STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#1A-8/6/81
LOCAL 252, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,	BOARD DECISION & ORDER
Respondent,	Case No. D-0189
upon the Charge of Violation of Section 210.1 of the Civil Service Law.	

GLADSTEIN, REIF & SIEGEL (AMY GLADSTEIN, ESQ., of Counsel), for Respondent

MARTIN L. BARR, ESQ. (ANTHONY CAGLIOSTRO, ESQ., of Counsel), for Charging Party

This matter comes to us on a charge filed by Counsel to the Public Employment Relations Board (Counsel) alleging that Local 252, Transport Workers Union of America, AFL-CIO (TWUA) caused, instigated, encouraged, condoned and engaged in a strike against the Metropolitan Suburban Bus Authority (MSBA)[1] for a consecutive nine-day work period covering January 2 through January 10, 1980. A hearing was held on the charge on July 2, October 28 and December 17, 1980, and the hearing officer recommended that the charge be dismissed on the ground that the conduct of TWUA and the unit employees did not constitute a strike within the meaning of §210.1 of the Taylor Law.

FACTS

TWUA represents a unit of approximately 640 employees, of whom approximately 460 are bus drivers. While MSBA required a pre-trip inspection by bus drivers of their assigned buses, the

1 MSBA operates 58 bus routes in Nassau County, some of which make connections in Suffolk and Queens Counties.

normal practice of the drivers was to drive buses which had equipment defects that violated the State Vehicle and Traffic Law. They would not report these defects until the conclusion of the run, thus avoiding the removal of the buses from service for immediate repair.

Sometime during November, 1979, TWUA entered into negotiations with MSBA for a collective bargaining agreement to succeed terms and conditions of employment that were imposed by a legislative determination of MSBA for the calendar year of 1979. During the course of the negotiations, Arnold, the president of TWUA, warned MSBA that there would be "big trouble" if the parties did not agree upon a collective bargaining contract by January 1, 1980. He also informed the bus drivers that they were not required to operate buses which had equipment defects that constituted violations of the Vehicle and Traffic Law. However, the normal practice of operating such vehicles continued at that time.

The parties were unsuccessful in reaching an agreement by the end of 1979 and from January 2 through January 10, 1980, drivers refused to drive buses that had equipment defects which violated the Vehicle and Traffic Law. On January 8, 1980, MSBA obtained a temporary injunction from Justice Altimari[2] ordering the bus drivers to drive the buses which had defects that violated the Vehicle and Traffic Law, except for specified types of defects which he found to constitute "an imminent danger to person or property". Arnold took the court decision to MSBA's depots

---

2 Metropolitan Suburban Bus Authority v. Transport Workers Union of America, Local 252, AFL-CIO, Supreme Court, Nassau County, (unreported).

and advised the drivers of its terms. The percentage of bus runs not operated on January 9 and 10 was 30%. This was significantly lower than the percentage of bus runs not operated during the other days of the alleged strike, except Sunday, January 6.

The charge herein is limited to the disqualification by driver order of buses for equipment defects which Justice Altimari found not to constitute an imminent danger to person or property. The number of such disqualified buses was significantly less than the number of buses disqualified for eqipment defects which Justice Altimari found to constitute an imminent danger to person or property.[3]

The hearing officer concluded that TWUA was responsible for the concerted refusal of the drivers to operate buses with equipment defects that violated the Vehicle and Traffic Law. He ruled, however, that it was not a strike because a strike cannot consist of a refusal to perform work in the normal manner where the normal manner of performance involves a violation of law or controlling regulation even if the refusal is motivated by an interest in pressuring the employer in negotiations.

