

H.E. NO. 2021-10

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT, MERCER,

Respondent,

-and-

Docket No. CI-2016-035

ATU DIVISION 540,

Respondent,

-and-

JAMAR T. COLEY,

Charging Party.

**SYNOPSIS**

A Hearing Examiner recommends that a majority representative violated its duty of fair representation under N.J.S.A. 34:13A-5.4b (1) of the Act by arbitrarily handling a unit employee's discharge grievance before the membership in a meeting at which a majority voted against proceeding to arbitration. The union omitted to provide the membership any meaningful or objective facts and circumstances upon which the vote was cast and it treated the charging party's grievance disparately, compared to another discharge grievance upon which the membership voted that day. Also, the union omitted to provide the charging party a meaningful opportunity to advocate on his behalf because he wasn't provided any information regarding the circumstances of the final (pre-arbitration) step of the grievance procedure, nor had it provided to him a meaningful opportunity to review some "evidence" that the public employer averred figured in its decision to terminate. Also, the majority representative violated its duty by arbitrarily omitting to process another grievance on behalf of the charging party.

The Hearing Examiner dismissed all charges filed by the charging party against the public employer. The charging party had not presented evidence demonstrating that the public employer violated the Act in terminating his employment.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,  
Gurbir S. Grewal, Attorney General  
(Frank Marasco, Deputy Attorney General)

For the Respondent,  
Oxfeld Cohen, attorneys  
(Arnold S. Cohen, of counsel)

For the Charging Party,  
Law Office of Shiohban Royster, LLC, attorneys  
(Shiohban Royster, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On February 5, 2016, September 23, 2016, and November 15, 2016, Jamar T. Coley filed an unfair practice charge and amendments against his public employer, New Jersey Transit Mercer, Inc. ("NJT") and his majority representative, Amalgamated

Transit Union Division 540 ("ATU").<sup>1/</sup> (C-1) The charge, as amended, alleges that NJT terminated his employment on August 9, 2015 for sleeping on the job, knowingly withheld information that was involved in an investigation, refused to accept the written statements from his witnesses or permit them to testify on his behalf, and relied on a witness statement from an ATU officer that contains claimed deficiencies and/or inconsistencies, in violation of section 5.4a (1) through (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et. seq. ("Act"). (C-1) The charge, as amended, also alleges that ATU failed to provide him with discovery before his discharge, failed to pursue the grievance contesting his termination to arbitration, and failed to file a grievance he submitted on August 20, 2015,<sup>2/</sup> claiming that NJT tampered with evidence and failed to pay him for working through his lunch break, in violation of section 5.4b(1) through (5) of the Act.

On November 28, 2016, a Complaint and Notice of Pre-Hearing issued against NJT on the Section 5.4a(1) and (3) allegations<sup>3/</sup>,

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1/ "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "ATU" represents Union exhibits; and "NJT" represents the Employer exhibits; "T" represents the transcript, followed by the page number(s).

2/ The charge as amended alleges that the grievance was submitted in 2016, but the record clearly shows that the conduct at issue in the case occurred in 2015.

3/ These provisions prohibit public employers, their  
(continued...)

and against ATU on the Section 5.4b(1) allegations.<sup>4/</sup> However since the litigated dispute between the parties implicates Section 5.4a(5) of the Act, I also analyze that provision.<sup>5/</sup>

On January 24, 2017, NJT filed an Answer and Crossclaim<sup>6/</sup> (C-3). It admitted that it discharged Coley on or about August 26, 2015, for sleeping while on duty, that ATU filed a grievance contesting the discharge, that it upheld its discharge determination as the grievance progressed through the third step of the grievance procedure, and that the ATU did not request a

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3/ (...continued)  
representatives or their agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; ... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

4/ This provision prohibits employee organizations, their representatives, or their agents from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act."

5/ This provision prohibits public employers, their representatives or agents from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative." Unless a represented employee proves collusion or a breach of the duty of fair representation by the majority representative, the represented employee cannot use the unfair practice forum to litigate an alleged contract violation under this subsection. Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981).

6/ C-3

hearing before an arbitrator. It also admitted that ATU did not file a grievance regarding Coley's allegations that NJT tampered with evidence and failed to pay him for working through his lunch break. NJT denies that it retaliated against Coley for any activity protected under the Act or otherwise interfered with the exercise of any rights afforded by the Act. It asserted various defenses under the Act, and a crossclaim "for indemnification and/or contribution against Respondent ATU Div. 540 for damages, including the apportionment of back pay. . . ."

On May 15, 2017, ATU filed an Answer (C-2). It admits that Coley was discharged for sleeping on the job, and that a grievance was filed on or around August 20, 2015.<sup>7/</sup> It generally denies all other allegations pertaining to ATU. It also asserts various affirmative defenses, including that the charge was filed outside the statute of limitations.

On March 5 and 6, and September 12 and 13, 2018, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by the Respondents on November 19, 2018 and by the Charging Party on November 28,

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<sup>7/</sup> The ATU's Answer appears to have incorporated the Charging Party's typo regarding the year, as it admits that Coley's grievance was filed in 2016. See FN 2, *supra*.

2018.<sup>8/</sup> Reply briefs were filed by Respondents ATU and NJT on December 5, 2018 and December 21, 2018, respectively.

The Charging Party failed to file a reply brief.

