

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL 842,)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 15-10-1011</u>
)	Decision on the Merits
)	
STATE OF DELAWARE, DELAWARE TRANSIT)	
CORPORATION,)	
)	
Respondent.)	

APPEARANCES

Lauren M. Hoye, Esq., Willig, Williams & Davidson, for ATU Local 842

Aaron Shapiro, SLREP, for the Delaware Transit Corp.

BACKGROUND

The State of Delaware ("State") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13. The Delaware Transit Corporation ("DTC") is an agency of the State.

The Amalgamated Transit Union ("ATU") is an employee organization within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of "all full-time and part-time [DTC] paratransit employees statewide and all full-time and part-time employees providing fixed route transit service in the Greater Dover Area," and a second bargaining unit of "all hourly-rated operating and maintenance employees" in New Castle County, within the meaning of §1302(j) of the

PERA.

The ATU and DTC are parties to a collective bargaining agreement for each bargaining unit, each of which has a term of September 1, 2013 through August 31, 2016.

On October 13, 2015, the ATU filed an unfair labor practice charge alleging DTC had engaged in conduct in violation of 19 DeI.C. §1307(a)(1) and (a)(5)¹ of the PERA, by failing or refusing to negotiate changes to the long-standing progressive discipline schedule for preventable accidents. The ATU asserts this is a mandatory subject of bargaining.

On October 23, 2015, DTC filed its Answer to the Charge including New Matter, in which it denied it had formally, officially, or intentionally altered the disciplinary schedule for preventable accidents. It asserted under new matter that the charge should be dismissed for failure to state a claim upon which relief can be granted, or dismissed as untimely because there had been two similar incidents involving discipline in excess of the preventable accident schedule more than 180 days prior to the filing of this charge. DTC also argued the charge should be deferred as it involves a contractual question which is subject to resolution exclusively through the parties negotiated grievance procedure.

On October 30, 2015, the ATU filed its response to DTC's new matter, denying the assertions contained therein. Also on October 30, the ATU amended its charge to include new allegations for asserted changes in disciplinary procedures for unrelated offenses. Those charges were subsequently withdrawn on November 24, 2015, when the ATU advised the PERB that

¹ §1307. Unfair labor practices.

- (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 by this chapter.
 - (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.

they had been resolved by the parties.

A probable cause determination was issued on January 4, 2016, finding the pleadings were sufficient to support the further processing of the charge. Thereafter, a hearing on the merits was conducted on February 12, 2016, during which the parties were afforded the opportunity to call and cross-examine witnesses and to submit documentary evidence. The record closed following receipt of oral argument by the parties at the end of the hearing.

This decision is based upon review of the record created by the parties and consideration of their arguments as well as related case law.

FACTS

The facts included herein are derived from the documentary and testimonial evidence presented by the parties.

On or about July 10, 2015, the Chief Transportation Supervisor for the North District issued a memorandum to a Fixed Route Operator for an accident which occurred on July 6, 2015, which stated:

On *July 8, 2015*, the Accident Review Committee met and determined that the accident in which you were involved in [*sic*] on *July 6, 2015*, was **preventable**. This accident occurred as you **tried to avoid heavy traffic by trying to crossover the median to Southbound Route 1 causing the bus to become stuck**. There were no injuries to anyone involved and minor damage to **Bus #915**.

It is your responsibility to check all clearances and proceed only when safe to do so. This is your **second preventable accident within the past 24 months**, and as such, you are being issued this advisory letter.

Be advised that a third incident within a 24-month period will result in a one (1) day suspension from work without pay. A fourth incident within a 24-month period will result in a three (3) day suspension without pay. A fifth incident within a 24-month period will result in a five (5) day suspension without pay. A sixth incident within a 24-month period will result in a ten (10) day suspension without pay and mandatory driver

re-instruction with pay. A seventh incident within a 24-month period will result in a thirty (30) day suspension without pay and mandatory driver reinstruction with pay. An eighth incident within a 24-month period will result in termination of your employment with the Delaware Transit Corporation.

In accordance with Policy 022.02, you have five working days from the date of notification of the original ARC² decision to request an appeal. This request must be submitted to the ARC Chairperson and contain the basis for appeal. The only basis for remand of the original decision is new evidence and/or new interpretation of previously submitted information.

