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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CAPITAL AREA TRANSPORTATION AUTHORITY,
Public Employer-Respondent,

MERC Case No. C18 I-088

-and-

AMALGAMATED TRANSIT UNION, LOCAL 1039,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Murphy & Spagnuolo, P.C., by Lindsay N. Dangl, for Respondent

Mark H. Cousens, for Charging Party

DECISION AND ORDER

On August 13, 2019, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: OCT 29 2019

[1] MOAHR Hearing Docket No. 18-017795

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CAPITAL AREA TRANSPORTATION AUTHORITY,
Respondent-Public Employer,

Case No. C18 I-088
-and- Docket No. 18-017795-MERC

AMALGAMATED TRANSIT UNION, LOCAL 1039,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Murphy & Spagnuolo, P.C., by Lindsay N. Dangl, for the Public Employer

Mark H. Cousens, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Amalgamated Transit Union, Local 1039 against the Capital Area Transportation Authority. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), formerly the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed on or before January 4, 2019, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural Background:

The Capital Area Transportation Authority (CATA) provides public transportation service to the greater Lansing area, including all of Ingham County and parts of Delta Township and Eaton County. In addition, CATA provides transportation to students of Michigan State University (MSU) free of charge seven days a week, 24 hours a day. The Amalgamated Transit Union, Local 1039 (ATU) represents a bargaining unit consisting of non-supervisory laborers employed by CATA, including bus operators, mechanics, mechanic helpers and utility employees.

On September 26, 2018, the ATU filed an unfair labor practice charge alleging that CATA violated its duty to bargain in good faith under Section 10(1)(e) of PERA by unilaterally changing the start times for bus operators assigned to "straight time protection" shifts. On October 19, 2018, CATA filed a motion for summary disposition asserting that the charge should be dismissed because the dispute is covered by the terms of the collective bargaining agreement in existence between the parties. The ATU filed a timely response to the Employer's motion for summary disposition. On October 26, 2018, I issued an order denying the motion on the ground that there were questions of material fact which warranted an evidentiary hearing. An evidentiary hearing was held before the undersigned on October 29, 2018, and the parties filed post-hearing briefs in this matter on January 4, 2019.

Findings of Fact:

I. Background

The ATU and CATA are parties to a collective bargaining agreement which covers the period July 23, 2015, to November 30, 2019. Article II of the contract is entitled "Management Rights" and provides as follows:

> The Union recognizes that the Authority shall have sole jurisdiction of the management and operation of its business and the direction of its work force, and the right to maintain efficiency on the jobs. Specifically, but by no means exclusively, the Authority shall:
>
> A. Routing and Schedules
>
> Have exclusive control of making schedules and routes for the safe operation of the Authority's vehicles, of prescribing the amount of service, and determining the amount of reasonable time to be allowed on scheduled runs.

The collective bargaining agreement also contains a grievance procedure to resolve "questions, complaints, violations, misapplications or misinterpretations involving the application" of the contract. The four-step procedure is set forth in Article VII of the agreement and culminates in final and binding arbitration conducted by the American Arbitration Association or the Federal Mediation and Conciliation Service.

Article IV of the collective bargaining agreement governs the work week and overtime requirements for members of Charging Party's bargaining unit. Article IV, Section 1, describes the standard workweek of all full-time employees under the contract as "five (5) days within any seven (7) day period." Under the contract, the standard work week is Monday through Sunday. Employees are generally guaranteed eight hours for each regularly scheduled workday, with overtime issued at the rate of time and one half for all hours in excess of eight hours in any work day and for all hours over forty in any work week. There is no language in Article IV or elsewhere in the agreement specifically listing the start or end times of any shift or route.

II. The Extra Board and Straight Time Protection

Pursuant to Article V, Section 2 of the parties' contract, bus operators are entitled to bid on work assignments five times each year, with the new assignments taking effect in January, March, May, August and December and lasting approximately five weeks. Regular work assignments are classified as straight runs, split runs, trippers, protection, limited and charters. Article V, Section 1. The Employer presents a list of runs to the ATU for review and then each run is posted for bidding by bargaining unit members. Bidding occurs based upon seniority.