Upon the record, I make the following:

**FINDINGS OF FACT**

Respondent NJT is a public employer within the meaning of the Act (C-1, C-3). Respondent ATU is the exclusive majority

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8/ All post-hearing briefs were supposed to be filed on November 19, 2018. The Charging Party filed its post-hearing brief late, advising that it made a mistake in reading the deadlines. By letter dated November 29, 2018, NJT filed a "Request to Suppress Charging Party's Post-Hearing Closing Brief." By letter dated December 4, 2018, ATU advised that it joined NJT in its application to suppress the Charging Party's post-hearing brief, but did not set forth any supporting explanation or legal citations. NJT asserted that "the Charging Party should be required to show 'extraordinary circumstances' in order to challenge NJ Transit's request for suppression." It further claimed that "[i]n other contexts mere mistake, lack of diligence or neglect is not sufficient to support a finding of 'extraordinary circumstances.'" The only two cases cited by NJT involve the interpretation of the "extraordinary circumstances" statutory exception to late filings under the state's Tort Claims Act. The cited cases do not have anything to do with the late filing of legal briefs. Moreover, neither Respondent makes any attempt to explain why suppression - which appears only to arise as a pre-trial motion for the purpose of preventing certain evidence or claims being presented at an upcoming hearing - should apply to a post-hearing brief, which is clearly not evidence. Given the complete absence of any legal authority supporting the basis for the relief requested by NJT and ATU as well the apparent inapplicability of suppression doctrines to non-evidentiary post-hearing filings, I did not issue a decision on Respondent's request. To the extent the request could be understood more generally as an objection to the late filing, the Respondents failed to identify any prejudice suffered in their submissions.

representative for all drivers, garage employees and certain salaried personnel (C-1, C-2; NJT-1).

NJT and ATU signed a collective negotiations agreement extending from July 1, 2008 through June 30, 2010 (NJT-1). This contract remained in effect during the applicable time period (T. 295). The agreement includes a grievance procedure under Article V, setting forth three steps (NJT-1 pgs. 6-7). If the grievance is unresolved after the third step, it may proceed to arbitration upon the written demand of either party. According to these provisions, the first step meeting includes the individual grievant, an executive board member for ATU or a designee, and the Superintendent or designee for NJT. The second step involves a meeting between the General Manager or designee for NJT and the President of ATU and Executive Board Member or designee. The third step meeting occurs between the Manager of Labor Relations or his designee and the ATU president. The grievant does not typically attend the third step meeting (T. 313).

The agreement also sets forth certain discipline procedures under Article IV. Section 6 provides that with the exception of minor offenses, disciplined members will be given charges and the record of discipline in writing, a copy of which is to be forwarded to the Secretary and President of the ATU (NJT-1 pg. 5). Section 10 of that Article provides that "[d]ue

consideration shall be given to the record of an employee for the past five (5) years when determining the extent and appropriateness of any contemplated disciplinary action.

Effective May 3, 2008, expungement of discipline is reduced from five (5) years to three (3) years" (NJT-1 pg. 6).

At the hearing, only the Charging Party presented witnesses. Their names and positions with NJT and/or ATU at the time of Coley's discharge were as follows: Jamar Coley – bus repairman and union member (T. 15); Kenan Lloyd – NJT employee and union member (T. 163-164); Kenneth W. Rice, Sr. – Operator and union member (T. 216-217); Michael F. Cribb – NJT operator and ATU president (T. 360, 383); Stephen D. Campbell – bus operator/Depot Master and ATU vice president (T. 170, 373, 474); and Damian Hall – Superintendent of Bus Maintenance (T. 440). All of these witnesses worked at the shop at the Hamilton garage during the relevant time period for this matter (T. 230).

The Charging Party, Jamar Coley, worked for NJT since 1994, and he became a full-time employee in August 1996 (T. 76, 82-83). He was initially employed as a driver before becoming a bus repairman around 2000 (T. 15). Jamar Coley was a member of the ATU and regularly attended union meetings, which were not typically attended by many members (T. 15, 216-217).

Michael Cribb was employed by NJT for over thirty years at the time of the hearing (T. 307-308, 348). He worked as a bus



operator (T. 383). He also served as ATU president for about ten years, from 2007 until June 2017 (T. 307-308, 368). He also previously served as the ATU's vice president for two terms (T. 307-308).

Stephen Campbell worked as a Depot Master and operator for NJT (T. 373). He had worked for NJT since 1994 (T. 383). He also served as ATU Vice President from 2010 through 2016 (T. 373). Kenneth W. Rice, Sr., at the time of the hearing, had been employed by NJT since 2007, and he worked as an operator (T. 216-17, T. 268). During his decade of employment at NJT, he was a member of the ATU and regularly attended union meetings (T. 216-217). In 2017, Rice defeated Cribb to become ATU president and was in that role at the time of his testimony (T. 216-217).

At the time of the hearing, Kenan Lloyd, had retired from employment with NJT and was still a member of the ATU (T. 163). He had been co-workers with Coley, Campbell and Cribb for over sixteen years (T. 164, 167). He also attended union meetings with Coley (T. 164).

#### Coley's Relationship with the ATU

Much of the testimony elicited at the hearing focused on the Coley's strained relationship with ATU President Cribb and ATU Vice President Campbell, as well as his reputation at the Hamilton Garage.