You are advised of your right to appeal. *Union Exhibit 1* (emphasis in original).

After receiving the advisory letter on July 10, 2015, the Operator received a second memorandum entitled “Letter of Suspension – Unsatisfactory Job Performance; Unsafe Operation of a Bus” approximately one week later, on or about July 17, 2015:

On Monday, July 6, 2015, at approximately 3:46 pm, you were operating Bus #915 on Route 301. Traffic on Route 1 was stopped due to an accident south of the Route 72 exit. You took it upon yourself without approval from the Control Center to drive Bus #915 unsafely across the grass median into the southbound EZ Pass lane of Route 1. The rear wheels of Bus #915 became stuck in the median with the front of the bus partially blocking the southbound EZ Pass lane on Route 1 causing an unnecessary safety situation for the passengers and other motorists attempting to use the EZ Pass lane.

These actions are a violation of procedures which include unsatisfactory job performance and unsafe operation of a bus. As a result of these actions, you will be suspended without pay for a period of ten (10) working days. This suspension will be served on **Sunday, August 23, 2015 through Saturday, September 5, 2015**. Be advised that future incidents of a similar nature will result in more progressive disciplinary actions being taken up to and including termination of your employment.

You are advised of your right to appeal. *Union Exhibit 2*.

This suspension letter was also issued by a Chief Transportation Supervisor in the North District, although it was not the same individual who had issued the July 10 memorandum.

A grievance was filed by the ATU on July 24, 2015, contesting the discipline issued to

² ARC = Accident Review Committee, established under Policy #022.2. *State Exhibit 3*.

the Operator. The grievance alleged a violation of: “Section 9 – Discipline, A. Just Cause, In accordance with DTC accident policy REF #022.02.” *Union Exhibit 3.* ATU’s President testified, without refute, that this grievance was denied at each step and that the Union chose not to appeal it to arbitration because the Union believed DTC had instituted a unilateral change to the disciplinary policy for preventable accidents. The ATU concluded the appropriate forum for resolution of the issue was through an unfair labor practice proceeding.

The ATU President also testified she verbally advised the DTC representatives at both Steps 3 and 4 of the grievance procedure that the union was demanding bargaining over the changes to the accident policy. A copy of a simple statement she testified she provided at each of the hearings stated:

It is our understanding that DTC has changed its accident policy. Because this change to the policy impacts ATU Local 842’s members’ terms and conditions of employment, ATU Local 842 hereby demands bargaining on this issue. *Union Exhibit 4.*

She further testified DTC did not respond to or acknowledge the ATU’s demand to bargain.

During the hearing, DTC provided documentary evidence of prior incidents in which a vehicle operator had received discipline under both the Preventable Accident policy and for rules infractions over the preceding three years. Each accident involved a different driver and the union president at the time was notified of each discipline, as evidenced by his or her receipt of the letters. The incidents involved included :

DATE OF INCIDENT	DISCIPLINE ASSESSED	SUMMARY (DATES OF LETTERS)
8/28/12	Fixed Route Operator #1 PA ³ – advisory letter TERMINATED	9/5/12 – Preventable Accident on 8/28/12 when bus swerved to avoid an on-coming vehicle and hit a parked car. (1 st PA) 9/19/12 – Operator terminated because gave false and dishonest statements during the investigation of the accident by DTC, Dover Police, and in his written statement

