

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

AMALGAMATED TRANSIT UNION LOCAL 842,)	
and ARMOND WALDEN,)	
Petitioners,)	<u>ULP No. 05-06-483</u>
)	Decision
STATE OF DELAWARE DEPARTMENT OF)	
TRANSPORTATION, DELAWARE TRANSIT CORP.,)	
Respondent.)	

Appearances

*Alaine S. Williams, Esq., Willig, Williams & Davidson, for the Petitioners
Catherine T. Hickey, Esq., State Labor Relations Service, for the Respondent*

BACKGROUND

The State of Delaware Department of Transportation, Delaware Transit Corporation (“DTC”)¹ is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1986) (“PERA”).

Amalgamated Transit Union, AFL-CIO, Local Union 842 (“ATU”) is an “employee organization” within the meaning of 19 Del.C. §1302 (i) and is the exclusive bargaining representative of DTC Fixed Route Operators within the meaning of 19 Del.C. §1302(j).

¹ The parties used the terms “DART” (Delaware Area Regional Transit) and “DTC” throughout their questioning, briefs and responses, without differentiating between the two for the benefit of the Hearing Officer. For purposes of this decision, “DTC” will be used.

Petitioner Armond D. Walden (“Mr. Walden”) was a Fixed Route Operator employed by Delaware Transit Corporation in New Castle County, Delaware. At all times relevant to this charge, Mr. Walden was a member of ATU Local 842.

DTC and ATU Local 842 are parties to a collective bargaining agreement for the period of December 1, 2002, through November 30, 2007. This agreement was in effect at all times relevant to this charge.

On or about June 13, 2005, the Petitioners filed an unfair labor practice charge alleging violations of 19 Del.C. §1307 (a)(1) and (a)(3).² The Charge was amended on June 30, 2005, to also allege a violation of 19 Del.C. 1307(a)(5). Specifically, the Charge alleged that DTC had failed or refused to provide workplace access to a designated ATU representative and had thereby violated the statute.

On June 24, 2005, DTC filed an Answer to the Charge denying all material allegations and included a Counter-Charge alleging a violation of 19 Del.C. §1307(b)(6).³ On June 28, 2005, ATU filed a Response to New Matter, also denying all material allegations.

A probable cause determination was issued on August 5, 2005, dismissing alleged violations of 19 Del.C. §1307 (a)(1) and (a)(3). The determination included:

- (2) Concerning the violation of §1307(a)(5) alleged in the amended Charge filed on June 30, 2005, the pleadings establish probable cause to believe

² 19 Del.C. §1307 (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.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure, or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive bargaining representative of employees in an appropriate unit, except with respect to a discretionary subject.

³ 19 Del.C. §1307(b) It is unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

- (6) Hinder or prevent, by threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment by any person, or interfere with the entrance to or egress from any place of employment.

that said violation may have occurred. The disposition of this alleged violation requires proof as to whether Charging Party Walden qualifies as a designated representative of the ATU and whether [DTC] improperly refused him reasonable access to DTC property necessary for him to perform his Union responsibilities.

- (3) Concerning [DTC's] New Matter, as amended in its Amended Answer filed on July 12, 2005, the pleadings establish probable cause to believe that a violation by Charging Parties of §1307(b)(6) may have occurred. The disposition of this alleged violation requires proof of the conduct attributed to Charging Party Walden and whether, at the time of his conduct, he was acting in the capacity of a designated representative of ATU. *Probable Cause Determination*, p. 5.

A hearing was conducted on November 15, 2005. The parties concluded their evidentiary presentations on the ATU's Charge on that date. Simultaneous opening written argument on the ATU's charge was received from the parties on January 5, 2006. ATU followed with Responsive Argument on January 12, 2006. DTC did not file a responsive brief.

A second day of hearing was scheduled for February 2, 2005 to receive testimony on DTC's countercharge. However, on February 1, DTC withdrew its countercharge petition.