Coley testified that he regularly pressed union leadership to provide information regarding expenses at union meetings, accused ATU President Cribb of misappropriating ATU funds and was generally outspoken at those meetings when he believed that those issues were not being addressed (T. 39-40, 95-96, 218-222, 224, 230). Rice corroborated that there was consistent tension between Coley and Cribb<sup>9/</sup> (T. 217). He specifically identified Coley's questions about ATU's expenditures that were ignored by Cribb at union meetings as a source of conflict (T. 218-219). Lloyd also corroborated that Coley asked questions of ATU president Cribb and other officers, that almost always remained unanswered (T. 164-165). Coley testified that when Cribb sought approval for meeting minutes, he objected and ask for details about those expenses (T. 39-40). For example, when Cribb sought four thousand (\$4,000.00) dollars for expenses related to his attendance at an Atlantic City convention, Coley asked for receipts, but those documents were not produced (T. 39-40). Coley testified that he told other ATU members that he believed

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<sup>9/</sup> Rice subsequently became ATU President and in August 2017, reviewed finances during Cribb's tenure, including seven years of bank statements at the institution where the union kept its funds (T. 247-248). His review of records led him to conclude that Cribb misappropriated ATU funds (T. 247-248). He testified at the hearing that he wrote a formal letter to the international regarding his concerns and also alerted law enforcement (T. 247-249). His investigation started in August 2017 and remained ongoing at the time of his testimony on March 6, 2018 (T. 248-249).

Cribb was misappropriating funds, but admitted he did not file formal charges against Cribb with the international union because he was not aware he could do so (T. 41, 95-96, 132-133). Coley testified that Cribb refused to pursue grievances on his behalf because of his conduct at union meetings. As an example, he testified that after he received a promotion due to his seniority with a higher pay rate, NJT subjected him to new rules, specifically, a thirty day trial period for the new position that he claimed had not been previously imposed upon other employees (T. 44-45, 97-98, 134-135). Coley told Cribb that he sought to contest what he believed to be differing treatment through the grievance procedure and subsequently filed the grievance, but Cribb did not process it (T. 44-45, 134-35).<sup>10/</sup> He also filed grievances about overtime opportunities offered to employees with less seniority than he that Cribb didn't pursue<sup>11/</sup> (T. 45).

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<sup>10/</sup> Coley testified that he ultimately resigned from that position before his thirty day trial period expired and returned to his regular mechanic position (T. 100). He explained that when the ATU did not take any action on his grievance, he feared being disciplined and potentially discharged in the new role for poor work performance during the trial period (T. 100-101).

<sup>11/</sup> Rice testified that Cribb also failed to take a grievance that he felt was meritorious to arbitration (T. 237-240). Rice testified that he had been passed over for overtime for an employee with less seniority (T. 237-240). Since the ATU did not take any initiative, Rice gathered all of the relevant records himself and presented it at the first and second step of the grievance procedure (T. 237-240). Cribb informed Rice that the grievance was denied at the third

(continued...)

Cribb testified that he never had any issues with Coley (T. 338). Cribb also denied knowing if Coley ever accused him of misappropriating funds, as he claimed he was accused of such conduct in "every other letter" to the ATU (T. 338-339). He testified that letters would be submitted to the ATU accusing him of misappropriating union funds, and that the ATU would send to him the actual letters containing the accusations for a response (T. 338-339). Although he received the actual letters from the ATU, Cribb testified that he did not know who was writing the letters (T. 338-339). I do not credit Cribb's testimony. The testimonies of Coley, Rice and Lloyd establish, at minimum, that Coley often sought information to verify Cribb's claimed expenses as ATU president, the main purpose of which would be to determine if union funds were properly used. Their testimonies also establish that Coley's requests were ignored by Cribb and a source of tension between them. I also credit Coley's testimony, corroborated by Rice, that Cribb omitted to process at least some legitimate grievances.

Coley's relationship with ATU Vice President Campbell over the years was particularly fraught with conflict. Both Coley and Campbell were employed by NJT as drivers in the mid-1990s (T. 81-

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11/ (...continued)  
step, but Rice claimed that an unnamed management representative informed him that Cribb never presented the grievance to NJT at the third step. (T. 237-242)

83, 383). During this period, Campbell was not yet a union officer (T. 373). Campbell had been dating Sheila Fraizer, a co-worker, but they broke up in around 1996 (T. 375-376). Coley then began to date Fraizer (T. 23, 375-376). Coley testified that Campbell would slam into him if they walked through the doorways together at work (T. 23). Campbell did not deny that there were tensions between them at that time, but attributed their conflict to Coley repeatedly "bad-mouthing" him rather than any romantic jealousy on his part (T. 375-376). Campbell testified that he and Coley argued at work, and that he told Coley "[w]hen we see each other outside the job, we'll settle it as men" (T. 376). Campbell did not want any altercations to happen while on NJT property because he feared getting fired (T. 376).

