STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 842,	)	
Petitioner,	)	
	)	
v.	)	**ULP No. 02-12-372**
	)	
STATE OF DELAWARE, DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT/DELAWARE TRANSIT CORPORATION,	)	
Respondent.	)	

Appearances

Joseph S. Pass, Jubelirer, Pass & Intrieri, P.C., for ATU Local 842
Jerry M. Cutler, SLRS/SPO, for DART/DTC

The Amalgamated Transit Union, Local 842 ("ATU" or "Local 842") is an employee organization within the meaning of Section 1302(i) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) ("PERA" or "ACT"). Local 842 is the exclusive bargaining representative of hourly-rated operating and maintenance employees of the Delaware Administration for Regional Transit ("DART"), within the meaning of Section 1302(j) of the Act.

DART is a subsidiary of the Delaware Transit Corporation ("DTC") which is an agency of the State of Delaware ("State") and constitutes a public employer within the meaning of Section 1302(p) of the Act. [1]

On December 9, 2002, Local 842 filed an unfair labor practice charge alleging that by unilaterally changing the pay period for bargaining unit employees from a weekly to a biweekly

[1] The Delaware Authority for Regional Transit ("DART") was created by the Delaware General Assembly in 1969 as a provider of public transit. In 1994 the General Assembly created the Delaware Transit Corporation (DTC) to oversee DART and the operation and management of the public transit system within Delaware. Currently, DTC is responsible for overseeing bus service along fixed routes throughout the State (Now "DART First State").

payroll without first bargaining with the Union, the State violated Sections 1307(a)(1) and (a)(5) of the PERA. [2]

On December 24, 2002, the State filed its Answer denying the Charge. A hearing was held on April 2, 2003, at which the parties presented testimony and documentary evidence in support of their respective positions. The parties submitted written post-hearing briefs the last of which was filed with the Public Employment Relations Board ("PERB") on June 20, 2003. The following decision results from the record thus compiled.

BACKGROUND

DART/DTC and ATU Local 842 were parties to a collective bargaining agreement with a term of March 1, 1999, through November 30, 2002. During early summer of 2002, it was rumored that DART intended to change from a weekly to a biweekly payroll. At that time, bargaining over a successor collective bargaining agreement had not yet commenced. When Jackie Herbert, President of Local 842, inquired of William Hickox, DART/DTC Director of Operations, and/or James Williams, DART/DTC Human Relations Manager, they confirmed DART's intention to convert to a biweekly payroll.

A meeting was held involving Mr. Hickox, Mr. Miller and Union President Herbert at which management again confirmed DART's intention to convert from a weekly to a biweekly payroll system.

Union President Herbert testified that on or about July 3, 2002, he met with Mr. Hickox and Raymond Miller, DART/DTC Executive Director. At that meeting, Mr. Miller and Mr. Hickox again acknowledged that a change in the payroll period was planned and they reviewed

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[2] 19 Del.C. Section 1307, Unfair Labor Practices provides, in relevant part:
(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

the underlying reasons for the change. At that meeting, there was no substantive discussion concerning the implementation of the change. Mr. Herbert met with Mr. Hickox and Mr. Miller on numerous subsequent occasions during which the conversion to a biweekly payroll was discussed.

Union President Herbert objected to the change claiming that bargaining unit employees live from paycheck to paycheck and could survive neither a two-week period between paychecks nor the extended period between paychecks during the conversion period when more than one week would elapse between paychecks.

Mr. Hickox discussed Mr. Herbert's concerns with the Secretary of the Department of Transportation. The State decided to advance three extra weekly checks during the month of December, 2002, in order to "bridge the gap" during the conversion to the biweekly payroll. Although Union President Herbert was appreciative of these efforts he continued to oppose the change because it was unsupported by the majority of bargaining unit members.

By letter dated October 9, 2002, Mr. Herbert was formally advised of the conversion to a biweekly payroll to be effective December 1, 2002. The letter provides:

> The purpose of this memo is to personally advise you of Delaware Transit Corporation's decision to replace the current weekly payroll system with a biweekly payroll system. This change will have several positive impacts, including the ability to stabilize our payroll function. The plan is to implement the new payroll program effective December 1, 2002, with the first biweekly check on December 27, 2002.
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> Understanding the possible financial impact on individual employees, three week's advance pay will be part of the implementation program, with the understanding that any advanced pay

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(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

> will be returned to Delaware Transit Corporation should the employee terminate prior to July 1, 2003. Information on the specifics of the transition and the new system will be distributed next month; however, I felt it appropriate you be given advance notice of this decision.
>
> Jackie, I have noted and considered your strong and consistent opposition to this change, however, I believe it is in the best long-term interest of all DTC employees, as well as the State of Delaware, to make this change.