This decision is based upon the record created by the parties as described above.

FACTS

ATU Local 842 represents approximately 450 active members in two bargaining units. The larger unit includes fixed route bus drivers and mechanics employed in New Castle County. The second unit includes "Dover fixed route and statewide paratransit operators who serve the elderly and handicapped with demand responsibility, curb to curb services." (TR. 11).⁴ DTC employees represented by ATU Local 842 work out of four facilities: two in New Castle County (Monroe Street and Mid-County), one in Dover (Kent County) and one in Sussex County. (TR.15).

⁴ "TR 11" references the transcript of the November 15, 2005, hearing, at page 11.

Armond Walden was employed by DART/DTC as a Fixed Route Operator in New Castle County. His employment was terminated in September 2004, as a result of an incident in which he was accused of “refusing a work assignment and threatening his supervisors”. (TR. 48) Mr. Walden challenged his termination both through the contractual grievance procedure and by filing an unfair labor practice charge before PERB.

The incident that resulted in Mr. Walden’s termination occurred at the Monroe Street facility, located in Wilmington, New Castle County, Delaware. Testimony established Monroe Street is the largest DTC garage in Delaware, and the site out of which the largest concentration of bargaining unit employees work. (TR. 28). The facility was described by former Director of Operations, Bill Hickox, as follows:

It’s an industrial facility that is for maintenance of vehicles and drivers reporting. There is no public access to it at all. . . [T]he only lawful access to that facility is through key card, swipe pad. . . The crew room is on the second floor of the Monroe Street facility. It’s the drivers’ crew room , and presumably talking about the maintenance crew room as well, which is on the first floor of that facility. (TR. 49).

By letters dated March 23, 2005, ATU Local 842 was placed in trusteeship by the International Union. *Union Exhibit 1* Lawrence J. Hanley (International Vice President) was appointed to act as Trustee. Trustee Hanley’s responsibilities were set forth in a letter from the International President:

Upon taking charge of Local Union 842, you shall assume full control and direction of the affairs of the local union. You shall take whatever steps are necessary to obtain custody and possession of all assets, property, and records of the local union. You shall see that all property of the local union is protected and the rights of the membership are looked after, their dues received, and the work of the local union kept in proper order according to the laws of the ATU.

You shall, either personally or through such assistance as you may designate, take over the books, records, and funds of Local Union 842, and you will perform the duties formerly performed by the officers of the local union, either personally or through such interim officers as you may select as assistants to the trustee. You shall take such further actions as may be necessary to protect the membership of Local Union 842. *Union Exhibit 2*

DTC was notified on or about March 23, 2005, that ATU Local 842 had been placed in trusteeship and that Mr. Hanley had been appointed Trustee. Shortly after his appointment, Mr. Hanley contacted Director of Operations Hickox and requested a “DART employee ID to be able to come and go from the property and to meet with the members.” (TR.18). Mr. Hickox arranged for Mr. Hanley to receive a key card which allowed him access to non-public areas of DTC facilities. (TR. 19, 53).

On or about April 6, 2005, Trustee Hanley hired Armond Walden to serve as his Assistant. Mr. Hanley testified that he is not personally in Delaware on a full-time basis, and that in fact, there have been months when he has only been here three or four days, and other times when he is here either more often or for longer periods of time. (TR. 14 - 15) He further testified he hired Mr. Walden to:

- Keep the Local 842 office in Newark operating
- Communicate with members of the Local
- Serve as a “statewide” shop steward
- Keep track of finances in Mr. Hanley’s absence, including depositing dues
- Facilitate the flow of information through the Local
- Represent the Trustee at meetings in his absence, including in the community, with the State AFL-CIO, DTC labor-management meetings
- Manage day-to-day operations and questions
- Represent bargaining unit members in grievances
- Assist employees who are called in by management that might be subject to discipline
- Provide employee orientation and assist probationary employees
- Conduct Union meetings
- Prepare training and conducting members for training

- Discuss union programs with bargaining unit members and potential leaders (TR. 16-18).