Coley's relationship with Fraizer ended around 1997 (T. 81). However, Coley testified that he was out one evening at a bar called Scotty's Lounge in South Trenton with another NJT co-worker and his girlfriend at that time, when Campbell arrived and saw Coley (T. 25). Coley saw Campbell leave and return with another individual, identified as Campbell's friend (T. 26). Coley decided he should leave (T. 26). When Coley and his companions exited the bar, Campbell was waiting outside and confronted him (T. 26). He testified that he heard Campbell's friend saying in the background that Campbell should not let

Coley get away, that this was his "chance to end this squall," and that Coley had been "messing with" Campbell's ex-girlfriend (T. 26). Coley testified that he told Campbell that he didn't want any problems, and that he was going to his car (T. 26). When Coley turned his back to Campbell, Campbell grabbed him by his shoulder and punched him in the eye, causing Coley to fall to the ground (T. 26). Coley then took a key chain that contained a pocket knife out and stabbed Campbell in the neck (T. 26-27, 376-377).

The police were called but Campbell and his friend fled the scene (T. 28). The police detained Coley, drove him to the precinct, took his pocket knife, and detained Coley in case Campbell appeared (T. 28). After about an hour, the police drove him back to the bar (T. 28). At the hearing, Campbell gestured to the visible "scratch" that the knife wound left on his neck (T. 376-377). Campbell and Coley both pressed charges against one another, but ultimately withdrew them at the request of Fraizer (T. 90-91). Campbell subsequently married Fraizer at sometime later in the 1990s (T. 82). Campbell testified that in 1997, he and Coley shook hands on a bus and apologized to one another for the altercation at Scotty's Lounge (T. 377). He testified that he did not have any more verbal or physical

altercations with Coley since that time (T. 376).<sup>12/</sup> I credit that testimony.

Coley testified that during a union meeting, he saw Campbell push or kick a chair, that struck fellow union member, Anthony Pue, "pretty hard" (T. 31-35). This incident occurred sometime during the year preceding Coley's August 2015 discharge (T. 33,92). A proceeding was held at the Hamilton Township Municipal Court, where Coley and a few other members testified against Campbell (T. 92-93, 380-381). Campbell denied harboring any animus against those who testified against him because he believed he would be vindicated (T. 382). The criminal charges against Campbell were ultimately dismissed (T. 381-382).

Both Rice and Lloyd testified that they observed tension and conflict between Coley and Campbell (T. 167-168, 219). When asked for a specific example, Rice explained that when Coley pressed ATU president Cribb for details regarding the expenses of

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<sup>12/</sup> Coley also related another incident that occurred in 1995, when he was working for NJT on a part-time basis, where his car had been hit by another vehicle while it was parked on a side street outside of Ms. Fraizer's residence (T. 23-24, T. 83). He concluded that damage to his car matched the markings of a NJT bus and that Campbell caused it, although he did not have any evidence (T. 23-24, T. 83-85). He testified that he reported his suspicions to his supervisor at that time, including those regarding Campbell's involvement, but never heard from NJT regarding his complaint (T. 83-35). Since Coley admittedly had no evidence of Campbell's involvement, this incident has minimal relevance in analyzing whether the ATU breached its duty of fair representation.

the executive board, Cribb would not respond (T. 219-220). Campbell would then become angered by Coley's persistence and would act in an aggressive manner to make it clear to Coley that he would not be receiving the information he was requesting (T. 222). Lloyd testified that after working with Campbell for 16 years, he knew when Campbell was "upset because he's in your face . . . he's got like a bully tactic. . . ." and witnessed Campbell behave that way towards Coley at times (T. 167-168). Lloyd testified that Campbell behaved in this manner towards him following a work-related dispute with Campbell's wife, Sheila Fraizer (T. 167). I credit Rice's and Lloyd's testimonies.

Coley, Rice and Lloyd all testified that "senior" employees, those co-workers with over thirty years with NJT, used the phrase "the Coley era" to describe Coley's efforts to stop perceived contract violations (T. 169, 223). Rice testified that when he initially started working at the Hamilton garage around 2007, Coley could be a "hot-head" because he would give his opinion in a demanding but respectful manner, to management or during union meetings (T. 223, 266-267). However, by 2009, Rice saw that Coley conducted himself more professionally at work and at union meetings, as he educated himself about the contract and the grievance procedure (T. 267-269). Campbell denied ever hearing the phrase "the Coley era" (T. 400). I do not credit Campbell's testimony, particularly given the consistency of Coley's, Rice's



and Lloyd's accounts. Coley and Rice also testified that Coley was sometimes referred to as a "jailhouse lawyer" (T. 45-46, 224). Coley attributed that nickname to the fact that he tried try to educate other members of the union about their rights (T. 46). Similarly, Rice credibly testified that some members would go to Coley if they believed that their issues weren't being addressed, and that Coley would speak out on their behalf as a "concerned coworker" to union leadership at the monthly meetings (T. 224). According to Rice, Coley brought up concerns about the contract "all the time," including unfair overtime, both at the Hamilton garage and during union meetings (T. 227, 229-230). Coley also filed more than ten grievances (T. 44-45). Coley and Lloyd both testified that newly hired employees told them that management representatives and union officials advised the new hires not to listen to them and that they were "troublemakers" (T. 45, 166-67, 189).