DISCUSSION

As indicated by their normal practice, both before and after the period of the job action, of driving buses which had equip-

---

[3] The record evidence supports this conclustion but is not sufficient to permit a determination of the precise impact of the charged strike.

ment defects that violated the Vehicle and Traffic Law, the drivers' refusal to do so at that time did not involve any concern on their part related to that law. This case, therefore, presents the question whether it is a strike if employees, for the sole purpose of securing job-related demands in collective negotiations, concertedly refuse to perform their duties in the normal manner when that normal manner violates certain State laws. We determine that, insofar as it involves provisions of the Vehicle and Traffic Law that do not involve an imminent threat to person or property, such a refusal by bus drivers to perform their duties in the normal manner is a strike in violation of the Taylor Law.[4] We conclude that the Vehicle and Traffic Law provisions were merely a pretext for the concerted refusal of the drivers to operate the buses.[5] The justification of the drivers' conduct is not offered in good faith and must be rejected by us. Plans for the concerted refusal to drive defective buses were formulated more than a month before their implementation and the sole purpose of those plans was to secure collective bargaining demands. Public employees' abnormal and overly meticulous adherence to law and rules which has the effect of

---

4 We note that the NLRB has indicated that a refusal to perform work prohibited by law might be improper even under the NLRA if based upon a malicious motive to frustrate the employer's business operations. Varied Enterprises, Inc., 240 NLRB No. 12, 100 LRRM 1305 (1979).

5 We recognize that a refusal to perform a task because of a bona fide fear of personal injury does not constitute participation in a strike. Van Vlack v. Ternullo, 74 AD2d 827, 13 PERB ¶7515 (Second Dept., 1980) and Buffalo Teachers Federation, 5 PERB ¶3025 (1972).

interfering with the performance of the mission of the employer and which is designed to extract collective bargaining concessions from the employer, is a strike. Dowling v. Bowen, 53 AD2d 862, 9 PERB ¶7523 (Second Dept., 1976).[6]

We conclude that TWUA engaged in a strike on January 2 through January 8, 1980, when the drivers refused to operate buses which did not, according to Justice Altimari, constitute dangerous conditions even though some did violate the Vehicle and Traffic Law. We do not find a strike on January 9 and 10. There is no evidence that TWUA was responsible for any refusal of the drivers to operate the buses on those days for defects other than those for which Justice Altimari authorized the refusal. On the contrary, the record shows that Arnold brought the court order to the attention of the drivers and the percentage of bus runs not operated declined significantly.

In assessing a penalty, we note that this is the second strike by TWUA. The earlier strike took place on January 3, 1975. On that day, too, because of a labor relations dispute, unit employees disqualified buses from service because of equipment

---

6 City policemen were held to have engaged in a strike when they disrupted the City's sanitation and transportation services by stopping City vehicles for Vehicle and Traffic law violations that did not impair the safe operation of the vehicles. This overly meticulous adherence to the law was a departure from the normal practice of the policemen. It reflected a dissatisfaction with the progress of police negotiations and not a concern for the strict enforcement of the law.

In the instant situation, Justice Altimari was also not impressed by TWUA's argument that the drivers' overly meticulous adherence to the Vehicle and Traffic Law shielded their refusal to perform their normal duties. He was only concerned with avoiding true danger to person and property.

defects for which they were not normally disqualified.[7]

The minimum suspension of dues deduction privileges that this Board has imposed upon an employee organization for a second violation of §210.1 of the Taylor Law has been for an indefinite period, subject to restoration upon application after the suspension has been in effect at least one year. Given the limited impact of the strike that was charged[8] and found to have occurred here, we impose that minimum penalty.

NOW, THEREFORE, WE ORDER that the deduction privileges for dues and agency shop fees, if any, of Local 252, Transport Workers Union of America, AFL-CIO, be suspended indefinitely, commencing on the first practicable date, provided that it may apply to this Board at any time after the suspension has been in effect for one year, for the full restoration of such privileges. Such application shall be on notice to all interested parties and supported by proof of good faith compliance with subdivision one of Section 210 of the Civil Service Law since the violation herein found, such proof to include, for example, the successful negotiation, without violation of said subdivision, of a contract covering the employees in the unit affected

---

7 See TWUA, 8 PERB ¶3096 (1975). In that case, however, a strike was found on the basis of the fact that some of the equipment defects for which buses were disqualified did not violate any law.