Mr. Walden was the only person Trustee Hanley hired to assist him.

By e-mail dated May 3, 2005, Trustee Hanley forwarded to Director of Operations Hickox a request that DTC provide access to Mr. Walden.

Please be advised that Mr. Armond Walden will be acting on the Union's behalf in an administrative capacity. It is necessary for him to access DART property on Union business. It is my understanding that as an employee he is not currently granted that permission.

Please make necessary arrangements with your security office to allow Mr. Walden access as needed for Union business. *Union Exhibit 3*

In response to a request from Mr. Hickox for further information as to the type and purpose of the access being requested, Trustee Hanley responded: "We are requesting access to the crew rooms for the purpose of doing the administrative work of the Union. Things like posting notices, distributing union materials to members and so forth." *Union Exhibit 5*

By e-mail to Trustee Hanley dated May 11, 2005, Director of Operations Hickox declined to grant access to DTC facilities for Mr. Walden, stating:

We have reviewed your request to grant access to DTC facilities for Mr. Walden. The purpose of this e-mail is to inform you that this request has been denied for several reasons including but not limited to Mr. Walden's previous conduct in the workplace, i.e., threatening supervisors, which was one of the reasons for his dismissal. *Union Exhibit 6*

Following DTC's denial to permit Mr. Walden access to DTC's facility, ATU's counsel provided a letter to DTC's counsel in which it sought to convince DTC that its position was contrary to law, citing numerous NLRB cases. *Union Exhibit 7*

At some time after May 11 and prior to September, 2005, Mr. Hickox left DTC and was replaced as Director of Operations by Mr. McGinness. In September 2005, Mr. McGinness verbally indicated to Mr. Walden that he could access the three smaller DTC facilities provided he notified DTC in advance that he intends to come onto its property. Mr. Walden is not

permitted access to the Monroe Street facility and DTC has not provided Mr. Walden with an access pass. (TR. 26-27).

ISSUE

Did DTC violate its duty to bargain in good faith and 19 Del.C. §1307 (a)(5) when it denied Armond Walden unlimited access to its facilities for the purpose of performing representation functions on behalf of ATU Local 842, as requested by the ATU Trustee?

POSITIONS OF THE PARTIES

Charging Parties:

ATU and Walden argue it is axiomatic under federal and state law that both unions and management have the right to select their agents and representatives to negotiate and administer the collective bargaining agreement. This rule is excepted only when there is an “extraordinary” or “special” circumstance which justifies one party’s refusal to recognize the other side’s duly selected representative.

In this case, DTC has failed to meet its burden of establishing that such extraordinary circumstance exists which support its refusal to recognize Mr. Walden as the ATU’s designate representative and to permit him access to facilities to carry out his responsibilities.

It is not enough for DTC to simply rely on the fact that Mr. Walden was discharged. DTC must demonstrate that Mr. Walden’s presence would jeopardize either the business enterprise or the collective bargaining process. It asserts that the NLRB decision in Claremont Resort and Spa and HERE Local 2850, 344 NLRB 105, 177 LRRM (BNA) 1193, 2005 WL145240, (2005), is on point and supports the ATU’s position.

ATU argues DTC failed to present persuasive evidence justifying its decision. By denying access to the workplaces and crew rooms of bargaining unit employees to the assistant

to the Trustee, DTC has violated the statute and interfered with the union's right to designate its representative and its obligation to effectively represent the bargaining unit.

DTC:

DTC argues that the ATU must establish that Armond Walden was a designated representative of the ATU and that the DTC refused him reasonable access to the workplace necessary for him to fulfill representative responsibilities.

It asserts Mr. Walden was terminated, in part, for violating the State policy against Workplace Violence and that he demonstrated an unacceptable risk in the workplace because of inappropriate behavior in threatening supervision. DTC also argues that Mr. Walden, unlike ATU Trustee Hanley, has no "legitimate reason for unfettered access to the workplace."

