



**State of New Hampshire**

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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Amalgamated Transit Union, Local 717	*	
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	*	
Complainant	*	
	*	Case No. M-0596-15
	*	
v.	*	
	*	Decision No. 2001-064
	*	
Manchester Transit Authority	*	
	*	
Respondent	*	

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APPEARANCES

For the Amalgamated Transit Union, Local 717 (Complainant):

Vincent A Winners, Jr., Esquire

For the Manchester Transit Authority (Respondent):

Diane Murphy Quinlan, Esquire and Erich Y. Shultz, Esquire.

BACKGROUND

The Amalgamated Transit Union, Local 717, (hereinafter referred to as the "Union") filed unfair labor practice charges on February 20, 2001 pursuant to RSA 273-A:5 I (a), (b), (c), (e), (f), (h) and (i) alleging that the Manchester Transit Authority (hereinafter referred to as the "MTA") and its agents breached certain provisions of the parties' Collective Bargaining Agreement (CBA) by failing and refusing to employ a sufficient number of employees to carry out the provisions of the work schedules therein contained. This alleged failure on the part of the MTA resulted in transit operators being required on a regular basis to work mandatory overtime.

The MTA answered by recognizing that transit operators have been required to work mandatory overtime, but it defended the practice on the grounds of the existence of emergency circumstances involving the unavailability of qualified transit operators. Initially, its answer also raised the issue that the parties' CBA provided for final and

binding arbitration of disputes and therefore the Union had breached the CBA and RSA 273-A:6 by filing its complaint with the PELRB rather than following the grievance procedures contained within the CBA. Prior to the hearing, the MTA withdrew this defense. The MTA also asserts that to the extent that the Union has alleged incidents which transpired six (6) months prior to the filing of the unfair labor practice complaint, those acts are barred by the six month limitation on actions from consideration by the PELRB under RSA 273-A:6.

The MTA seeks a dismissal of the Union's complaint, a finding that Union charges occurring six months prior to the filing of this complaint be barred from consideration, and for an award of reasonable attorneys' fees and costs. For its part, the Union requests relief in the form of a finding that the MTA has engaged in an unfair labor practice and requests that the PELRB order the MTA to cease and desist from its practice of imposing mandatory overtime upon the transit operators lacking the existence of a genuine emergency.

An evidentiary hearing was conducted at the offices of the PELRB on April 24, 2001 at which both parties presented testimony and submitted exhibits in support of their respective positions. At the conclusion of the hearing, the record was held open until May 3, 2001 to allow the parties to submit legal memoranda and for the MTA to forward to the PELRB a copy of the separate contract it had with the Manchester School District. All submissions were received and the record was then closed on May 3, 2001.

#### FINDINGS OF FACT

1. The Manchester Transit Authority (hereinafter referred to as the "MTA") employs personnel in the operation of its public transportation service and otherwise qualifies as a "public employer" within the meaning of RSA 273-A:1, X.
2. The Amalgamated Transit Union, Local 717 (hereinafter referred to as the "Union") is the duly elected and certified exclusive bargaining representative of an employee unit comprised of certain positions employed by the Manchester Transit Authority and qualifying as public employees within the meaning of RSA 273-A:1, IX.
3. The MTA operates two bus operations, a statutorily chartered one allowing service to the public at large and a second contractual operation serving school students. It is signatory to a collective bargaining agreement with the transit operators and with the school bus drivers who are employed to service each rider clientele. The transit operators are full time employees and the school bus drivers are part-time employees who work mostly during the school year only.
4. The matter at issue in this complaint involves a provision in the collective bargaining agreement (CBA) then in force with the transit operators (Union Exhibit #36) that, in relevant part, states in Section IV, 16 (See also Joint Exhibit #1, Section IV, 15, for successor CBA treatment):

"Sufficient Number of Operators: In normal times the Authority agrees to employ sufficient number of operators to carry out provisions of the work schedules and to cover all regular runs/list work or special work so that no operator working a schedule shall be required, except in an emergency, to do other than his/her regular work."

Both CBA's also address "Emergencies" as in Section IV, E.8 in this manner,

"Emergencies: Emergencies shall be kept genuine. When an emergency does arise the first available regular operator may be assigned to cover it."

5. The CBA in effect at the time (Union Exhibit #36) also delineates the drivers' work week in Section IV, A.28 as follows:

"Basic Work Week: The basic workweek for all full time operators shall be five working days, forty (40) hours per week."