#### Coley's Prior Disciplines

The record does not include a copy of Coley's disciplinary record. Coley admitted, however, that NJT sought to discharge him and three other employees for sleeping on the job in a prior incident (T. 77-79, 101). Coley and the other employees were reinstated at the second step of the grievance procedure (T. 78). It is unclear from the record precisely when that incident occurred, though Coley testified that it occurred more than five

years before his discharge at issue in this case (T. 78-79). He also testified that that prior incident was not part of his disciplinary record because under the collective negotiations agreement, prior disciplines occurring more than five years before the next incident can no longer be considered (T. 78-79). Coley also had been fired for poor work performance in 2008, about six years before his 2014 promotion (T. 96-97, 101). The ATU successfully contested that discharge, although it is unclear at what stage of the grievance procedure he was reinstated (T. 101-102). Coley had also been discharged on another occasion that was unrelated to sleeping on the job or work performance that was successfully contested by ATU at arbitration (T. 102).

Coley testified of his belief that the ATU, under Cribb's leadership, grieved the prior discipline for sleeping on the job because some of the other union members who were also disciplined for the same offense, were friends of Cribb (T. 131). The ATU had processed their disciplines as a group (T. 130-131). Coley claimed that in the other prior disciplinary hearings Cribb was not present, but conceded that the ATU did fight for him on multiple occasions over the years (T. 102-103). In the absence of other corroboration, I don't credit Coley's "belief" as a fact.

Coley's Discharge

Coley was employed as a bus repairman for approximately 15 years before his discharge (T.15, 466). As Damian Hall, the Superintendent of Bus Maintenance, explained at the hearing, Coley had bid into the "pull-out" position (T. 440, 465). This position could include acting as a "vault puller," requiring him to remove the cash vault from a bus, if necessary (T. 465). This task involved taking a device known as a "RDM" or alternatively, a "vault puller RDM" to a bus, using it to access the cash box, before placing the cash box into a large safe known as a receiver (T. 466). The money from the bus would then be deposited, and the emptied cash box would be returned back to the bus (T. 466).

In the early morning hours of August 19, 2015, then-ATU Vice President Stephen Campbell was working as Depot Master (T. 400; ATU-1, ATU-2, ATU-3). As Depot Master, Campbell was responsible for performing a task referred to as the "end of day," which basically involved entering information into the computer system to calculate the funds for the buses that were in service as part of NJT's daily accounting process (T. 393-395). This task needed to be performed after the last bus came into the garage, but before 3:00 a.m. so that the new revenue collection cycle could begin (T. 393-395). In order to initiate the end of day task, the money needed to be taken out of the last bus by the vault

puller so it could be calculated (T. 393-395). This process generates a slip that the vault puller gives to the assigned depot master (T. 395, 397).

That morning, Coley was working as the vault puller (T. 395, 465; ATU-1, ATU-2). The last bus returned to the garage around 2:20 a.m. (T. 395; ATU-2). When Coley did not appear with the RDM to retrieve the vault on the last bus, Campbell took the RDM and began to look for him (ATU-2). Since he did not see Coley, Campbell gave the RDM to Foreman David Calabrese who was at the foreman's desk in the maintenance area of the garage (ATU-2). Foreman Calabrese was Coley's direct supervisor (T. 400). Campbell asked Calabrese to direct Coley vault to the last bus that came in so he could complete the end-of-day accounting process (T. 395; ATU-2). Calabrese paged Coley by using the phone at the foreman's desk (T. 396; ATU-1, ATU-2, ATU-3).

When Coley did not respond to the page, Campbell returned to the maintenance side of the garage to look for him (T. 396; ATU-1, ATU-2, ATU-3). At the hearing and in a witness statement he wrote on the morning of the incident at the request of Superintendent Hall, Campbell testified (and wrote) that he saw Coley sleeping on bus 5533; that he returned to the foreman's desk to alert Calabrese that he needed to wake up Coley so that he can end the day, and then proceeded to his office (T. 396-397, 398). At the hearing, Campbell clarified that he was alone when

he found Coley asleep (T. 398). This account is largely consistent with the witness statement he wrote that morning in response to Superintendent Hall's request (T. 391, 443-447; ATU-2). The witness statement prepared by Calabrese provides that both Campbell and he walked down the bus bays when Calabrese discovered Coley sleeping in bus 5533 (ATU-1, ATU-3). Foreman Calabrese was not called to testify at the hearing. Both Calabrese's and Campbell's statements placed the discovery of Coley asleep at around 2:50 a.m. (ATU-1, ATU-2, ATU-3). A document entitled "Hamilton Bus Garage, Bus and RDM Activity Report for August 19, 2015," that lists the times drivers and vault pullers use the RDMs, shows that Coley signed in at 3:04 a.m. and off at 3:09 a.m. that day (T. 462-463, 510; CP-4). This is consistent with Campbell's testimony that Coley appeared with the slip a little after 3:00 a.m. (T. 397).

Sometime between 4:00 a.m. and 5:00 a.m., Superintendent Hall arrived at the Hamilton garage (T. 440-41). As the direct supervisor of Foreman Calabrese, he received Calabrese's write-up slip that morning (T. 443-44, 448; ATU-1). The write-up slip identifies the incident as "theft/embezzlement" and includes Calabrese's witness statements (ATU-1). Reading in the write-up that Campbell was referenced, Hall asked Campbell for a statement, which he received in an email sent at 8:52 a.m. that morning (T. 445-46, 397; ATU-2). Campbell testified that he

initially refused Hall's request to provide a statement until Hall gave him a "direct order" to write one. Superintendent Hall denied issuing any sort of directive, explaining that there had been many times when he asked employees for statements and never received any (T. 397-398, 446-447). I do not find this apparent disagreement to be a material factual dispute.