DTC does not dispute that Mr. Hanley had the authority to appoint Mr. Walden to assist him in fulfilling his responsibilities as Trustee for the local under the ATU's Constitution and By-laws. DTC is not a party to nor bound by the ATU's Constitution and there is nothing in the parties' collective bargaining agreement that requires DTC to grant access to its facilities to non-employees.

DTC distinguishes the NLRB's decision in Claremont (Supra) asserting DTC did not refuse to recognize or deal with Mr. Walden. DTC argues that it only limited Mr. Walden's access to its facilities to less than what Trustee Hanley had requested based on reasonable, good-faith concerns. It asserts the ATU has at least six employee shop stewards in the workplace and that the ATU has failed to establish that Mr. Walden has any special qualifications which necessitate that he personally be granted the access requested when there are others who could also perform those functions.

DTC argues it acted reasonably and in good faith when it placed restrictions on Mr. Walden's access to non-public DTC facilities despite his history of inappropriate and threatening

behavior toward supervision in the Monroe Street facility. DTC has continued to act in good faith by dealing with Mr. Walden as an ATU representative and has provided alternatives to Monroe Street for meeting sites when Mr. Walden is involved.

DISCUSSION

The Public Employment Relations Act mutually obligates public employers and public employee organizations which have been certified to represent public employees to enter collective bargaining negotiations with a willingness to resolve disputes. 19 Del.C. §1301; §1302(e).

The statute also grants to public employees the right of organization and representation by representatives of their choosing. 19 Del.C. §1301; §1303. It clearly sets forth that employee organizations may act by and through their designated representatives with the same authority and responsibility as the parent organization. 19 Del.C. §1302(i).

The Delaware PERB first addressed the issue of the relationship of employer preference to the designation of an agent or representative by an employee organization in Indian River Education Association v. Bd. of Education⁵, Del.PERB, D.S. No. 89-03-035, I PERB 439 (1989). In that case, the School District sought to exclude from an Association bargaining team non-bargaining unit employees, basing its position in part on past practice and also on an argument that those persons were not “employees” within the meaning of the Public School Employment Relations Act, at that time. The decision states:

This case involves the fundamental right of bargaining unit employees to negotiate through representatives of their choosing. The Act clearly states that

⁵ PERB rulings decided under the Public School Employment Relations Act (14 Del.C. Chapter 40), the Police Officers’ and Fire Fighters’ Employment Relations Act (19 Del.C. Chapter 16), and /or the Public Employment Relations Act (19 Del.C. Chapter 13) are controlling in issues which arise under any of the statutes to the extent that the relevant provisions of the statutes are identical to those of the PERA. Local 1590, IAFF v. City of Wilmington, Del.PERB, ULP 89-05-037, I PERB 413 (1989).

its policies are best effectuated by granting this right to employees and obligating boards of education to enter into negotiations with such representatives. In defining “employee organization”, the Act clearly establishes that such organizations may have agents or representatives who may act as the organization and are therefore endowed with the same rights and responsibilities under the Act as the parent organization. Nowhere does the Act expressly limit the right of the organization to freely choose its agents or representatives. The right to choose such agents and/or representatives must be an inherent right of the employee organization. The District’s interpretation of this language would place a restriction on the rights of an employee organization which the Act does not support. The PERB is obligated to administer the clear language of the Act. [citation omitted]

. . . [T]he conclusion reached here is consistent with that established under the National Labor Relations Act and as affirmed by the Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 302 US 1 (1936). *Indian River*, p. 446-447.