One of the work assignments which CATA drivers can bid for is an "extra board" assignment. The extra board exists for the purpose of ensuring that there are bus operators available when, due to illness, family situations, vacations or for other reasons, a driver is not available to report to his or her assigned run. An operator who bids on a five-week assignment to the extra board may be selected to drive any run for which a regular driver is not available to work. Management reviews upcoming bus runs two days in advance and selects drivers from the extra board to fill scheduled vacancies based upon seniority. Extra board drivers are paid on straight time unless they exceed eight hours of work in a day, in which case they earn overtime for the additional hours worked. The start and stop times for extra board runs may vary each day.

Bus operators assigned to the extra board who are not selected for a run two days in advance are placed on what the parties refer to as "straight time protection" which is a type of extra board work. Operators assigned to straight time protection show up each day at the CATA facility on Tranter street and wait for runs to become available due to unplanned absences or emergencies. They are assigned runs on a "first-up, first out" basis pursuant to their seniority. Although there is no assurance that bus operators on straight time protection will be assigned work on any given day, they are nevertheless guaranteed a minimum of eight hours pay per day at the straight time rate. Bus operators assigned to straight time protection also have the opportunity to earn overtime by picking up another route after their straight time run ends. Overtime shifts may vary in length and start times.

Extra board protection is described in the parties' collective bargaining agreement. Article V, Section 4 states:

> A. Definition
>
> The extra board is comprised of full-time operators who protect the work board, operate all runs in the absence of assigned operators and have priority for overtime and charters.
>
> B. Work Assignments
>
> Extra board operators are assigned work on a "first-up-first-out" basis. That is: the first available piece of work must be taken by the first available extra operator; the second available piece of work must be taken by the second available extra operator, etc.

C. Rotation

> The extra board will be rotated one person daily. The extra operator at the top of the rotation on each given day will be first assigned to work and will have the first opportunity to work overtime, if available. The daily rotation will be maintained even if an extra operator is absent. In other words, if an extra operator is scheduled off for vacation and, in the course of the rotation, that operator rotates to the top of the extra board, he will be marked up as first for posting and overtime even though he is not available for work.

D. Bottom of the Board

> When a full-time operator is placed at the bottom of the board, he will be placed on protection under the last scheduled operator at straight time and rotate in sequence with others on protection.

III. Straight Time Protection Shift Times

As noted above, this dispute concerns the start times for regularly scheduled straight time protection shifts. The parties agree that the start times for overtime runs, as well as for protection shifts occurring on holidays or when MSU is not in session, have historically started at varying hours and that there has been no change with respect to the scheduling of those shifts.

Kathleen Kelley has been employed by Respondent for 26 years and has been Charging Party's president and business agent since May of 2016. Previously, she was a financial secretary and steward for the Union and has been a part of Charging Party's negotiating team. In her time as a Union representative, Kelley has attended various sessions with management during which the assignment of extra board work was discussed and has personally observed the start and end times for operators assigned to straight time protection. At the hearing, Kelley testified that for at least the past five years, the start times for non-overtime straight time protection shifts have consistently been 5 a.m. and 1 p.m. and that, except for holidays and periods during which MSU is on break, "there have not been any variations to that [schedule] to speak of."

Kelley testified that in the fall of 2018, management posted the straight time protection schedule for start of the new 5-week assignment period and, for the first time, there were protection shifts scheduled to begin at times other than 5 a.m. and 1 p.m. Kelley contacted CATA's operation director, Roger Garza, and asserted that start times were a mandatory subject of bargaining and that the parties "needed to talk about that and he needed to repost the board." The following day, Garza sent Kelley a text message stating that Respondent believed it had the right to take such action and that it "was the best use of taxpayers' money." Thereafter, the start times for straight time protection shifts have included 5 a.m., 7 a.m., 10 a.m. 1 p.m., 3 p.m. and 4 p.m. Kelley testified that the change in start times may impact the ability of bus operators to earn overtime. Kelley explained that if an operator works a 5 a.m. to 1 p.m. protection shift, he or she may be able to pick up an

additional route, an opportunity which might not be available if, for example, the driver works a protection shift starting at 7 a.m. and ending at 3 p.m.