8 A more severe penalty would have been assessed had TWUA been found responsible for all the loss suffered by MSBA and all the inconvenience suffered by its riders.

by the violation, and accompanied by an affirmation that it no longer asserts the right to strike against any government as required by the provisions of Civil Service Law §210.3(g). If it becomes necessary to utilize the dues deduction process for the purpose of paying the whole or any part of a fine imposed by order of a court as a penalty in a contempt action arising out of the strike herein, the suspension of dues deduction privileges ordered hereby may be interrupted or postponed for such period as shall be sufficient to comply with such order of the court, whereupon the suspension ordered hereby shall be resumed or initiated, as the case may be.

DATED: Albany, New York
August 6, 1981

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

Dissenting Opinion of Chairman Harold R. Newman

I cannot agree with my colleagues that it is a strike if employees, for the purpose of securing job-related demands in collective negotiations, concertedly refuse to perform their duties in a normal manner when that normal manner violates state law.

The Taylor Law requires bus drivers employed by MSBA to perform the tasks that are inherent in the jobs for which they were hired. The Vehicle and Traffic Law requires the bus drivers to perform tasks that are enjoined upon them by law. To this extent, the two laws have a common purpose and must be deemed in pari materia. For the purpose of the instant case, they should be construed together as though forming part of a single statute.[1] In doing so, I conclude that the Taylor Law forbids the bus drivers to abstain from the full performance of their normal duties only to the extent that such normal duties are not prohibited by the Vehicle and Traffic Law. My colleagues' failure to treat the Taylor Law and the Vehicle and Traffic Law as being in pari materia leads to the mischievous result of compelling the bus

---

1 McKinney's Statutes, §221.b.

drivers to perform work that is prohibited by law.[2]

DATED: Albany, New York
August 6, 1981

Harold R. Newman, Chairman

---

2 In Purcell v. Wald, 14 PERB ¶7504 (1980), the Supreme Court for Nassau County dealt with a similar question when police demonstrated their dissatisfaction with the progress of contract negotiations by over-zealously enforcing the Vehicle and Traffic Law. The Court said:

> "Can it truly be said that the insistence by the police on strict compliance with the Vehicle and Traffic Law coupled with a directive of the president of the PBA to 'go strictly by the book' constitutes a work stoppage? Or, put another way, can the Court take judicial notice that the excessive enforcement intended to cause embarrassment to the County and its officials has caused more than inconvenience to the public and taxpayer and has risen to the level of a strike? I think not."

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#1B-8/6/81
COUNTY OF ORANGE,	:	
Respondent,	:	BOARD DECISION AND ORDER
-and-	:	CASE NO. U-4781
COUNTY EMPLOYEES UNIT, ORANGE COUNTY LOCAL 836, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
Charging Party.	:	

JAMES G. SWEENEY, ESQ. (ALBERT P. PACIONE, JR., ESQ., of Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, ESQS. (WILLIAM M. WALLENS, ESQ., of Counsel), for charging Party.

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc. (CSEA) to a hearing officer's decision dismissing its charge that the County of Orange (County) committed an improper practice in that it excluded job titles from a certified negotiating unit.

FACTS

The relevant facts upon which the hearing officer relied for a decision were stipulated by the parties. CSEA had been originally certified in 1968 as the representative of a unit which included all county employees except for those in specified titles.[1]

[1] 1 PERB ¶399.07.

In certifying CSEA, this Board did not determine the appropriateness of the unit. Its role was merely to ascertain whether the employees in the unit, which was agreed upon by CSEA and the County, wished to be represented by CSEA. Subsequently, in 1974, the Service Employees International Union challenged CSEA's status as representative of the employees in the certified unit. Again this Board held an election in the agreed-upon unit, and it certified CSEA as the employee organization selected by the unit employees.[2]

On May 29, 1980, a date on which a petition for decertification would have been timely under our Rules, the County notified CSEA that it was recognizing CSEA as the representative of a unit of employees that excluded certain employees who were in the existing unit. CSEA contends that this conduct of the County is improper.

Following Board precedent, the hearing officer ruled that the County had been free at that time to withdraw the recognition of CSEA because this Board had not approved of the parties' original unit determination on its merits. CSEA does not argue, in support of its exceptions, that the hearing officer has misread the relevant Board decisions. Rather, it argues that the Board should reconsider and overrule those decisions on the ground that a contrary ruling would better serve the public policy underlying the Taylor Law of guaranteeing the right of public employees to be represented and to continue to be represented in appropriate units by the employee organization of their choice.