The PERB next addressed the issue of choice of designated representative in Delaware State Troopers Association v. Del. Division of State Police, D.S. 92-01-068, II PERB 787, 791 (1992), wherein the principles of General Electric v. NLRB, 412 F.2d 512 (2nd Cir., 1969), 71 LRRM (BNA) 2418, were specifically adopted:

Clearly, each party’s to the collective bargaining process has the right to designate its representatives and the opposing party has the duty to negotiate with those representatives. . . . A party’s right to designate its representatives to the bargaining process is not, however, absolute. Application of the rule must be reasonable. The integrity of the collective bargaining process must be preserved and to the extent that the designation of a bargaining representative thwarts good faith negotiations, it must be rejected as contrary to the clear intent of the statute.

Under a similar statutory scheme, the National Labor Relations Board has recognized limited exceptions to the general rule that parties can choose their bargaining representatives freely. However these exceptions are ‘. . . so rare and confined to situations so infected with ill will, usually personal, or conflict of interest as to make good faith bargaining impractical.’

. . . [T]he standard that alleged conflicts of interest of negotiating team members of the parties must be of such a nature that they present a reasonably clear and present danger to the collective bargaining process. . . *DSTA*, p. 791-792.

It is a long-standing principle of labor law expressed by the U.S. Supreme Court that the duty to bargain in good faith continues beyond the period of actual negotiations:

Collective bargaining is a continuous process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. Conley v. Gibson, 355 U.S. 41, 46; 41 LRRM 2089, 2091 (1957); NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967).

The Delaware PERB has similarly held that the duty to bargain in good faith applies to the continuing relationship between the parties in administering the collective bargaining agreement.

The test of good faith was set forth in the Executive Director's Probable Cause Determination in this case. Initially the ATU must establish that Mr. Walden was a designated representative of the employee organization responsible and able to serve in the interest of the bargaining unit and its members, and that DTC was aware that he was so designated. The burden then shifts to DTC to establish that its refusal to allow a designated ATU representative the requested access to its facilities was reasonable and made in good faith consistent with its obligation under the statute.

The record establishes that Hanley had authority under the ATU's Constitution and By-laws in his capacity as Trustee to appoint individuals to assist him in fulfilling his responsibility to protect the membership of Local 842. *Union Exhibit 2*. It is not disputed that Mr. Walden was hired to staff the Local office in early April 2005 and to perform in Mr. Hanley's stead during periods of his absence from Delaware.

There is no question that DTC was on notice that Mr. Walden had been designated to assist the Trustee. Mr. Hanley directly advised former DTC Director of Operations Hickox by letter and e-mail, that Mr. Walden would be conducting Union business and acting on the Union's behalf. *Union Exhibit 3*. Hanley further clarified in response to DTC's request for further information that Walden would need "access to crew rooms for the purpose of doing the administrative work of the union." *Union Exhibit 5*.

Consistent with the analysis above, the burden shifts to the employer to establish that its denial or limitation of access to the workplace for a designated Union representative was reasonable and made in good faith. DTC must establish that it had a good faith basis on which to conclude that Mr. Walden was a danger, would create ill will or poison the environment such that a good faith and productive labor management relationship could not be maintained.

Former DTC Director of Operations Hickox testified he denied the request following consultation with State Labor Relations Services and DTC's risk managers and insurance carriers based on a belief that Mr. Walden posed a danger in the workplace. He testified:

. . . it would be considered gross negligence to allow a former employee unfettered access to the property where they were discharged for threatening supervisors. As such, if those threats had been carried out and the company knowingly allowed that action to take place, we would certainly not be protecting the safety and best interest of the employees at that facility.

In addition, if Mr. Walden were allowed unfettered access, DTC would have no recourse based on the continuous violations that he engaged in as an employee. We certainly would have no recourse if he wasn't an employee. You can't fire him again. So we were really concerned about his conduct and what would transpire if allowed into the facilities at any given day and time. (TR. 50).

Other than this testimony, DTC produced no evidence to support this conclusion. The record is void of any information concerning the incident in which Mr. Walden is alleged to have "threatened supervision" or of a history of potentially violent behavior. The Policy Against Violence in the Workplace was not produced nor was there evidence of how employees are disciplined under the policy.