³ PA = Preventable Accident

		the bus, and failure to provide door-to-door service.
8/16/13	Paratransit Operator #5 2 nd PA – suspended pending termination TERMINATED	8/26/13 notice of intent to terminate. Operator was involved in a collision which he failed to immediately report. The collision caused extensive damage to one of the bus tires. The Operator falsified DTC report by that stating another vehicle forced the bus to the curb. Video showed no other vehicle involved and that accident occurred at a different location and time than reported; also showed Op had Bluetooth in his ear and was not wearing seat belt at time of collision. Later same day, OP left customer on bus in DTC yard after indicating on manifest has been dropped off. Customer on board from 8:30 – 10:00 a.m. (when discovered). 9/6/13 Employee terminated effective 9/3/13 (after 9/3/13 pre-termination hearing). 10/14/13 – ARC determined was PA. 2 nd offense – suspended pending termination due to “circumstances of the accident.”
8/16/13	Paratransit Operator #6 1 st PA – suspended pending termination TERMINATED	9/10/13 – Operator involved in an accident on 8/16/13 on Rt. 13 & Middleford Road while operating a bus. Video showed the Operator was using an unauthorized electronic device at the time of the collision. 10/3/13 – terminated effective 8/26/13 10/14/13 – ARC determined was PA. 1 st offense – suspended pending termination due to “circumstances of the accident.” 11/12/13 – Step 4 grievance hearing result – 8/16/13 Op involved in a motor vehicle collision with a Paratransit bus. At time of accident Op was on electronic device having a conversation with another DTC employee. Operator was negligent in not paying full attention to the road and surroundings and her dishonesty was a contributing factor to the accident.
2/19/14	Paratransit Operator #7 2 ND PA – adv. Letter TERMINATED – later reduced to 45 days suspension	2/28/14 – ARC determines accident was preventable and that it was the Operator’s second PA in 24 months. The Operator misjudged clearance and struck a yellow parking pole. No injuries and minor damage to bus. 3/18/14 – Pre-termination hearing held 2/25/14. The Operator was using a cell phone at the time of the accident. She failed to disclose she was using phone in accident report and did not dispute investigative finds in hearing. 4/18/14 – Step 4 hearing results – termination reduced to 45 day suspension after Grievant apologized, accepted full responsibility, and vowed the unacceptable behavior would not be repeated.
5/24/14	Paratransit Operator #8 3 rd PA – 1 day suspension Suspended pending termination	5/30/14 – Operator was suspended without pay pending outcome of pre-termination hearing. After reviewing the accident report, police report and viewing the video, it was determined the Operator was driving aggressively. Operator’s conduct was in violation of the “Code of Conduct: <i>Violation of Safety, Security or Environmental Health Rules, Unprofessional Behavior, and Unsafe Driving Practices.</i> ” <i>NOTE: No documentation was provided which established what, if any, discipline was finally issued to this Operator for the enumerated Code of Conduct violations.</i>

		6/4/14 – ARC determines accident was preventable. Because it was a third preventative accident in 24 months, Operator was assessed a one day suspension.
5/19/14	FIXED ROUTE OPERATOR #2 2 nd PA – adv. Letter 5 day suspension	5/22/14 – Letter of suspension “The incident was investigated and it was determined that, as a result of your actions, the vehicle suffered significant damage to the oil pan, causing all of the oil to leak out of the bus onto the roadway over several blocks. The oil spill called for immediate and extensive environmental clean-up.” A five day suspension issued. <i>Note: ATU President testified this Operator never served the suspension.</i> 6/4/14 – ARC determined accident was preventable; 2 nd PA in 24 months so advisory letter was issued. Accident occurred when the Operator misjudged a clearance and drove the bus off a curb damaging the oil pan of the bus. There were no injuries and minor damage to bus.
8/20/14	FIXED ROUTE OPERATOR #3 <i>No PA letter in the record</i> 10 day Suspension for unsatisfactory job perf. & unsafe operation of bus 10 day suspension for 1 st violation of cell phone policy 1 day suspension for 2 nd violation of seat belt policy	8/20/14 operating on Route 1. Traffic was stopped just north of the Rt. 72 exit. Operator (without approval from Control Center) pulled bus onto the shoulder of Route 1 and across the grass to enter the closed down and unmaintained old Route 13. The video showed the Operator was not wearing a seat belt and was talking on his cell phone while driving. Operator then drove the bus onto the closed portion of Route 13, causing the bus to bottom out and a loud scraping noise was heard. Maintenance found, upon later inspecting the bus, that: “1) left front battery panel was bent; 2) skid plate left side scraped; 3) leaves in the drag link; and 4) skid plate under the door was scraped.” 8/29/14 – Letter of 10 day suspension issued for “unsatisfactory job performance and unsafe operation of a bus.” 8/29/14 – 10 day suspension issued for 1 st violation of the cell phone policy. 8/29/14 – one day suspension issued for 2 nd violation of seat belt policy.