Andrew Brieschae has been part of Respondent's management team since April of 2008 and is currently CATA's deputy chief executive. In that capacity, he is responsible for overseeing operations, maintenance and facilities. Brieschae testified that while it has been common for regularly scheduled straight time protection shifts to start at 5 a.m. and 1 p.m., there have been other start times assigned by Respondent. Brieschae asserted that he has never negotiated with Charging Party over start or stop times for straight time protection runs and that management has never conveyed to the Union that regularly scheduled straight time protection shifts would start only at 5 a.m. and 1 p.m.

Todd Brooks has been operations manager for Respondent since 2014. Brooks oversees all day-to-day operations and is responsible for making the shift schedules for drivers. At the hearing, Brooks acknowledged that straight time protection shifts have generally started at 5 a.m. and 1 p.m. because that is when CATA typically requires the bulk of coverage. However, like Brieschae, Brooks asserted that Respondent has utilized various other shift start times for operators assigned to straight time protection, including 7 a.m., 3 p.m. and 4 p.m. According to Brooks, the Union has never previously complained to management about these alternate start times for straight time protection shifts.

CATA uses the Trapeze software system to produce its work assignments. In preparation for the hearing in this matter, Brooks utilized the data within the Trapeze system to prepare a 106 page report, Respondent Exhibit 2, listing straight time protection work assignments from January 2014 through October 24, 2018.[1] Brooks prepared the report by doing a search in Trapeze using the keyword "protection." The document identifies both eight-hour shifts as well as shifts lasting less than eight hours. Brooks testified without contradiction that all of the eight-hour shifts listed on the report were standard straight time protection shifts, while all shifts of less than eight hours consisted of overtime work.

Exhibit 2 confirms that the vast majority of scheduled eight-hour straight time protection shifts during the period detailed in the report, including after the alleged unilateral change by Respondent in the Fall of 2018, did indeed start at 5 a.m. and 1 p.m. However, the report does not distinguish between normal workdays, holidays and days when MSU is not in session. At the conclusion of the hearing, I encouraged counsel to review Exhibit 2, identify which dates were regular work days and jointly submit a list specifying the results of the examination along with their post-hearing briefs. The parties did not do so. Rather, Charging Party produced its own marked-up copy of Exhibit 2 which purportedly identifies, by way of highlighting and handwritten notations, holidays and dates in which MSU was not in session.[2] I obviously cannot rely on Charging Party's ex parte notations as an accurate

[1] Although Brooks testified that Exhibit 2 lists all straight time protection shifts during the period in question, there are several small gaps which were not explained on the record. For example, the document has no information for January 7, 8 or 9 of 2014 or for January 17 to January 25 of 2015. Nevertheless, I find that these gaps do not materially impact the overall relevance of the data for purposes of this case.

[2] The handwritten notes on Exhibit 2 seem to suggest that Fridays were treated differently in terms of scheduling. However, there is no evidence in the record to support such a finding.

representation of which days were regular work days. However, those markings are largely consistent with data publicly available on MSU's website, as well as the calendars for 2014 to 2018, of which I take official notice pursuant to Rule 172, R 423.172(i) of the Commission's rules. See https://reg.msu.edu/ROInfo/Calendar/academic.aspx. Based upon that information, Exhibit 2 indicates that from January 2014 through April 26, 2018, there were well over 300 days, excluding holidays and days in which MSU was on break, in which bus operators assigned to 8-hour straight-time protection shifts started at times other than 5 a.m. and 1 p.m.