The affected employees were advised by a written explanation and on-site employee meetings conducted on November 12, 13, and 14, 2002, at which the employees could ask questions about the change.

Bargaining for a successor to the collective bargaining agreement commenced in early October, 2002. During the course of negotiations, ATU President Herbert raised the issue of the biweekly payroll on numerous occasions. The issue was raised when the ATU objected to proposed changes in the weekly dues check-off provision contained in Article III, section 3(d). Mr. Herbert testified DART/DTC representatives were unwilling to discuss the issue during formal negotiations.

ISSUE

DOES THE UNILATERAL IMPLEMENTATION BY THE STATE OF THE BIWEEKLY PAY PERIOD VIOLATES THE PUBLIC EMPLOYMENT RELATIONS ACT?

PRINCIPAL POSITIONS OF THE PARTIES

ATU Local 842:

ATU argues that the pay period is directly related to the payment of wages and, therefore, a term and condition of employment which must be bargained prior to any unilateral change in the status quo.

Alternatively, if it is determined that the subject of pay periods is a permissive subject of bargaining about which a party may not be required to bargain, by including language in Article III, Section 3(d) of the collective bargaining agreement authorizing the weekly deduction of union dues, the parties have indicated their intent to treat pay periods as a mandatory subject of bargaining. ATU argues that Section 3(d) of the Agreement can only be modified after the parties have bargained to impasse. ATU contends that a directive from the Department Secretary mandating the change does not excuse DART from complying with its duties and responsibilities under the Act.

The Union concludes that by unilaterally implementing the change without first bargaining with the Union DART violated Section 1307(a)(1) and (a)(5) of the Public Employment Relations Act.

DART/DTC:

DART/DTC contends that the conversion from a weekly to a biweekly payroll does not constitute a mandatory subject of bargaining over which it is required to bargain. The State argues that the change in the pay period involves the utilization of technology which is an inherent managerial prerogative and a permissive subject of bargaining about which it may but is not required to bargain.

In the event the payroll period is determined to be both a term and condition of employment and an inherent managerial prerogative, application of the balancing test adopted by the PERB in Appoquinimink Ed. Assn. v. Bd. of Ed. of the Appoquinimink School District Del. PERB, ULP 1-3-84-3-2A, I PERB 35, 42 (1984), would result in a determination that the probable effect on DART's operation outweighs the impact of the change upon the individual employees.

DART/DTC argues compelling circumstances may justify a unilateral change in a term and condition of employment. Prior to the start of negotiations over a successor agreement,

DART provided the ATU President with advance notice of the impending change. The ATU President responded that the union would never agree to a biweekly pay period under any circumstances. The State claims ATU's intransigence constituted a compelling circumstance resulting in the right to unilaterally implement the biweekly pay period.

Furthermore, to be actionable, a unilateral change in a term and condition of employment must be material and significant. Here, the employees benefited from the change by receiving three additional weeks of wages during the month of December, 2002.

The State argues that DART was at all times willing to meet with the ATU to discuss the implementation of a biweekly pay period. In fact, ATU President Herbert met with management approximately once every two weeks from June to December, 2002. The biweekly payroll issue was discussed at every one of these meetings. The decision to advance three weeks of pay to the affected employees was intended to address the union's major concern.

DART/DTC cites other additional circumstances which it claims required the conversion to a biweekly payroll. New software purchased in 1999 for processing payroll and human resource matters was not functioning effectively resulting in significant and unplanned operating and maintenance costs. Prior to the conversion to a biweekly payroll DART's payroll system was not part of the State-wide system used by all other State agencies. Consequently, DART did not enjoy the benefit and economies of the statewide system.

DART/DTC argues that Local 842 waived its right to bargain, if any, when it failed to request DART to either rescind and/or bargain over the change after receiving adequate prior notice.

DISCUSSION

The Delaware Courts have held that, "Cases arising under the National Labor Relations Act have precedential value in labor relations matters where a Delaware statute follows the

federal act." City of Wilmington v. Wilmington Firefighters Local 1500, Del. Super., 385 A.2d 720 (1978).

The question of whether the pay period is a term and condition of employment and, therefore, a mandatory subject of bargaining is a question of first impression before the PERB. The bargaining status of the payroll period has, however, been addressed by the National Labor Relations Board ("NLRB"). [3] The NLRB has held that the payroll period constitutes a mandatory subject of bargaining. S&I Transportation, Inc., v. NLRB, 311 NLRB 1338, 144 LRRM 1118 (1993); South Carolina Baptist Ministries, 310 NLRB 156 (1993). Sonic Automotive & IAMAW, District Lodge 190, NLRB 2003 WL 935310. The NLRB and the Supreme Court have also held that a mandatory subject of bargaining must be bargained to impasse before a unilateral change in the status quo of that particular subject can occur. NLRB v. Katz, 82 S.Ct. 1107, 50 LRRM 2177 (1962).