6. Barbara Condon is a full time operator for the MTA and testified that operators have been required to work mandatory overtime on days, including their scheduled days off, and cited herself as an example as one having done so on nine occasions in the year 2000 and 2 days in the month of January 2001 before she went out on leave. She also testified that when she returned to duty in March of 2001, and since that time, she has not been required to work mandatory overtime.
7. Union Exhibit #12 is a statement of Debra A. Oxley and provides another example of an operator having to work mandatory overtime on seven occasions in the year 2000 and on two in the month of January, 2001.
8. The witnesses differed in their opinion of the number of transit operators and bus drivers actually employed by the MTA. Ms. Condon testified that she believed there were approximately twenty-seven (27) regular transit operators and about one hundred and nineteen (119) school bus operators. Later testimony by the MTA's General Manager, Donald Clay, indicated that there were eighty-five (85) school bus drivers. John Webster, Superintendent of Transportation for the MTA later testified that there were twenty-six (26) full time transit operators and seventy-six (76) part-time bus drivers. Mr. Webster's opinion was that the optimum number of school bus drivers was between eighty (80) and eighty-five (85).
9. Francis Canning is a former employee of the MTA. He was also a former transit operator for the MTA for fourteen (14) years and an Assistant Superintendent for ten years, having retired from the MTA in 1997. He testified that although transit operators are required to drive school bus routes, school bus operators never drove regular transit runs. During his tenure, overtime was always performed on a voluntary basis. If there were insufficient operators, he would call operators using the list established and if unsuccessful obtaining volunteers, he and other managers

and mechanics would drive. Despite several personnel warnings and discipline issued to Mr. Canning in his earlier career with the MTA (See Authority Exhibits # 39 - #43), his testimony was credible in this matter on the relevant issues relating to the use of overtime.

10. Transit operators and school bus operators are both regulated by the State of New Hampshire and both are qualified and licensed to operate either the regular transit vehicles or the school buses. However, only transit operators were required at least since 1999 to perform mandatory overtime, most often to make school bus runs. School bus operators were not used to drive transit runs.
11. John T. Mahoney has been employed by the MTA for twenty years and is a transit operator and President of the Union. He testified that most of the overtime is required to drive school bus runs. He also testified that the wages are different for the transit operators and the school bus operators and that the union recognized that the MTA was having problems attracting additional drivers.
12. David Gosselin has been a transit operator for twenty-eight years and is Vice-President of the Union. He testified that the Union, for the most part, withheld earlier grievance filings after a discussion with Mr. Webster. (Union Exhibit #13).
13. Both parties acknowledge that the shortage problem seemed to become significant in 1999 and continued through the year of 2000.
14. The parties attempted to work together to address the driver shortage at least since 1999. (Union Exhibits #3 - #9) During that period of time, the union filed grievances (Union Exhibit #2) and contemplated filing more grievances than it did (Union Exhibits #7 and #13), but withheld such filings for two reasons. First, because they believed that the MTA would resolve the underlying problem themselves or through negotiations with the School Board. Second, because they did not want to jeopardize the contract the MTA had with the School Board for fear that the School Board would terminate it with adverse affects on the school bus drivers.
15. Donald Clay is the General Manager of the MTA and has been for the past three years, during that period of time when the implementation of mandatory overtime became commonplace. He also testified that in his opinion the MTA was not fully staffed from approximately January of the year 2000 through February of this year primarily because of the difficulty the MTA had in "finding part-time help".
16. Mr. Webster testified that the number of school bus routes increased as a result of increased student registration at several Manchester schools. The MTA also unsuccessfully explored a policy to compress the school routes to lessen the need for drivers. (See MTA Exhibits #14, #15, #17, and #18), although it is not apparent that any such proposals were formally presented to the School Board for its vote.

