

in violation of 14 Del.C. section 4007 (a) (5)".

The District filed its answer on September 11, 1990. The parties filed a Stipulation of Facts with the Delaware Public Employment Relations Board ("PERBB") on October 9, 1990, which is set forth below, in its entirety. The parties agreed to brief the legal issues and the final brief was received on November 20, 1990.

STIPULATED FACTS

The Red Clay Education Association is the collective bargaining representative of the teachers and other professional employees employed by the Board of Education of the Red Clay Consolidated School District. The RCEA and the District were signatories to a collective bargaining agreement which was in effect at all times relevant hereto.

On or about August 3, 1990, Laidlaw Transit, Inc. informed the District that it would not renew twenty-eight (28) school bus contracts for the 1990-91 school year. Each of these contracts represented one bus which covered two routes in the morning and two routes in the afternoon, for a total of 56 morning and afternoon bus routes. The District has 315 morning and 315 afternoon bus routes each school day.

By August 7, 1990, in an attempt to fill the 56 morning and afternoon routes, the District, as required by Delaware law, advertised for bids to fill the bus contracts. As required by Delaware law, those bids could not be opened for approximately two weeks.

On August 15, 1990, the District determined that no bids had been received. Immediately after receiving no bids for the bus contracts, the District directly pursued bus companies both within and without the state of Delaware. As of the date of the Stipulation of

Facts (October 9, 1990), no bus company has been willing to pick up any of the 56 morning or afternoon bus routes.

In attempting to fill the bus routes, the District can only contract with a bus company at the rates prescribed by the State. Thus, if a bus company is unwilling to enter into a contract to provide bus services at the State mandated rate, the District cannot offer to pay the company a higher rate.

As a result of the District's inability to obtain another bus company to take some or all of the 56 morning and afternoon routes, the District put all of its spare buses into service and contacted other school districts to see if they had any buses available for loan or lease to the District. No school district contacted by the District had any buses available.

The District also attempted to get the State to purchase a sufficient number of buses to fill some or all of the 56 routes. As of October 9, 1990, the State of Delaware has not approved any funds for the District's purchase of buses. The District does not have sufficient funds to purchase buses on its own.

Due to the District's inability to find alternative buses to fill the 56 routes, the District approached those companies with whom it still had contracts to provide bus services and asked those companies if they would agree to run three morning and three afternoon routes with each bus, rather than the two routes they had run in previous years. Those companies agreed to increase each bus' morning and afternoon routes from two to three in order to cover the unfilled routes.

As a result of switching from a two route bus schedule to a

three route bus schedule, the District determined that it was necessary to have schools start at three different times rather than two times. This change was required because with each bus running three routes, only one third of the District's students could be brought to school or back home at any one time. In setting the three start times, the Board was required to stagger the start times in a manner which would leave enough time between start times for the bus to drop students off at one school, run the next route, and drop students off at the next school. The District was also required to comply with the state mandated requirement that students attend school for a minimum number of hours each day.

Taking these considerations into account, and after considering all possible scheduling options, the District, by August 16, 1990, formulated a schedule in which the earliest of the three start times would have to be 7:45 a.m. The District also determined by that date that no possible schedule would allow every school to have a start and finish time which would allow all teachers to start no earlier than 7:30 a.m. and finish no later than 4:30 p.m.

On August 16, 1990, the day after the bids were opened, John Holton, the District's information officer, left a message for Ms. Marilyn Little, President of the RCEA, asking her to return his call. Ms. Little received Mr. Holton's message on the evening of August 16. Ms. Little attempted to reach Mr. Holton at home that evening but there was no answer. Ms. Little returned the call on the morning of August 17, 1990, and was informed that Dr. Green wished to speak with her.

Ms. Little and Dr. Green met at 3:30 p.m. on August 17, 1990. At the meeting, Dr. Green explained the scheduling problem created by

Laidlaw's failure to renew the bus contracts and the District's inability to obtain another bus company to fill those contracts. Dr. Green then informed Ms. Little that an alternative schedule had been designed to address the problem, that this schedule would have three staggered starting times for students, the earliest of which would be 7:45 a.m, and that the Board was attempting to obtain more buses. Dr. Green and Ms. Gladys Glover, a District employee who attended this meeting, would testify that Dr. Green also told Ms. Little that every effort would be made to revise the schedule. Dr. Green asked for Ms. Little's opinion on the bus problem and the alternative schedule. She replied that she would have to confer with other RCEA leaders, and would contact him after obtaining feedback from them.