Kelley was recalled as a rebuttal witness and questioned about some of the shifts identified on Exhibit 2 as having started at times other than 5 a.m. or 1 p.m. For example, counsel for Respondent asked Kelley about a line on the document which indicates that five drivers were assigned to work straight time protection shifts starting at 7 a.m. and ending at 3 p.m. each day from January 6, 2014, through March 16, 2014. Kelley was unable to specifically dispute that information; rather, she cited the need for "more clarification" and hypothesized that the runs could have been overtime rather than protection shifts. Similarly, when Kelley was asked whether she could dispute the fact that an eight-hour straight time protection shift listed on Exhibit 2 started at 4 p.m. and ended at midnight. Kelley responded, "I can't dispute it completely, it's on the paper; so I wasn't there, I didn't do the run, so I don't know specifically."

Discussion and Conclusions of Law:

Charging Party argues that CATA unilaterally altered working conditions by changing the start times for bus operators assigned to straight time protection shifts. Respondent maintains that the collective bargaining agreement gives it the authority to set start and end times for all shifts, including straight time protection work and that, regardless, there has been no change in start times for its bus operators.

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass' n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 329 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. It is well established that the obligation to bargain over hours includes the number of hours worked, the particular hours and days of the week to which employees are assigned and the starting and ending times of work shifts. See e.g. *Royal Oak Pub Sch*, 23 MPER 95 (2010); *Wayne State Univ*, 1987 MERC Lab Op 899 (no exceptions); *Detroit Bd of Ed*, 1986 MERC Lab Op 121.

An employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain by negotiating a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron Ed Ass'n, supra.* Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement. *Port Huron* at 327; *Calhoun County*, 29

MPER 71 (2016) (no exceptions). As the Commission stated in *St Clair Co Rd Comm*, 1992 MERC Labor Op 533, 538, where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented.

The Commission has repeatedly found that a unilateral change in working hours by a public employer does not constitute a violation of PERA where there is contract language giving management the right to establish work schedules. For example, in *City of Detroit*, 1985 MERC Lab Op 606, the employer unilaterally added an extra half-hour of unpaid lunch for members of the bargaining unit. The change had the effect of lengthening the workday without providing employees with additional pay. The Commission held that the modification of the work schedule was within the scope of the employer's right to unilaterally establish hours and schedules of work. In so holding, the Commission relied on the management rights clause in the parties' contract which gave the employer "the right to establish hours and schedules of work." Similarly, in *Detroit Bd of Ed*, 1996 MERC Lab Op 30, the union filed a charge alleging that the school district violated its duty to bargain when it capped the number of hours that faculty members were able to work. The Commission concluded that the employer's actions were authorized by a clause in the contract which gave it the right to set hours when necessary. See also *Royal Oak Pub Sch*, 23 MPER 95 (2010) (union waived its right to bargain over starting and ending times by agreeing to a contract giving employer the right to determine class schedules and hours of instruction); *City of Detroit*, 1991 MERC Lab Op 601 (unilateral reassignment of shifts lawful where management rights clause gave the employer the authority to determine schedules and hours of work); *City of Romulus*, 1988 MERC Lab Op 504 (contract giving employer broad discretion regarding the length of the workweek and employee schedules constituted a waiver of union's right to bargain over schedule change).