---

2 7 PERB ¶3071.4.

DISCUSSION

In 1976, this Board issued a consolidated decision dismissing four charges that named public employers acted improperly by unilaterally altering a negotiating unit during the period when a decertification petition could have been filed.[3] This decision held that a public employer did not violate paragraphs (a) or (d) of §209-a.1 of the Taylor Law by unilaterally altering the negotiating unit during the period when a decertification petition would have been timely. The reasons for this holding were that there was no evidence that the action was taken by the employers for the purpose of depriving public employees of protected rights, and that the employers did not violate their duty to negotiate in good faith because the definition of a negotiating unit is not a mandatory subject of negotiation.

---

3 Southern Cayuga CSD, et al., 9 PERB ¶3056 (1976). As the decision involved several public employers in different counties, it was separately appealed in two different courts, both of which confirmed the decision of this Board. Skaneateles Teachers Association v. PERB, 9 PERB ¶7024 (Supreme Court, Onondaga County, 1976); Southern Cayuga Teachers Association v. PERB, 10 PERB ¶7008 (Supreme Court, Montgomery County, 1977), affirmed 59 AD2d 1032, 10 PERB ¶7017 (4th Dept., 1977). This decision was based upon the reasoning in prior decisions of this Board. See: City of White Plains, 3 PERB ¶3086 (1970), confirmed by the Supreme Court, CSEA v. PERB, 65 Misc.2d 544, 4 PERB ¶7000 (Albany County, 1971), affirmed on other grounds, 39 AD2d 971, 5 PERB ¶7013 (3rd Dept., 1972); County of Jefferson, 4 PERB ¶3057 (1971). It has also been cited with approval by this Board in several decisions for reasons not relevant to the issue before us. See: Addison Central School District, 13 PERB ¶3060 (1980); County of Orange, 14 PERB ¶3012 (1981); and Hudson Falls, 14 PERB ¶3021 (1981).

In the above-cited 1976 consolidated cases, this Board gave controlling weight to the statutory power of public employers, as specified in §204 and §207 of the Taylor Law, to recognize employee organizations and to define the appropriate employer-employee negotiating unit, subject to the statutory standards.[4] It reasoned that the statutory power of an employer unilaterally to define a unit for purposes of voluntary recognition of an employee organization included the power later to redefine the unit at such time as the representation rights could be challenged. In permitting the public employer to alter an agreed-upon negotiating unit during the period when a decertification petition would have been timely, this Board concluded that the impact upon the rights of public employees would be de minimis. While a dissatisfied employee organization could, if it wished, file a representation petition to question the employer's action, the relative ease by which a public employer could alter agreed-upon negotiating units would, we believed, generally encourage such agreements and discourage the litigation of representation issues.

In its brief and oral argument in the instant case, CSEA now urges us to overrule the prior decisions and to declare it improper for a public employer to alter unilaterally an agreed-upon negotiating unit. It argues that such unilateral action interferes with the organizational and representational rights of public employees.

Further assessment of the policy implications of past decisions in light of evolving labor relations experience has led this Board to reconsider the wisdom of its position. We now con-

---

4 See CSEA v. Helsby, 21 NY2d 541, 1 PERB ¶702 (1968).

clude that the consequences for public employees of a unilateral alteration of agreed-upon negotiating units are more substantial than we had previously thought.

The employees' rights of organization and representation specified in §202 and §203 of the Taylor Law are at the heart of the statute. Indeed, §200 of the Taylor Law, which states the public policy underlying the law, indicates that they are the first means of effectuating that public policy. In contrast, the public employer's power to recognize unions and to define negotiating units is merely a procedural convenience. The action of a public employer in unilaterally altering a negotiating unit by contracting its scope will, inevitably, weaken the employee organization's ability to represent and negotiate for the employees excluded by the employer and for those remaining in the contracted unit. The exclusion of some employees from a negotiating unit enables the employer unilaterally to change at will and with impunity the terms and conditions of employment of those employees. The employees and their representative are deprived of the right both to negotiate the change, and to file a grievance about it. Similarly, they are without recourse to the improper practice procedures of this Board. The employees in the redefined unit are likely hurt by the contraction of their unit because their organization's ability to negotiate on their behalf may well be impaired. Moreover, the inability of the employee organization to prevent the employer's unilateral action would tend to shake the employees' confidence in their organization and can affect their choice of representative.