Ms. Little and Ms. Edith Mahoney, a teacher who also attended the meeting, would testify that Ms. Little also told Dr. Green that the revised schedule might violate the RCEA collective bargaining agreement.

This was the first discussion Dr. Green had with a representative of the RCEA regarding the scheduling issue.

On August 17th, prior to the meeting between Ms. Little and Dr. Green, the District communicated the revised schedule regarding starting times to some of its school principals. Two principals of schools with a 7:45 a.m. start time, Rudolph F. Karkosak of Wilmington High School and Al DiEmedio of Alexis I. DuPont High School, wrote to their staffs on August 17 that commencing on September 4, 1990, the first day of the 1990-91 school year, the high school teacher day would begin at 7:15 a.m. Under the prior schedule teachers has been required to arrive at school one half hour before the start of the school day in

order to insure adult supervision when students began arriving at school and to provide adequate time for the teachers to prepare for the school day.

On the morning of August 22, 1990, Ms. Little called Dr. Green's office to arrange a meeting. Early that afternoon, Dr. Green visited Ms. Little in her classroom. Ms. Little informed Dr. Green that the RCEA had determined to adhere to the terms of the contract, but Ms. Little suggested that a way could be found to handle the scheduling problems without violating the terms of the contract. Ms. Little did not, however, tell Dr. Green specifically how the RCEA would suggest the District handle the problem. Dr. Green responded that he could not understand why the RCEA was taking such an unreasonable position on an issue over which the District had no control and needed the assistance of everyone to resolve.

Ms. Little addressed the Board of Education at the public recognition portion of the Board's meeting on the evening of August 22, 1990.

As of October 9, 1990, the RCEA has not proposed any alternative to the schedule which Dr. Green described to Ms. Little at their August 17, 1990 meeting, and which was ultimately implemented. The District and the Association have had no other formal discussions on this issue.

ISSUE

The issue presented for resolution is twofold:

- 1.) Whether the Public Employment Relations Board has jurisdiction to rule in this matter.
- 2.) Whether the District committed an unfair labor practice,

by violating section 4007 (a) (5) of the Act when it unilaterally changed the required starting time for teachers in the designated schools from 7:30 a.m. to 7:15 a.m..

PRINCIPAL POSITIONS OF THE PARTIES

I. Jurisdiction

The District argues that the PERB is without jurisdiction to rule on this matter because the Association expressly waived its right to negotiate during the term of the collective bargaining agreement. The foundation for its argument is a "zipper clause" set forth in Article 2:4 of the collective bargaining agreement between the parties, which provides:

This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiations. During the term of the Agreement, neither party will be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

Citing both private sector decisions issued by the National Labor Relations Board and a public sector decision issued by the State Labor Board of Maine, the District concludes that the clear and unmistakable language of Section 2.4 constitutes a waiver of the right

to insist on collective bargaining over any issue during the term of the collective bargaining agreement. The effect of the zipper clause, according to the District, is that the resolution of disputes concerning alleged mid-term modifications made by an employer is exclusively the grievance procedure set forth in the collective bargaining agreement.

The Association, on the other hand, argues that the zipper clause does not constitute a "clear and unmistakable" waiver of the right to bargain. The Association cites Sections 2.1 and 2.5 of the collective bargaining agreement and maintains that consideration of the Agreement, as a whole, compels the opposite conclusion. Section 2.1, provides:

This Agreement will be for a period as specified in the Duration of Agreement Article, and negotiations concerned with the terms of this Agreement will not be reopened during that time except by mutual written agreement of the parties.

Section 2.5, provides:

This Agreement will not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

The Association contends that the parties clearly contemplated the possibility of reopening negotiations and that the specific language of Sections 2.1 and 2.5 takes precedence over the more general language of the zipper clause which merely authorizes a party to refuse to negotiate a mid-term change, if requested to do so by the other.

Alternatively, the District argues that should it be be

determined that the zipper clause does not constitute a waiver by the Association of its right to negotiate mid-term changes, thereby precluding resort to the Board's unfair labor practice procedures, the PERB can, and should, defer in this matter to the agreed upon grievance and arbitration procedures if it determines that the issue turns on an interpretation of the meaning of the word "normal", as used in Article 18.1 of the collective bargaining agreement.

