time, not on March 4 when employee cashed check and benefitted from alleged theft. When an employee says they were working, and they were not, that is time theft, and the employer need not wait to see if the employee corrects their timecard.

**[2] Notice of discharge - Time cards - Theft ▶ 118.305 ▶ 118.6486 ▶ 118.6488** [\[Show Topic Path\]](#)

Delivery company's right to discharge employee for alleged theft of time by recording pre-shift time and failing to account for certain off-route time is waived as to alleged occurrences on February 18, 19, 20, 21, and 22, as employer's notice of discharge issued on March 4 violates labor contract' requirement that such notice be issued "within five days" of date it knew that dischargeable event occurred, which was February 20 when an audit revealed the pre-shift and unaccounted for time and each day thereafter that grievant fraudulently claimed time worked.

**[3] Notice of discharge - Time cards - Theft ▶ 118.305 ▶ 118.6486 ▶ 118.6488** [\[Show Topic Path\]](#)

Delivery company's notice of discharge to employee accused of theft of time on February 25, 26, and 28 was timely issued on March 4, as this complied with contract's requirement that such notice be issued "within five days" of date it knew that dischargeable event occurred and each separate incident triggers the notice requirement. Grievance is remanded to the joint labor management committee for consideration of the merits.

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For the employer-Kenneth Ramirez Duran, senior labor relations manager.

For the union-Dominic Chiovare, local president.

ANDREA L. DOOLEY, Arbitrator.

**DECISION AND AWARD****INTRODUCTION**

This dispute involves the application and interpretation of the collective bargaining agreement ("Agreement") between DHL Express ("Employer") and Brotherhood of Teamsters, Local Union No. 70 ("Local 70" or "Union"). Pursuant to Article 26 of the Agreement, the parties selected the undersigned Arbitrator to serve as the neutral panel member in this case. Robert Bell was appointed by the Union to serve as a member of the panel and Phillip Rinaldi was appointed by the Employer to serve as a member of the panel. This matter came for hearing in Oakland, California, on May 17, 2019. The parties submitted this matter to the Panel Arbitrator after presentation of evidence and oral arguments.

**ISSUE**

Whether DHL violated the Agreement by providing a notice of discharge to [Grievant] and the Union more than five days after the occurrence of the alleged cause for discharge, and if so, what shall be the remedy? [\*654] ?

**RELEVANT CONTRACT PROVISIONS****ARTICLE 24. DISCHARGE OR SUSPENSION**

Any employee may be discharged or suspended for just cause subject to the provisions and procedures contained in Article 26.

**ARTICLE 26. GRIEVANCE PROCEDURE****Section 5. Handling of Discharges or Suspensions**

Any case pertaining to a discharge or suspension shall be handled as follows:

(a) In all cases except theft, proven intoxication, proven gross insubordination, proven sexual harassment, selling or transporting illegal narcotics and/or controlled substances while on duty, and unprovoked physical assault on an employee, each having occurred on the job, an employee to be discharged shall be allowed to remain on the job without loss of pay unless and until the discharge is sustained under the grievance procedure. In suspension cases, the employee shall be allowed to remain on the job without loss of pay unless and until the suspension is sustained under the grievance machinery.

(b) *Within five days*, excluding Saturdays, Sundays and holidays, of the occurrence of the alleged cause for discharge or suspension, DHL shall give written notice by certified mail to the employee and the Local Union its decision to discharge or suspend the employee and such notice shall set forth the reason or reasons for the discharge or suspension. *If DHL fails* to give such notice within the specified five (5) day period, the right to discharge or suspend for that particular reason shall be waived, but this shall not preclude DHL from introducing as evidence, should a subsequent discharge or suspension occur, any reason or reasons to substantiate unsatisfactory work performances arising out of circumstances which occurred during the six (6) month period immediately preceding the date of the discharge or suspension notice. *However, in order for any such reason to be introduced as evidence* DHL must have given specific written notice by certified mail to the employee and to the Local Union of the circumstances giving rise to such reason with ten (10) days of the occurrences of the circumstances.

Emphasis added by Union to Union Exhibit 4.