The Delaware Public Employment Relations Act, Section 1302, Definitions, provides at 1302(e):

> (e) "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 1302(t) provides:

> (t) "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided however, that

[3] National Labor Relations Act (1935), as amended by the Labor Management Relations Act (1947) et al., 29 U.S.C. §§ 141 et seq.

> such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer.

In the case of Appoquinimink Ed. Assn. v. Bd. of Ed. of the Appoquinimink School District (Supra) Del. PERB, ULP 1-3-84-3-2A, I PERB 35, 42 (1984), the PERB addressed the scope of the phrase "concerning or related to" concluding:

> Considering §4002(p), in its entirety, the phrase "matters concerning or related to . . . " constitutes a broad and encompassing scope of negotiability. It is clear that the legislature intended all matters concerning or related to the specified terms and conditions of employment to be mandatorily bargainable unless statutorily reserved to the exclusive prerogative of the public school employer. [4]

Within this context, the pay period clearly relates to the payment of wages and, therefore, constitutes a term and condition of employment and a mandatory subject of bargaining the status quo of which may not be unilaterally altered without collective bargaining first taking place.

The next question is whether the payroll period also qualifies as an inherent managerial prerogative about which the State cannot be required to bargain. If the payroll period qualifies as both a term and condition of employment and an inherent managerial prerogative, it would then be necessary to determine which would prevail by applying the balancing test adopted by PERB in Appoquinimink Ed. Assn., (Supra).

What constitutes an inherent managerial prerogative must be determined on a case-by-case basis. The State's argument that the inherent managerial prerogative involved here is the efficient utilization of technology is unpersuasive. In 1999, DTC implemented a new computerized system for administering the weekly payroll and Human Resource matters. The

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[4] Relevant provisions of the Public Employment Relations Act, (19 Del.C. Chapter 13), The Police Officers and Firefighters Employment Relations Act, (19 Del.C. Chapter 16), The Public School Employment Relations Act, 14 Del.C. Chapter 40 where identical decisions issued under one Act serve as precedent for similar issues arising under another of the Acts. AFSCME Council 81, Local 1607 v. New Castle County, Del. PERB, ULP No. 01-01-396, IV PERB 2609 (2001).

inefficiencies of the new system resulted in increased cost resulting from the need to hire consultants to address deficiencies in the system. The evidence of record fails to establish that what is involved here is the development of new technology rather than a change from one computerized software program to another computerized software program.

Nor does management's desire to convert from a weekly to a biweekly payroll period in order to bring DTC in line with other State agencies excuse the State from its bargaining obligation.

According to the testimony of DART officials, the directive to convert to a biweekly payroll period was issued by the Secretary of the Department of Transportation and was not negotiable. The following testimony from Mr. Hickox details the circumstances requiring the change.

> Mr. Cutler: Did DTC have a choice in whether or not it converted and moved toward the State payroll system . . . State of Delaware Payroll System?
> Mr. Hickox: No.
> Mr. Cutler: You were under instructions to do that?
> Mr. Hickox: Clear instructions because of the situation that was occurring. The Delaware Department of Transportation had their own payroll system. DTC, Delaware Transit Corporation, had our own payroll system and when we were preparing budgets it came to the attention of the new Secretary of Transportation, Secretary Hayward that we were paying double consultants and staff for one system. Consultant and staff for a second system, and at that point between the State Budget Office and DELDOT the determination was made that we needed to consolidate into one. And as such the winning system was the State system. (*Transcript, p. 51-52*)
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> Mr. Hickox: You know that we had . . . our payroll system was extremely volatile and we needed to migrate

> to the State Payroll System and the first step in accomplishing that would be to go to a biweekly system consistent with . . . and a lag system to be consistent with what the State was doing. And, in fact, we were the only State agency or Operating Division of DELDOT that was not on biweekly payroll system. (*Transcript, p. 44*)

The decision by the Secretary of Transportation and the subsequent discussions between the Secretary and Mr. Hickox did not relieve the State of its obligation to bargain with the Union not only the impact of the change but also the decision to change from a weekly to a biweekly payroll period.

> [A]s a general rule, when, as here, parties are engaged in collective negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. There are two limited exceptions to that general rule: 1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or 2) when economic exigencies or business emergencies compel prompt action. Visiting Nurses Services of Western Mass. v. NLRB, 177 F. 3d 52, 57 (1st Cir. 1999), citing Visiting Nurse Services, 1998 WL 414982 at *9.