After reviewing the statements, Superintendent Hall did not ask Calabrese or Campbell why their accounts seemingly differed regarding who discovered Coley sleeping (T. 448). Under oath, Hall surmised that the apparent discrepancy in their statements "had to be the only reason" he retrieved the video of the foreman's desk (T. 450). Superintendent Hall credibly testified that the video's camera was focused on the foreman's desk. It showed Campbell giving Calabrese the RDM, followed by the two of them walking somewhere off-camera together (T. 445-456). Hall also watched Calabrese pick up the phone to use the PA system a few times, but could not hear what was said because the video did not provide an audio component (T. 484-486). Superintendent Hall credibly testified that while there could have been other cameras that showed where Calabrese and Campbell walked, he did not review them because the cameras would not have recorded activity in the bus bays where they both claimed to have discovered Coley sleeping (T. 458-459). The video was not entered into evidence or otherwise shown at the hearing.

In determining whether Coley was sleeping, Superintendent Hall reached his conclusion based on the two statements and Coley's disciplinary record (T. 478-79). He also specifically relied on Coley's disciplinary record in determining to discharge him (T. 495, 499). Hall explained that under the contract he could only consider disciplinary offenses that occurred within the prior three-year period (T. 499). However, he could not specifically recall whether Coley had been disciplined for sleeping on the job within the three years before the contested incident (T. 494). He testified that "if" Coley had a conduct unbecoming violation within the last three years of the incident, then such a violation would have served as the basis for determining that Coley should be discharged (T. 495). According to Hall, sleeping on the job was itself a dischargeable offense, and that the presence of any additional offenses on Coley's record<sup>13/</sup> would not have altered the outcome (T. 499).

Coley received a "see-me" slip the same morning from Calabrese (CP-1; T. 47-52). The "see-me" slip requests the employee to appear at an office on a certain date regarding an

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<sup>13/</sup> Although it is clear from testimony and the contract language that only offenses occurring within the past three years can be considered in assessing the appropriateness of a disciplinary action, it is unclear from the record whether Coley had any disciplinary offenses that occurred within the three-year period. Coley denied having any other offenses within that time frame, while Superintendent Hall could not recall (T. 78-79, 494). None of the admitted exhibits provide any insight on this factual issue.

offense (CP-1, CP-2). The "see-me" slip in this instance identified the offense generally as a "failure to follow standard rules/procedures - sleeping on duty" (CP-1). No other factual details regarding the offense are provided. (CP-1)<sup>14/</sup> Coley signed and dated the slip on August 19, 2015, and also sets forth a handwritten notation of the time as 4:15 a.m. (CP-1). The following day, August 20, 2015, Coley received a second see-me slip from Calabrese (CP-2; T. 52). This document identified the offense as "conduct unbecoming-theft." Again, no other factual details regarding the offense are provided. Coley signed it on August 20, 2015<sup>15/</sup> (CP-2). Both "see-me" slips provide minimal additional information. They identify the employee name, number, incident date, incident time, reporting date, and reporting time (CP-1, CP-2).

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<sup>14/</sup> CP-1 also contains what appears to be an identical copy of the "see-me" slip at the bottom half of the page with a few minor differences. The slip identifies the time to report as August 26, 2015 and appears to have been signed by Coley on August 26, 2015. The signatures of the supervisors are also different. It appears that Coley received another copy of this "see-me" slip on August 26 at his step 2 hearing.

<sup>15/</sup> CP-2 also includes an identical copy of the August 20 see-me slip on the top half of the page with a few minor differences. The report date is identified as August 26, and appears to have been signed by Coley on August 26, 2015. The signatures of the supervisors are again different. It appears that Coley received another copy of the August 20, 2015 "see-me" slip for conduct unbecoming-theft on August 26 at his step 2 hearing.



Kenan Lloyd testified that soon after Coley had been fired, he saw then-ATU Vice President Campbell walking through the shop with an unlit cigar in his mouth while talking with other senior employees (T. 177). He heard Campbell and the senior employees claiming that it was "the end of the Coley era" (T. 177, 179). Lloyd observed Campbell and the senior employees talking about the end of the Coley era every day for some time after his discharge, describing it as "their little chant" (T. 178). I credit this unrebutted account.

#### Coley's Discharge Grievance

The ATU filed a grievance on or around August 20, 2015 on Coley's behalf in connection with the sleeping incident<sup>16/</sup> (C-2, C-3). The first step meeting for the discharge occurred the same day (ATU-1, ATU-2, ATU-3). Coley testified that no ATU representative contacted him before the meeting (T. 54). Coley, shop steward Ricardo Neblett, Superintendent Hall, and Management Representative<sup>17/</sup> Steve Barany attended the first step meeting in Barany's office (T. 54-56). Superintendent Hall informed him of the alleged offenses, which were inscribed on the see-me slips he previously received (T. 56). Coley testified that Superintendent

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<sup>16/</sup> ATU's Answer claims the grievance was filed on August 20, 2016, which is clearly a typographical error, based on the timeline established in the record.

<sup>17/</sup> Steve Barany's official title with NJT is unclear from the record.