State Exhibits 2 and 4-1 through 4-10.

ISSUE

WHETHER DTC VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH AND 19 DEL.C. §1307 (A)(1) AND/OR (A)(5) BY FAILING OR REFUSING TO NEGOTIATE A UNILATERAL CHANGE IN THE DISCIPLINARY PROCESS FOR PREVENTABLE ACCIDENTS, AS ALLEGED.

DISCUSSION

It is well established in Delaware case law developed under the application of the three

public sector collective bargaining statutes⁴ that matters concerning or related to discipline are a condition of employment and may not be unilaterally altered by either party without negotiation at least to the point of impasse.⁵ The PERB has held that a unilateral change in the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty-to-bargain. *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, II PERB 1279, 1290 (1995); affirmed by full PERB, II PERB 1201 (1995); *CWA Local 13101 v. Kent County Levy Court*, ULP 14-08-971, VIII PERB 6321, 6326 (2014).

In order for the ATU to prevail on this charge, it must establish both that a unilateral change in the status quo was effected and that such change involved a mandatory subject of bargaining.⁶ Having determined that this charge involves a mandatory subject of bargaining (discipline), in order to find that an unfair labor practice was committed, there must first be a finding that there was a unilateral change in the *status quo* of application of discipline, as alleged.

The ATU argues there was a unilateral change to the progressive discipline policy for preventable accidents. Documentary and testimonial evidence clearly establish there are two separate reviews conducted of each accident involving a DTC vehicle. The Accident Review Committee is established by DTC Policy #022.02 for the purpose of determining "... by majority vote, whether each transportation, industrial or office environment accident is

⁴ Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982, 1989) and /or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986), are controlling to the extent that the relevant portions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

⁵ *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, II PERB 1279, 1290 (1995); affirmed by full PERB, II PERB 1201 (1995).

⁶ *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Bd. of Education*, ULP 85-06-005, I PERB 131, 143 (1986).

preventable or non-preventable...”⁷ The ARC is comprised of the DTC System Safety Manager (non-voting); two employees from the Operation Department (voting); Risk Manager (voting); Transit Instructor (voting); and one representative from the collective bargaining unit (voting).

The policy lists the information which will be presented to the ARC, as it is determined to be applicable and is available:

- Employee’s report of accident
- Police investigation reports
- Insurance Company investigation reports
- Supervisor’s report of the accident
- Statement(s) of witnesses
- Diagrams, photographs, and any other available evidence
- Any other available information deemed relevant by the Chairperson
- The employee involved in the accident may be called before the ARC to present information only in circumstances involving conflicting source information.⁸

The ARC process requires that each member of the committee submit a confidential vote (on written voting forms) as to whether the accident was either “preventable” or “non-preventable”, after all of the available facts and information have been presented. The policy defines both types of accidents:

PREVENTABLE – Any accident which results in any property damage and/or personal injury, regardless of who was injured, what property was damaged, to what extent or where it occurred, and when the employee involved failed to exercise reasonable precaution to prevent the accident.

NON-PREVENTABLE – An accident where it is shown that the employee involved did nothing that contributed to the occurrence.

The ARC Policy also establishes the method by which employees are to be notified and provides a one-step appeal process:

⁷ *State Exhibit 3*, Administrative Process: Accident Review Committee (ARC), REF #022.02, Issued 5/23/97; Update: 8/22/01, p.1

⁸ *Supra*, p. 3

Advising the Employee:

Once an accident has been reviewed and determination of preventability has been made, the employee involved and the employee's supervisor will be notified of the outcome by the Chairperson on an ARC Accident Determination form signed by all ARC members. Notification will be forwarded within five (5) working days of the determination. The employee, their supervisor and other involved personnel shall coordinate to effect any recommended corrective actions.