In this matter neither of the two exceptions noted above are present. With regard to the first exception, the State did not make a diligent and earnest effort to engage in bargaining as required by Section 1307(a)(5), of the Act. To the contrary, the Employer did not raise the subject during the ongoing negotiations over a successor collective bargaining agreement and was

unwilling to participate in meaningful discussion when the subject was raised by the Union. Mr. Hickox testified that the purpose of the verbal notice to the Union President in June, 2002, was for the purpose of gaining his support "Before we put this out to the folks." (*Transcript, p. 56*)

Nor did the Union continually insist on avoiding or delaying bargaining. In addition to Union President Herbert, the position of both the State and ATU concerning the duty to bargain is evidenced by written communications between the authorized representative of the State and ATU after Local 842 received formal written notice of management's intent on October 9, 2002. In a communication to the State dated November 13, 2002. Union counsel stated:

> It is my understanding that the Union and DART have exchanged proposals and commenced negotiations to reach a labor agreement to succeed the parties' current agreement, which, by its terms, will expire November 30, 2002. It is my further understanding that DART introduced a proposal at the table to switch bargaining unit employees from a weekly payroll, which is a term and condition of employment under the current agreement, to a biweekly payroll. Mr. Herbert has informed me that the parties have already engaged in collective bargaining over this proposal, and that the Union will continue to bargain in good faith on this subject.
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> . . . When the parties' current agreement expires on November 30, 2002, the law will impose a status quo obligation on both the Union and DART to abide by the terms and conditions of employment existing under the expired agreement until a new agreement is collectively bargained. I have been asked to advise that should DART unilaterally alter this status quo by implementing the biweekly payroll, without first reaching an agreement with the Union on the subject, the Union will regard that action as an unfair labor practice and will prosecute it accordingly in order to restore the status quo.

By letter dated November 14, 2002, the State responded, in relevant part:

> I am not sure how you came to believe that the State had submitted such a proposal during bargaining but I can assure you that it has not, and that it does not intend to do so in the future. Notwithstanding this fact, you should know that all Delaware Transit Corporation (DTC) employees-union and nonunion- will be transitioned to a biweekly payroll in the near future.

By letter dated November 22, 2002, Union counsel responded, in part:

> In sum, the Union's position on this matter, as reflected in my previous letter, is unchanged. It is the Union's sincere desire that this matter will be worked out at the bargaining table and not at the Public Employment Relations Board. To this end, I urge you to contact Messrs. Herbert and Siano to arrange for negotiations to resolve this matter.

The second exception involves the existence of economic exigencies or business emergencies which compel prompt action. The evidence does not establish management was confronted with a legitimate economic exigency or business emergency which compelled prompt action. In fact, after the decision was informally conveyed to Union President Herbert in June, 2002 approximately five months elapsed before the plan was implemented effective December 1, 2002.

This brings us to the question of whether the Union either affirmatively or by its actions waived its right to bargain over the change in the payroll period.

Citing Owens Corning Fiberglass Corp. 282 NLRB 85, 124 LRRM 1105 (1987), the PERB in Local 1590, Int'l. Assn. of Firefighters and FOP Lodge No. 1 v. City of Wilmington, observed:

> . . . The Board will not lightly infer waivers of statutory rights . . . Nor does the fact that the Respondent previously changed the terms of the program without bargaining preclude the Union

> from effectively demanding to bargain over the most recent change. A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time. Local 1590, Int'l. Assn. of Firefighters at 465.

Based upon the continuing opposition expressed by Union President Herbert and the aforementioned correspondence between Union counsel and the State Director of Labor Relations there is no basis for concluding that Local 842 waived its statutory right to bargain.

DECISION

Consistent with the foregoing discussion, it is determined that by unilaterally altering the status quo of a mandatory subject of bargaining without first bargaining with the Union the State violated Sections 1307(a)(1) and (a)(5) of the Act, as alleged.

The parties agreed to bifurcate this matter by first addressing the underlying substantive issue and then the remedy, should there be a decision finding DART/DTC unilaterally implemented a change in a mandatory subject of bargaining. In light of the decision sustaining the Union's position on the merits, I will promptly initiate a conference call with counsel for DART/DTC and counsel for ATU in order to determine whether additional evidence is required and, if not, the schedule for the submission of briefs by the parties setting forth their respective positions concerning the appropriate remedy.

IT IS SO ORDERED.

August 18, 2003
(Date)

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR., Executive Director
Delaware Public Employment Relations Bd.