Hall asked him what happened on the day of the incident (T. 56). No testimony was ever elicited from Coley or Hall regarding how Coley responded to that question at that meeting about his conduct. Superintendent Hall then informed Coley that he was being terminated, and that the decision to terminate was based on witness statements and on a video (T. 56-57). Coley testified that at the conclusion of the meeting, Superintendent Hall revealed to him witness statements from both Depot Master and ATU Vice President Campbell as well as Foreman Calabrese<sup>18/</sup> (T. 56-57). This was the first time Coley learned that ATU Vice President Campbell had provided a witness statement (T. 57). Superintendent Hall informed Coley that he was being discharged based upon those witness statements and a video (T. 58). Steward Neblett never spoke during the first step hearing (T. 57-58).

After the meeting, Coley asked Shop Steward Neblett why the ATU did not have the statements before the meeting was held and

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<sup>18/</sup> It is unclear from the record whether the witness statements from Campbell and Calabrese were given to Coley for review only or whether he was permitted to retain copies. Campbell's witness statement was in the form of an email (ATU-2). Calabrese's statement appeared in two different documents that Superintendent Hall referred to as an employee incident form (T. 481-82; ATU-1, ATU-3). Although covering two different documents, Calabrese's statement is identical in both (ATU-1, ATU-3). Shop Steward Neblett signed the bottom of a form on August 20, 2015 at the first step meeting, acknowledging receipt of Calabrese's statements in the employee incident forms (ATU-1, ATU-2). Shop Steward Neblett presumably retained a copy of Campbell's statement.

whether he had seen the video Hall mentioned (T. 56-67).

According to Coley, Neblett responded that he did not have the statements beforehand nor had he seen the video, but would get the information to him (T. 59). I credit that testimony.

On the same day as the first step meeting, Coley filed a grievance alleging that NJT tampered with evidence involved in an investigation and did not pay him for working through his lunch break the same day (C-1). ATU did not process this grievance (C-3).

The second step meeting occurred on or around August 26, 2015 (T. 60). No ATU representative contacted Coley before the meeting, nor had he seen the video Superintendent Hall referenced in the first step meeting six days earlier (T. 60, 61).

Typically, ATU Vice President Campbell would have served as the union representative at this stage (T. 60, 373). For Coley's second step meeting, Campbell was replaced with the shop steward for the bus drivers, Darrell Williams (T. 60). Carl Harris served as the Step 2 representative for NJT.<sup>19/</sup> Coley testified that Harris told him that there was "no use" for Harris to see the video and that there was no use for Coley to see the video either, as the video and the two witnesses statements proved management's case (T. 61-63). Coley told Harris he still would like to view it, but his request was ignored or otherwise

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<sup>19/</sup> His specific title is unclear from the record.

remained unanswered (T. 63). Coley testified that Shop Steward Williams did not say anything about viewing the video but instead offered the defense that bus drivers frequently sleep at the garage and aren't penalized (T. 64). NJT representative Harris replied that bus drivers work in the operations department and that department is different from the maintenance department where Coley worked (T. 64). The meeting ended with Harris advising that he would follow-up with Steward Williams regarding whether the discharge determination would change (T. 64-65). Coley testified that after the meeting, he had no other discussion with Steward Williams (T. 65). At some point after the second step meeting, ATU Vice President Campbell called Coley to inform him that the discharge decision was upheld (T. 65). I credit Coley's testimony about the second step meeting.

No ATU representative contacted Coley prior to the third step meeting (T. 66). Coley, as the grievant, did not participate in the third step meeting (T. 68, 313). Typically, the third step meeting was held between ATU President Cribb and NJT representative Phil Shuster (T. 68). No evidence in the record establishes when the third step meeting was convened, but based on the timing of the second step meeting and the arbitration vote at the then-upcoming union meeting, it was likely to have occurred between August 27 and August 31. ATU President Cribb testified that in investigating Coley's

discipline, he received Campbell's witness statement, and based on that statement, spoke directly with Campbell about the depot master's end-of-the-day procedure and the allegation that Coley was sleeping on the bus prior to his break (T. 326-331). He also testified that as part of the ATU's investigation, union representatives obtained all of the information that NJT would use as evidence against Coley (T. 333). ATU President Cribb testified that while he recalled that there was a third step meeting for Coley, he had no recollection regarding any of its details other than his presence for it (T. 334). Shop Steward Williams, who did not participate in the third step meeting, called Coley to inform him that the discharge decision was upheld at the third step (T. 68). When Coley asked what the decision was based on, Shop Steward Williams responded that President Cribb did not share any information with him about the meeting (T. 69).

#### Coley's Arbitration Vote

At the time of Coley's discharge, union meetings convened on the first Tuesday of every month (T. 103, 362). The union meetings had a morning session and an evening session (T. 103, 107). The morning meeting occurred at 10:00 a.m. and the evening one at 7:00 p.m. (T. 359). At these monthly meetings, the ATU's practice was to permit employees who had been disciplined to present their case to the members before they voted on whether

their discipline should proceed to arbitration (T. 367-69, 402-404). Ballots are then circulated on which members could write a check mark in a "yes" box or a "no" box on whether to proceed to arbitration (T. 273-274). The vote is counted at the end of the evening meeting in view of the members who attended it (T. 365-66).