17. Management had previously arranged for mechanics employed within the MTA to hold licenses to operate buses but abandoned that practice when they did not renew licenses for mechanics since approximately October 1997. Mr. Webster explained this change in practice by stating that he needed mechanics to be fixing buses. He indicated that sometimes management employees could be assigned to drive. Those management employees are himself, the Assistant Superintendent, the Street Supervisor and the Dispatcher. He testified that he did not employ this option to any significant degree.
18. In response to an inquiry of a Board member regarding the date of the beginning of the emergency situation, Mr. Webster indicated that "Every year we run into [this] problem." The emergency situation was not restricted to the years 2000 or 1999. However, it does not appear that mandatory overtime was necessary to address situations arising in years prior to his tenure as Superintendent of Transportation for the MTA in 1997.
19. The parties agree that management stated that the need for overtime was due in substantial part to an insufficient number of drivers.
20. Mr. Mahoney testified that John Webster informed the Union that there would be no days off from the mandatory overtime practice due to the lack of "any light appearing at the end of the tunnel" following his failure to advance certain initiatives before the School Board.
21. Mr. Webster stated his opinion that when he didn't have enough drivers he considered it an emergency. He informed the Union on May 20, 1999 that he felt that the situation could be resolved if the parties worked together. (MTA Exhibit #20) and on May 25, 1999 also indicated to the Union that he felt the worst was behind them for that year. (MTA Exhibit #21).
22. Both parties shared the concern that the School Board may not renew the MTA's contract for services with them. This concern ameliorated the level of protest over the required overtime that might otherwise have been expressed by the Union.
23. After a number of months, the MTA undertook several efforts to increase the number of drivers, including advertisements in a state-wide newspaper of general and daily circulation, distributing posters around the city of Manchester (MTA Exhibits #5-#7) and reducing the minimum age of drivers from twenty-one to nineteen years of age. None of these proved very effective.
24. In or about November of 2000 a joint committee was formed and additional outreach strategies were developed. (MTA Exhibits #2 and #3). Some of this effort resulted in a series of newspaper articles (MTA Exhibits #10, #12, #13, and #19) describing the shortage situation.

25. Mr. Clay testified that the parties' CBA provides that if there is a full time vacancy in the transit operator ranks, then the position must first be offered to a school bus driver. He cited this as a reason that the MTA did not advertise for additional transit operators as to do so would "gain no new bodies" and he would still be looking to hire even more part-time school bus drivers as a result.
26. Mr. Clay cited as the emergency the lack of drivers leading to a threat to the safety of the children standing out on the road and the MTA's obligation to "get them picked up and out of harm's way".
27. The MTA accepted an additional six weeks of so-called "charter work" despite having insufficient drivers to perform it without mandating overtime. (MTA Exhibit # 22).
28. Under cross-examination by the Union's attorney, Mr. Clay stated that it was management's responsibility to have enough drivers and that he always asked the transit operators for their cooperation to get through the manpower problem. He did not ask them to refrain from using the grievance procedure if operators thought it necessary.
29. Management considered it an emergency whenever they didn't have enough people to make all school bus runs.
30. Management did not offer any increase in the hourly wages of school bus drivers or attempt to renegotiate the wages or overtime rate of transit operators to address the hiring difficulty and coverage problem.
31. Late in the year 2000, management offered a five hundred dollar (\$500) signing bonus to attract new drivers. This did not result in any significant influx of candidates.
32. The word "emergency" is not defined in the parties' collective bargaining agreement, however the parties did refer to a so-called "emergency clause" in their discussions. (Union Exhibit #9).
33. Since approximately January 25, 2001 and the new CBA, mandatory overtime has not been required of any transit operator.
34. Since the approximate time of the Union's complaint to the PELRB, thirteen additional school bus drivers have been hired.

#### DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) has exclusive primary jurisdiction over complaints filed by the exclusive representatives of public employee associations against public employers and *vice versa*. RSA 273-A:1 *et seq.* This is particularly true where the complaint involves conduct qualifying as an unfair labor practice under the provisions of RSA-A:5. The instant matter presents a set of circumstances that had existed over a protracted period of time.

On October 13, 1998 the parties executed a collective bargaining agreement (CBA) that provided for an effective date of July 1, 1997 and that was to remain in existence until June 30, 2000 and thereafter unless either party requested to negotiate changes. (Union Exhibit #36). A new CBA was not negotiated to agreement and signed until January 26, 2001. (Joint Exhibit #1). The terms of this latter CBA were to be retroactively applied to be effective as of July 1, 2000. Over the period of time beginning sometime in 1999 and continuing throughout the year 2000, a shortage in the number of school bus drivers developed that reached a significant level. (Finding of Fact #13). During this time period, full time transit operators were being assigned mandatory overtime to make school bus runs. (Findings of Fact # 10 and #11). Such mandatory overtime continued to be assigned into the month of January, 2001 and had throughout had mandated that transit operators drive on their scheduled days off. (Findings of Fact #6 and #7).