In the instant case, Respondent asserts that the subject matter of this dispute, start times for straight time protection shifts, is a matter "covered by" the parties' collective bargaining agreement. Article II of the contract, the management rights clause, gives the Employer the sole jurisdiction to manage and operate its business and direct its work, as well as the right to maintain efficiency on the job." Pursuant to Article II, Section A, CATA's management has "exclusive control of making schedules and routes for the safe operation of the Authority's vehicles, of providing the amount of service, and determining the amount of reasonable time to be allowed on scheduled runs." The parties also agreed to detailed language pertaining to extra board assignments, as well as provisions governing the work week and overtime requirements for members of Charging Party's unit. None of these additional contract provisions place restrictions on Respondent's ability to make "schedules and routes." The Union had the opportunity to bargain more specific language concerning the scheduling of straight time protection shifts but failed to do so. See *Gogebic Community Coll*, 1999 MERC Lab Op 38, 31, aff'd 246 Mich App 342 (2001) (union already exercised its right to bargain over the identity of the dental insurance carrier by entering into a contract provision covering dental insurance that did not specify a carrier or restrict the employer's right to change carriers); *Clare County Rd Comm*, 33 MPER 2 (2019) (no exceptions) (a union may have already exercised its right to bargain over an issue by entering into a contract provision which does not explicitly address the issue in dispute, but which covers the subject in dispute).

Charging Party argues that the contract is silent with respect to start times for straight time protection shifts. The Union asserts that language in Article II, Section A giving the Employer the right to create "schedules and routes" is directed only at when bus transportation will be offered to the public, where it will be operated and how long the routes will be. While the Union's reading of this provision is certainly fair, the interpretation of the contract set forth by Respondent in this matter is equally reasonable. As noted, where there is a contract covering the subject matter of a dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is presented. *Wayne Co*, 19 MPER 61 (2006). Because arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations, doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. *Macomb Co v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65, 235 (2013). Under such circumstances, I conclude that Respondent reasonably relied on the language of the collective bargaining agreement in making decisions concerning the start times for straight time protection shifts and that the record fails to establish a violation of Section 10(1)(e) of PERA.

Notwithstanding the existence of a collective bargaining agreement that arguably covers the matter in dispute, the Union contends that the parties' course of conduct created an obligation on the part of Respondent to schedule straight time protection shifts beginning at 5 a.m. and 1 p.m. only. A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 454-455 (1991). In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." *Id.* However, where the contract unambiguously covers a term of employment that conflicts with a party's behavior, a higher standard of proof is required. In such situations, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Ed Ass'n, supra.*

I find Charging Party's past practice argument unpersuasive. The Supreme Court has held that the arbitrator, not MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment. *Macomb County, supra* at 235-236. Regardless, there is simply no evidence in the record suggesting that the parties had even a tacit agreement that straight time protection shifts would start at 5 a.m. and 1 p.m. only. Although Kelley, the current Union president and business agent, was adamant that there has been no deviation from the 5 a.m. and 1 p.m. start times for the past five years, her testimony was refuted by two management witnesses, one of whom, Todd Brooks, has been personally responsible for making the driver schedules since 2014. Kelley's testimony was also contradicted by Exhibit 2, the spreadsheet listing work assignments for CATA drivers from 2014 to 2018. That document shows that while the vast majority of straight time protection shifts from January 2014 through April 26, 2018, started at 5 a.m. and 1 p.m., there were hundreds of days during that period in which protection shifts started at other times, most frequently at 4 p.m. The Union was unable to provide any testimony or

documentary evidence specifically disputing the information contained within Exhibit 2. On these facts, I conclude that Charging Party has failed to establish that there was a meeting of the minds to prove the existence of a past practice mandating the scheduling of straight time protection shifts at specific times of the day.

In so holding, I reject Charging Party's contention that Exhibit 2 should be disregarded as "misleading." The Union asserts that the document should not be relied upon in this matter because it was produced using the search term "protection" and, therefore, does not distinguish between straight time protection and overtime protection. There is no evidence in the record to support this contention. To the contrary, Brooks testified without contradiction that all of the eight-hour shifts listed on the report were standard straight time protection shifts, while all shifts of less than eight hours consisted of overtime work.

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. In summary, I find that Respondent did not violate Section 10(1)(e) of PERA by refusing to bargain over the start times for straight time protection shifts. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Amalgamated Transit Union, Local 1039 against Capital Area Transportation Authority in Case No. C18 I-088; Docket No. 18-017795-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: August 13, 2019