Appeal Procedures:

If an employee feels that the finding of the ARC in a particular accident is incorrect, he/she has the right to appeal the Committee's decision, through the following procedure:

- An employee has five (5) working days from the date of notification of the original ARC decision to file an appeal. The appeal must be submitted in writing to the Chairperson and contain the basis for the appeal. The only items that shall be considered for appeal are new evidence and/or a new interpretation.
- The Chairperson will notify the Director of Support Services of the appeal and provide copies of all relevant information. The Director of Support Services or his non-ARC designee will review the information with the Director of Operations or his non-ARC designee and determine if (1) the new evidence or interpretation is significant enough to warrant further consideration by the ARC or (2) that the new evidence or interpretation is not sufficient to merit further consideration by the ARC. The resulting action will either be to remand the ARC decision for further consideration of the new information by the ARC or to uphold the original ARC determination. This decision will be communicated in writing to the ARC Chairperson and employee requesting the appeal within five (5) days of receipt of the notification to appeal from the employee.

If an ARC appeal review is scheduled, the employee may have a union representative present at the meeting when this review is conducted. An active ARC member cannot represent an employee in the Appeals Procedure. If the union representative attends, the Union will be responsible for all costs of Union representation. If the employee appeals and the original decision is reversed, the employee (whether contract or non-contract) will be paid for his/her time. If the decision is unchanged, he/she will not be paid.

The decision of the ARC on any case is final once the appeal is made and the appeal ruling is issued.⁹

⁹ *Supra*, p. 4.

The ARC is exclusively responsible for determining whether an accident could have been prevented through the “exercise of reasonable precaution,” based on documentary evidence.

The record also establishes that following an accident, an investigation is conducted by DTC’s Operations Division to determine why the accident occurred. In the course of this investigation, when it is determined that employees violated work rules or operated vehicles in an unsafe manner, discipline has been issued based upon those violations. The record does not support the ATU’s assertion that additional discipline is only issued in instances where there is significant damage to the vehicle.

In one of its earliest decisions, this agency established the difference between an unfair labor practice and a contractual grievance:

... In an unfair labor practice proceeding it is of no consequence that the disputed conduct may also constitute a violation of the collective bargaining agreement. While an unfair labor practice is statutory in origin and raises a question of statutory interpretation to be resolved by the Public Employment Relations Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language.¹⁰

Although the two letters issued to the Operator in this case are based on the same incident, the July 10, 2015 letter clearly addresses the ARC finding that the accident was preventable, whereas the July 17 suspension letter was based on finding that the Operator unsatisfactorily performed his job and operated the bus in an unsafe manner which caused an unnecessary safety risk to passengers and other motorists.

Any discipline which is issued as a result of the investigation by the Operations Division is subject to a just cause standard and can be challenged through the negotiated grievance procedure, through arbitration. It is undisputed a grievance in this matter was filed and

¹⁰ *Brandywine, Supra.*, p. 142-143.

processed through Step 4 in accordance with the requirements of Section 7 of the negotiated collective bargaining agreement.

Based on the evidence presented and the facts derived therefrom, the ATU's assertion that there was change in the disciplinary schedule for preventable accidents is unsubstantiated. Consequently, the charge is dismissed in its entirety.

CONCLUSIONS OF LAW

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

2. The Amalgamated Transit Union, Local 842 is an employee organization within the meaning of 19 Del.C. Section 1302(i) of the PERA.

3. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of "all full-time and part-time [DTC] paratransit employees statewide and all full-time and part-time employees providing fixed route transit service in the Greater Dover Area," and a second bargaining unit of "all hourly-rated operating and maintenance employees" in New Castle County, within the meaning of §1302(j) of the PERA.

4. The ATU and DTC are parties to a collective bargaining agreement for each bargaining unit, each of which has a term of September 1, 2013 through August 31, 2016.

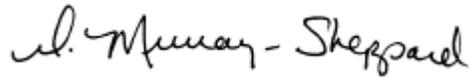
5. The allegation that the Delaware Transit Corporation violated 19 Del.C. §1307(a)(5) by unilaterally implementing a change to the disciplinary policy applied to bargaining unit employees who are involved in preventable accidents while on duty is not supported by the record.

6. The charge that DTC, by its actions, violated 19 Del.C. §1307(a)(1) is also unsupported by the record.

WHEREFORE, this Charge is dismissed in its entirety.

IT IS SO ORDERED.

Dated: May 18, 2016



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.