The only evidence entered into the record concerning Mr. Walden's potential threat was the decision of the Arbitrator resolving the grievance filed on his behalf contesting his discharge. The Arbitrator sustained the grievance and ordered that Mr. Walden be "reinstated with full back pay and commensurate fringe benefits, including lost overtime and seniority credit, if applicable." *Arbitration Decision, AAA No. 14 300 02180 04 RVB, Jan. 2006.*

Applying the standard of Del. State Troopers (Supra) DTC has failed to meet its burden to establish that Mr. Walden presented a reasonably clear and present danger to either the collective bargaining process or to persons in the workplace.

DTC has argued that its limited denial of complete access did not deprive the ATU of the opportunity to effectively represent bargaining unit employees. The manner in which the union's meets its representative responsibilities to its members is not subject to employer judgment. The fact that the sole full-time designated ATU representative was denied access to the crew rooms of the largest garage facility from which the largest number of bargaining unit employees perform their daily assignments creates a strong inference that the work of the union will be impacted. Moving meetings involving Mr. Walden from the Monroe Street facility to other locations does not address the ATU's fundamental responsibility to provide representation to members in the workplace.

For all of these reasons, DTC is found to have violated its duty under the statute to enter in good faith into a collective bargaining relationship with the exclusive bargaining representative of employees and its designated representative.

CONCLUSION

1. The State of Delaware Department of Transportation, Delaware Transit Corporation ("DTC"), is a public employer within the meaning of 19 Del.C. §1302(p).
2. Amalgamated Transit Union, AFL-CIO, Local 842, is an employee organization within the meaning of 19 Del.C. §1302(i). It is the exclusive bargaining representative of two bargaining units of DTC employees within the meaning of 19 Del.C. §1302(j).
3. ATU Local 842 and DTC are parties to a collective bargaining agreement which has a term that extends from December 1, 2002, through November 30, 2007.

4. On or about March 23, 2005, ATU Local 842 was placed under trusteeship by the ATU International. Larry Hanley was appointed to act as Trustee and was instructed to “assume full control and direction of the affairs of the local union.”

5. On or about April 6, 2005, Trustee Hanley hired Armond Walden to act as his assistant in running the Local office and handling day-to-day functions of the local. He requested DTC provide Mr. Walden access to the workplace to meet with bargaining unit employees in crew rooms and to perform other representation functions on behalf of the Local.

6. On or about May 3, 2005, DTC denied Trustee Hanley’s request and refused to allow Mr. Walden access to non-public areas of DTC facilities, including the Monroe Street facility which is the site of DTC’s largest garage and out of which the largest concentration of bargaining unit employees work.

7. Armond Walden is a designated representative of ATU Local 842 within the meaning of 19 Del.C. §1302(i).

8. The evidence of record in this case is insufficient to establish that Mr. Walden posed a reasonably clear and present danger to either the collective bargaining process or to persons in the workplace.

9. By refusing to allow a designated representative of the exclusive bargaining representative access to the workplace to fulfill statutory responsibilities for bargaining unit employees, DTC violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5) which provides it is an unfair labor practice for a public employer or its designated representative to:

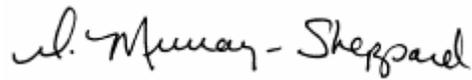
- (a)(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

WHEREFORE, DTC is ordered to cease and desist from denying access to the workplace to Armond Walden, a designated representative of ATU Local 842, for purposes of

providing representation to bargaining unit employees. DTC is further ordered to post copies of the Notice of Determination in all locations where notices affecting employees represented by ATU Local 842 are normally posted, including in the workplaces and DTC administrative offices. The Notice must remain posted for thirty (30) days.

IT IS SO ORDERED.

DATE: 5 April 2006

A handwritten signature in cursive script, reading "D. Murray-Sheppard", positioned above a horizontal line.

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.