Prior to the 1999-2001 period, overtime was performed on a voluntary basis and if that practice resulted in insufficient coverage, supervisors and mechanics, who also were licensed to operate transit and school buses would drive. (Finding of Fact #9). In 1997 John Webster assumed the position of Superintendent of Transportation and was aware that the situation whereby the MTA was relying on some degree of overtime performance by the transit operators was causing a problem. (Finding of Fact #18). He also adhered to a different method of operations and in or about October 1997 he abandoned the practice of having administrative personnel and mechanics undertake to fill-in as drivers to complete the school runs. (Finding of Fact #17). The problem had not existed at the level of required mandatory overtime in years prior to that. In or about 1998, Donald Clay became General Manager of the MTA and it was subsequent to his assuming that post that the need for overtime seemed to have risen to the point at which overtime was then required of transit operators on what became a more commonplace basis. (Finding of Fact #15).

On or about May 13, 1999, the MTA declared to the transit operators in a letter from Mr. Webster that an emergency situation existed and invoked Section IV, E.8 and E.9 (a,b) requiring they perform overtime upon request and indicating that discipline would result, in accordance with Section III of the parties' CBA, from any failure to do so. (Union Exhibit #3). On May 20, 1999, Mr. Webster stated his opinion that whenever there were not enough drivers it constituted an emergency. (MTA Exhibit #21) (Finding of Fact #21). On or about September 27, 1999 the MTA reiterated in a letter from Donald L. Clay that its policy was that "Anytime we don't have enough drivers we are in an emergency or maybe a better word is 'crisis mode.'" (Union Exhibit #8, MTA Exhibit #24) (Finding of Fact #30). In the interim, Mr. Webster indicated to the Union

that he felt that the worst was behind them for that year. (MTA Exhibit #21). In August of 2000 the parties were still discussing the manner of transit operations under of Section IV, E#8. (Union Exhibit #9).

The MTA stated that the emergency situation was caused by the shortage of school bus drivers (Finding of Fact #19), the increase in the number of school bus routes due to increased student registrations at Manchester's several schools and a failure at achieving school bus route "compression", *i.e.* combining runs. (Findings of Fact #16 and #25). Shortages were also caused by additional charter runs contracted by the MTA with the School Board. (Finding of Fact #28, MTA Exhibit #22). In sum, the MTA had managed itself into a position of either under-performing its contractual obligations with the School Board or mandating that the transit drivers perform overtime.

From the documents and testimony provided at the hearing, the MTA undertook several actions to address what it, by at least May 13, 1999, declared to be an emergency. Invoking this provision of the parties' CBA resulted in substantial mandatory overtime for the transit workers. It asked for ideas from the Union, it ran advertisements soliciting applicants as part-time school bus drivers, that by its own admission had been running "in newspapers on a daily basis and have been for the past year and one-half." (Clay letter dated September 27, 1999, see Union Exhibit #8, MTA Exhibit #24). By late in the year 2000 it offered to interested applicants a five hundred dollar "sign-on bonus" that did not result in any significant influx of candidates. (Finding of Fact #32). The MTA submitted several exhibits depicting newspaper pieces that it placed, suffered or cooperated with related to the issue of the need for drivers. To the extent that these are relevant, we note the dates of such efforts as occurring in December of 2000 (MTA Exhibits #12 and #13), January of 2001 (MTA Exhibits #9, #10 and #14) and February of 2001 (MTA Exhibit #8). It did not offer any increase in the hourly wages or benefits for school bus drivers, nor attempt to renegotiate the wages or overtime rate of the present transit operators. (Finding of Fact #31). It did not hire additional transit operators to diminish, if not alleviate, the requirement of mandatory overtime. (Finding of Fact #25) Ostensibly management states that to have done so would have exacerbated the required mandatory overtime situation and not eased it because full time operator positions would have to be offered to part-time drivers first, further depleting the number of bus drivers.

The Union's complaint was formally filed with the PELRB on February 20, 2001. There has been no mandatory overtime required of the transit operators since that filing and probably since the parties signed their present CBA on or about January 25, 2001. Further, since the approximate time of the Union's filing of its unfair labor practice complaint, the MTA has hired an additional thirteen school bus drivers. (Finding of Fact #34). While both parties submitted evidence through testimony and exhibits that referenced the existence of grievances filed and withheld prior to six months before the above-stated filing date, we are prevented under the circumstances presented here from considering incidents of mandatory overtime violative of RSA 273-A:5, I by the limitation on actions found within RSA 273-A:6. Therefore, the MTA's motion to dismiss any such untimely claims is granted. There were no prohibitions to the

Union seeking relief from this panel or through the grievance procedure at an earlier date. However, we have considered all such evidence to the extent that it is relevant to our determination of the ultimate issue before us. We conclude with that determination as to whether or not the MTA's conduct comported with the provision of the parties' CBA that provided that "Emergencies shall be kept genuine." (CBA Section IV, E.8) and that any such emergency existed so as to allow the MTA to require transit operators to perform mandatory overtime.