We confront, moreover, a question of policy in the administration of this statute. Considerations of fairness and reasonableness should preclude a public employer which has agreed to a

negotiating unit and which has dealt with an employee organization on the basis of that unit from changing the unit unilaterally. It is reasonable that the burden of petitioning this Board for a definition of the appropriate unit should be borne by the party seeking to change an existing unit and not by the party that is content to abide by the status quo. While the employer might be slightly inconvenienced by having to file the petition, it would not be prejudiced thereby.

Accordingly, we overrule the holding of Southern Cayuga CSD that a public employer may determine unilaterally, at a time when decertification would be timely, that a unit created by agreement is no longer appropriate.[5]

We now determine that the County violated §209-a.1(a) of the Taylor Law by unilaterally altering the negotiating unit represented by CSEA. We direct the County to rescind its action of May 29, 1980, excluding certain employees from CSEA's negotiating unit, and we further direct it to cease and desist from refusing to negotiate the terms and conditions of such employees with CSEA. This relief is necessary to protect the statutory rights of the employees whom the County removed from the unit. On the other hand, we extend the time for the County to file a

---

5 In doing so, we note that we are not bound by the earlier decisions. A labor relations agency may reappraise its prior decisions and overrule them when new insights gained from practical experience with past principles change its understanding of how to protect the statutory rights of employees. See: NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). We did so in Cheektowaga-Maryvale Educators Association, 11 PERB ¶3080 (1978), affirmed Maryvale Educators Association v. Newman, 70 AD2d 758, 12 PERB ¶7018 (1979). This conclusion is not affected by the fact that the prior decisions have been affirmed in court. The court decisions have not held that the prior Board interpretations were the only possible correct interpretations of the Taylor Law. Rather, they have held that (continued)

decertification petition concerning such unit until the expiration of 30 days following its receipt of this decision. It is appropriate that the County's time to file a petition be so extended because its decision not to file a petition during the normal period was taken in reliance upon decisions of this Board.

NOW, THEREFORE, WE ORDER the County of Orange to:

1. Rescind its action of May 29, 1980, excluding certain employees from CSEA 's negotiating unit; and
2. Cease and desist from refusing to negotiate the terms and conditions of such employees with CSEA in the unit as it existed prior to May 29, 1980, unless and until said unit is changed in an appropriate proceeding initiated by the employer within 30 days from the date hereof, as indicated in this decision.

DATED: Albany, New York
August 6, 1981

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

---

5. (continued)

"PERB's interpretation is legally permissible and does not breach constitutional rights and protections." Southern Cayuga Teachers Association v. PERB, 10 PERB ¶7008, at p. 7016, aff'd 59 AD2d 1032, 10 PERB ¶7017 (4th Dept., 1977).

Board - U-4781

Dissenting Opinion of Chairman Harold R. Newman

I agree with my colleagues that the rule of Southern Cayuga School District, 9 PERB ¶3056 (1976), is unwise and that a public employer should not be permitted to alter an agreed-upon negotiating unit unilaterally even at a time when it could have filed a decertification petition. I also agree with my colleagues that this Board is not legally bound by the principle of stare decisis and may, therefore, depart from the precedent of its prior decision. However, I do not believe that this Board should do so in the instant case and adjudge the County of Orange in violation of §209-a.1(a) of the Taylor Law, since the County relied upon the earlier decisions of this Board and the court.

I would dismiss the charge herein, while simultaneously announcing to the clientele of this agency that the rule of Southern Cayuga School District would not be applied in the future and that public employers may no longer alter negotiating units unilaterally.

DATED: Albany, New York
August 6, 1981

Harold R. Newman, Chairman