The Association argues, in response, that the District's deferral argument ignores the exclusionary language in Article 3:7 of the collective bargaining agreement which provides, in relevant part:

No claim by an employee or the Association will constitute an arbitrable matter or be processed through arbitration if it pertains to:
(a.) a matter where a specific method of remedy or appeal is prescribed by law: (e.g., the Fair Dismissal Act) and/or by this Agreement.

The Association argues that this provision precludes the processing of this dispute through arbitration. It further states that the contractual arbitration procedure would not finally resolve the matter since it results only in an advisory non-binding decision.

II. Substance

The District argues that Article 18:1 of the collective bargaining agreement contemplates abnormal situations such as the bus emergency and permits the District to adjust start times in such situations. Article 18:1, as relied upon by the District, provides in relevant part:

The employees normal in school work day will be seven (7) continuous hours and will normally fall between the hours of 7:30 a.m. and 4:30 p.m.

The District contends that the facts clearly establish the existence of a sudden abnormal occurrence which required the flexibility expressly anticipated by the use of the word "normally". According to the District, the change in start time was intended to provide a temporary quick fix to an "abnormal" situation.

In response, the Association argues that the word "normal" implies "occasional resort to the abnormal", and not to an extended or permanent change from that which the parties have agreed constitutes the normal condition..

Lastly, the District argues that even if it should be determined that the Association did not waive its right to bargain and that the District's action was not contractually permitted by Section 18.2, the charge must still be dismissed because the District, in fact, met its duty to bargain under the circumstances existing at the time.

The Association contends that not only did the District fail to fulfill its bargaining obligation but also refused to, at any time, even commence the bargaining process.

OPINION

I. JURISDICTION

The Delaware Public Employment Relations Board has held that its jurisdiction in an unfair labor practice proceeding is neither controlled nor dependant upon whether the disputed action may or does

constitute a violation of an existing collective bargaining agreement. The PERB enunciated this principal in Seaford Education Assn. v. Board of Education (Del.PERB, U.L.P. No. 87-10-018 (2/2/88)), at page 4 of that decision:

...The issue here is not whether the action of the District violates section 15.2 of the labor agreement. Such a determination is proper subject matter only for the negotiated grievance procedure for which the unfair labor practice forum is not a substitute. An unfair labor practice, on the other hand, is statutory in origin and raises a question of statutory interpretation to be resolved by the PERB. It is, therefore, not controlling in an unfair labor practice that the disputed action may or does, in fact, constitute a violation of an existing collective bargaining agreement. While the PERB has no jurisdiction to resolve grievances by interpreting contractual language, it may be required to interpret such language in order to resolve an unfair labor practice matter properly before it.

In F.O.P. Lodge No. 1 v. City of Wilmington, (Del.PERB, U.L.P. No. 89-08-040 (12/18/89)), the PERB stayed an unfair labor practice proceeding, pending exhaustion of the parties' contractually agreed upon grievance procedure, where the issue involved an alleged violation of the employer's obligation to bargain in good faith over a mandatory subject of bargaining, as evidenced by an alleged breach of the parties' collective bargaining agreement. The PERB clearly differentiated this case from prior cases (where the issue also involved the interpretation of specific contractual provisions) by

noting:

... these [prior] cases differ in one significant respect from the present dispute. The City of Wilmington and F.O.P. Lodge No. 1 have negotiated a grievance procedure which culminates in the submission of outstanding disputes to final and binding arbitration by an impartial arbitrator.

[F.O.P. Lodge No. 1, Supra., at page 5]

The PERB further supported its adoption of a limited discretionary deferral policy in that case by citing the parties' long standing and well established collective bargaining relationship, the employer's stated willingness to submit the issue to arbitration in accord with the provisions of the collective bargaining agreement, and because any decision in that matter would turn on an interpretation of the specific contractual provision in question.

Because the current Red Clay collective bargaining agreement does not include "a grievance procedure which culminates in the submission of outstanding disputes to final and binding arbitration by an impartial arbitrator", the dispute presented in the current unfair labor practice charge is not consistent with the parameters established for deferral in F.O.P. Lodge No. 1 (Supra.).

Consistent with the prior PERB decisions, it is appropriate that the Public Employment Relations Board exercise its jurisdiction to rule on the merits in this matter.