The facts before us involve contractual language contained within a collective bargaining agreement between two parties and not the interpretation of statutory language. Specifically, the parties disagree as to what constitutes an "emergency" as used by the parties' at all times relevant to the Union's complaint such that would allow the MTA to require mandatory overtime of the transit drivers.

It is well settled that collective bargaining agreements (CBA) are construed in the same manner as other contracts. Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 279 (1955); Appeal of Timberlane Reg. School Bd., 142 N. H. 830, 834 (1998); Appeal of Sanborn Regional School Board, 133 N. H. 513, 579 (1990). Hence, our review of the CBA focuses on the language of the written contract, and we determine the intent of the parties by looking at the agreement taken as a whole and construing its terms according to their common meaning. Appeal of Lincoln-Woodstock Cooperative School District 143 N. H. 598 (1999), citing BankEast v. Michalenoick, 138 N. H. 367, 369, 639 A.2d 272, 273 (1994). These parties did not define "emergency" in their negotiated CBA. The parties did not provide examples in their CBA of circumstances endemic to the transportation industry that would constitute emergencies. The interpretation of this word and its plural form as used in Section IV, 16 and in Section IV, E.8 respectively are paramount to our decision.

Webster's Third World New International Dictionary (unabridged ed.1961) defines emergency as a "distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen." It has received treatment at law involving varying mixtures of the elements of foreseeability, severity and immediacy. (See 29A C.J.S., pp140-141 generally). In applying its meaning to the instant matter, it appears that the parties were initially of a single mind in applying the term within the administration of their CBA. However, it also appears that the parties were at least mindful that such situations that were to qualify as "emergencies" were not to be also considered ordinary nor lightly declared because the parties added a qualifying or limiting reference when they agreed that "Emergencies are to be kept *genuine*". (emphasis added) (CBA Section IV, E.8) We accord this word its ordinary meaning as well and reference its accepted definition appropriate to this usage as "having the qualities or character claimed or appearing to have : not adulterated or cheapened" and "conforming precisely to its name or description". (Webster's Third World New International Dictionary (unabridged ed. 1961). We conclude from the parties' inclusion of this qualifier that they both acknowledged the possibility that the power initially inherent in management to declare an emergency was not to be left unrestrained.

The facts reveal a recurrent circumstance occurring not infrequently over a period of years. To face a situation, on a single day, of children stranded at bus stops or kept after school because there were not enough bus drivers to transport them on that single day would clearly constitute an emergency that would require mandatory overtime. To have this situation arise on even several occasions due to circumstances beyond the control of management may similarly constitute an emergency. To have such situations arise frequently over a period of at least two years pushes the meaning of "emergency" beyond its intended meaning. Management has the responsibility to prepare for such circumstances under the conditions existing here as the result has been anticipated and, by its own evidence, foreseen.

We note with the MTA's argument that it had difficulty attracting and retaining qualified bus operators because of the level of pay, the lack of benefits and the work hours. All three characteristics have long been within their control to change. The MTA did undertake other actions to address the shortage of bus drivers that both parties agree exacerbated the mandatory overtime at issue in the Union's complaint. The totality of the circumstances that preceded the Union complaint lead us to the conclusion that what had been intended by the parties to be a genuine emergency had devolved over recent years into a common method of operation within the MTA. As a result of this practice, members of the Union have been improperly required to perform frequent mandatory overtime; a practice, itself, that could create a safety risk.

We therefore find merit in the Union's complaint and find that the Manchester Transit Authority violated the parties' collective bargaining agreement and their statutory obligations under RSA 273-A:5. However, under the present circumstances known to the Board, we decline to issue a cease and desist order as requested by the Union. We do believe that the parties can more clearly express the nature of "emergency" that would legitimately trigger the use of mandatory overtime. Therefore, we hereby order the parties to reopen their present collective bargaining agreement for the specific and limited purpose of negotiating a new provision or provisions to better express their intent as to what constitutes, defines or delineates an "emergency" and what overtime use of drivers in emergency situations is agreed to by the parties. Said negotiations are to commence within thirty (30) days. We feel our basic charge to resolve disputes between government and its employees is achieved here by ordering this relief, that allows for the greatest degree of self determination,

So ordered.

Signed this 17<sup>th</sup> day of July, 2000.

  
BRUCE K. JOHNSON  
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.