**STATEMENT OF THE FACTS**

The facts in this case are not in dispute. On February 20, 2019, DHL conducted a routine audit of its time records and determined that employee [Grievant] has recorded pre-shift time on February 18, 19 and 20. DHL monitored [Grievant]'s time records for the subsequent days and found that, in addition to pre-shift time, [Grievant] had unaccounted-for, off-route time on February 18, 21, 22, 25, 26 and 28. According to the audit, DHL concluded that [Grievant] had stolen 8 hours and 23 minutes on his time cards. UX 2.

[Grievant] was issued a check on February 28 and deposited it into his own account on March 1 or 4. On March 1, [Grievant] was interviewed by a manager and did not dispute the overage on his timecard, but stated, "We've been punching in early for years ... go ahead and check." UX 2.

DHL issued a notice of discharge on March 4 which was sent certified mail to the Union and to [Grievant]. UX 3.

### DECISION AND AWARD

Although this case originated as a disciplinary matter concerning the discharge of [Grievant], the Union contends that the discharge violates Article 26.5(b) because it includes dates which are more than five (5) days prior to the date of the discharge notice. The matter before the Arbitrator is a contract dispute over the meaning and application of the agreement in the present case, and the Union bears the burden of demonstrating that a contract violation has occurred.

In such cases, the Arbitrator's first obligation is to determine whether the disputed language is clear and unambiguous. If so, she must give the words their plain meaning, even if one party finds the result somewhat harsh or contrary to its initial expectations. If, however, the disputed language is found to be unclear and ambiguous, or sometimes silent, extrinsic evidence (bargaining history, past practice, etc.) may be used to help determine the parties' intent. In addition, words and phrases are rarely interpreted on their own. To give force and effect to the entire agreement, words and phrases must be interpreted in context [\*655] with their paragraph, section, article, and the Agreement as a whole.

[1] In this case, the parties agree that the language is clear, and the DHL must issue a notice of discharge within five days of having knowledge that the incident giving rise to discipline occurred. The question is whether DHL knew an incident occurred on February 20 when they discovered the pre-shift and unaccounted for time, or whether they are correct, as they contend, that the "incident" was [Grievant] cashing the check and thereby financially benefitting from alleged misstatements on his timecard.

The Union asserts that each day that [Grievant] alleged to have padded his timecard is a distinct incident, and do not dispute that the notice was timely for February 25, 26 and 28. In the Union's view, DHL may only take disciplinary action (if at all) for those dates and that all other dates are untimely.

The Employer argues that the employee could have gone back at any time and corrected his timecards, and therefore didn't convert the Employer's time to his own benefit until he received his pay. This is an inaccurate view of time. Time is not an object that belongs to the Employer and which converts to cash at the end of each pay period. Time is perishable; once it's used, it's gone. To extend the metaphor, a shoplifter steals a toy when she leaves the store with it but if the shoplifter ate an apple from the produce section and didn't tell the cashier at check-out, she stole it as soon as she ate it. Like the apple, time in a workday is committed to the employer and for one's work in that time, the employee is paid. If an employee says they were working, and they were not, that is time theft. The employer need not wait to see if the employee corrects their timecard. Once the fraud has been committed, the incident has occurred.

The Employer referred in its arguments to a prior case between DHL and Teamsters Local 2785 involving Grievant Schulz. The Schultz decision is silent on the question of when the theft occurred, but it clearly did happen. The termination on that case was upheld, where to employee clocked in, left to attend appointments, and never returned to clock out. There was a similar outcome in the Murray case between DHL and Teamsters Local 2785. Neither case suggests that the employee must cash a check before theft occurs.<sup>1</sup>

[2] [3] The Union is correct that each day, or even each occurrence, is a separate incident which triggers the notice requirements of the Agreement. While the Employer need not send separate disciplinary notices for each date and can bundle them as they have here, they do need to give notice within five days of learning of the alleged misconduct, per the Agreement.

The grievance is therefore sustained, but only as to February 18, 19, 20, 21, and 22. The notice is timely as to February 25, 26 and 28. The grievance is remanded to the Joint Council 7 Labor Management Committee for consideration of the merits of the notice of discharge. Furthermore, DHL did give proper notice within ten (10) days of the February 18-22 incidents to include them as evidence but cannot rely on those delays for the decision to discharge.

Dated: May 20, 2019.

<sup>fn</sup> 1

In his argument, Mr. Duran suggested that the Arbitrator's off-hand comments may have led the Employer to conclude that they should wait until the check has cashed. While I don't remember making the remarks, I apologize if they led to management misunderstanding their authority in this regard.