Further, the District's argument that the "zipper clause" contained in Article 2.4 of the current collective bargaining agreement constitutes a waiver by the Association of any recourse other than the contractual grievance procedure is rejected. When read in

the context of Article 2.1 (which prohibits the reopening of the contract except through mutual agreement) and Article 2.5 (which prohibits modification of the agreement except through a mutually and duly executed written document), it is evident that intent of the parties in drafting Article 2.4 was to prevent unilateral changes in the terms of the agreement. While the District cites numerous NLRB cases in support of its position, the PERB has previously held that it is not bound by such decisions. Critical differences exist between the private and public sectors which are sufficient to distinguish this matter from the cited NLRB decisions. Binding arbitration of contractual grievances originated as a quid pro quo in the private sector for employees' limiting their recourse to economic strikes. The circumstances here differ both in that the employees have no right to strike and in that binding arbitration has not been agreed to as the final step of the contractual grievance procedure. Consequently, the existence of the "zipper clause" as contained in this agreement does not deprive the PERB of jurisdiction to rule on the merits of this charge.

II. Substantive Issue

In order for the RCEA to sustain its charge that the District has acted in dereliction of its duty to bargain in good faith, it must prove that the District effected a unilateral change in a mandatory subject of bargaining. Christina Education Assn. v. Bd. of Education, Del.PERB, U.L.P. 88-09-026 (11/29/88). The Act clearly establishes that the employer and the exclusive representative of its employees are required to negotiate in good faith with respect to "... matters

concerning or related to ... hours ...". 14 Del.C. sections 4002 (e) and (r). The parties' definition of the parameters for a "normal school work day" is such a matter concerning or related to hours, and is, therefore, a mandatory subject of bargaining.

Having so concluded, the Association must next establish that the District adopted a unilateral action which violated the status quo existing between the parties with respect to hours. It is clear from the stipulated facts submitted in this case that the District did act unilaterally without bargaining with the Association when it instituted the early start time for its secondary schools in response to the transportation problems it faced. What is less clear is whether its actions violated the status quo. In determining the status quo during the term of an existing collective bargaining agreement, the specific terms of that agreement may provide insight into the nature of the underlying relationship itself. In this case, there exists an explicit contractual provision:

...The employees normal in school work day will be seven
(7) continuous hours and will normally fall between
the hours of 7:30 a.m. and 4:30 p.m.

Lacking, however, is any supporting evidence of the parties' intent in incorporating the term "normal" and "normally" into this clause, not once but twice. Absent evidence concerning the original intent of the parties in drafting this clause or its prior application, there is no sufficient basis for determining whether or not the status quo in this matter has been altered.

The RCEA correctly cites Christina (Supra.) as impacting this case. In the Christina case, however, the decision was based in large

part upon distinguishable facts:

...Where the District has at least one year's prior notice of the impending [busing] problem and recognized it as a problem that would continue into the foreseeable future, it is unreasonable to conclude that this was an issue which would fall within a standard definition of 'abnormal'.

Christina Education Assn. v. Bd. of Education, (Supra., at page 10.

The present case clearly differs in the time frame in which the problem surfaced and had to be remedied. Considering the PERB ruling in Christina, the District was, at the least, ill-advised in not contacting the RCEA earlier in its deliberations and seeking input from the Association on a matter which could foreseeably impact the teachers' work day. Also as in the Christina case, there are compelling reasons against resorting to immediately reinstating all school starting times to their pre-August 17 schedule. The opportunity now exists, however, for the parties to jointly pursue a mutually acceptable solution to their dilemma during the course of their current collective bargaining negotiations. It is the responsibility of the parties to creatively and constructively resolve the inconveniences and disruptions which have resulted from the District's transportation crisis.

CONCLUSIONS OF LAW

1. The Red Clay Education Association is an employee organization within the meaning of section 4002(g) of the Public School Employment Relations Act.

2. The Red Clay Education Association is the exclusive bargaining representative of the the school district's certificated professional employees within the meaning of section 4002(j) of the Act.

3. The Board of Education of the Red Clay Consolidated School District is a public school employer within the meaning of section 4002(m) of the Act.

4. Consistent with its prior decisions, the PERB declines to exercise its discretion to defer this unfair labor practice charge to the parties' contractual grievance procedure and retains full jurisdiction over the substantive issues raised.

5. Upon the record established by the parties, the Hearing Officer finds insufficient evidence to sustain the charge that the Board of Education of the Red Clay Consolidated School District has refused to bargain in good faith or likewise violated 14 Del.C. section 4007 (a)(5).

WHEREFORE, this unfair labor practice charge is hereby dismissed.

IT IS SO ORDERED.

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant/Hearing Officer

Delaware PERB

Charles D. Long, Jr.

CHARLES D. LONG, JR.

Executive Director

Delaware PERB

DATED: January 8, 1991