The arbitration vote for Coley's discharge occurred during the ATU's September 1, 2015 meeting (CP-3; T. 105). At the morning session, Coley received information pertaining to his discharge from ATU, including a copy of the video that Superintendent Hall had referenced during the first step meeting (CP-3; T. 105). This was the first time Coley had received the video (T. 105). Coley signed a September 1, 2015 document from the ATU entitled, "Receipt of All Discoveries" (CP-3). The document explains that at that time, NJT had provided to ATU a CD copy of the video and two "write-up slips" and that by signing the document, Coley was acknowledging their receipt (CP-3). There is some ambiguity about what documents in the record are the "two write-up slips" referenced in the ATU's September 1 letter. Coley acknowledged receiving with the September 1 letter the two "see-me slips" that were issued at the outset of his discipline, together with the NJT's Employee Incident Forms providing Foreman Calabrese's and Campbell's statements (T. 149;

CP-1, CP-2; ATU-1, ATU-2).<sup>20/</sup> However, there is no dispute that Coley received the copy of the video for the first time at the morning session of the union meeting where members would decide whether his discharge should be contested at arbitration.

When Coley initially received the video, he asked ATU President Cribb if he could show it to the members attending the morning meeting session, even though he personally had not yet had an opportunity to view it (T. 105-106). Cribb refused his request without explanation (T. 106, 108). When Coley made his presentation in defense of his grievance to the attendees at the morning session of the union meeting, he had not yet viewed the video tape that he recently received from the ATU.

Of all the witnesses, Rice provided the most detailed and credible testimony of what transpired during the September 1 union meeting. Although Rice missed some union meetings in the months leading up to Coley's discharge (since he was on a leave of absence at that time), he did attend the morning session of the union meeting for Coley's arbitration vote (T. 270). Rice credibly testified that Cribb's presentation was quick,

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<sup>20/</sup> Coley denied receiving the Employee Incident Form containing Foreman's second witness statement in support of the sleeping on duty allegation (ATU-3; T. 143). However, since the content of Foreman Calabrese's statement in both the Employee Incident Form regarding the "theft" charge (ATU-1) and the Employee Incident Form regarding the sleeping on duty charge (ATU-3) are identical, whether Coley actually received the latter document is inconsequential.

describing it as follows: “[t]he then-previous president stood up and said we’re going to have an arbitration vote for Mr. Coley. All of those who want to vote for him can, all those who want to vote against him can.” Rice testified that at no time in Cribb’s brief presentation of Coley’s grievance did he explain what happened at any of the prior steps, or make any statement regarding the evidence that was against Coley (T. 275). According to Rice, Cribb then asked Coley to make his case to the members (T. 272). Rice did not recall that Coley was interrupted in any way during his presentation. He could not recall whether Coley fielded any questions from members, acknowledging that a grievant typically would have an opportunity to answer any questions (T. 273). Rice recalled that numerous members attended the morning session of that month’s union meeting, observing that matters involving Coley had a tendency to attract a crowd (T. 285-286). Rice estimated that there were twenty-one (21) chairs set up at the union meeting and there were people, “still standing” (T. 285-286). He estimated that at least 30 members attended<sup>21/</sup> the morning session (T. 286).

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21/ There is no evidence in the record regarding the vote tally for Coley’s grievance. While ATU’s counsel, in his opening remarks, claimed that thirty (30) votes were cast against going to arbitration and fifteen (15) votes in favor of it, no supporting evidence was actually introduced into the record (T. 12).



Rice's testimony is largely consistent with Coley's recollection of events. Coley testified that Cribb did not make any comments about whether his discipline should be contested at arbitration or any substantive statement that would inform the members about the details of his grievance (T. 106, 136). Coley testified that before every other arbitration vote except his, Cribb would explain what occurred at each of the prior steps and then permit the grievant to make a presentation (T. 106, 137-138, 140-141).

Coley's discharge was not the only discharge subject to a vote at the September 1, 2015 union meeting (T. 315, 402). Jim Crespo was also discharged by NJT and the circumstances surrounding his vote are noteworthy (T. 276-277, 315). Both Rice and Coley recalled Cribb's presentation of Crespo's disciplinary matter. They both specifically recalled Cribb telling the members that Crespo's discharge was unjust because he was not trained to be a bus cleaner but instead was a mechanic (T. 140-141, 276-277).

After the morning session and vote, Coley returned home to watch the video (T. 107). After viewing it, he concluded that the video did not support NJT's decision to discharge (T. 107-108). He did not testify about why he believed that the video did not support NJT's determination.

When Coley returned for the evening union meeting session, he again requested that the video be shown to the members (T. 108). Cribb again denied his request (T. 108). Coley credibly testified that at the evening meeting, having had the opportunity to watch the video, he informed the membership that the evidence did not support the NJT's position and that the evidence was "100 percent" in support of his position (T. 107-108). Coley also told the membership (although it is unclear at which session), that he believed that there were a lot of loopholes in NJT's case and that NJT and ATU colluded to have him discharged (T. 107). No other evidence in the record indicates what specific arguments, or version of events claims Coley advanced in his presentation supported a membership vote to advance his grievance to arbitration.

Consistent with Coley's and Rice's testimonies, Cribb testified that he gave Coley "the floor" to make his case for arbitration, and that he did not make any recommendations regarding whether Coley's case should proceed to arbitration (T. 314, 358). Cribb testified that during his tenure as ATU president, to avoid "interference," the leadership "left everything blank" (T. 358-359). His practice was to offer grievants "the floor" to present their case, and then permit the membership to question them about the case or "the scuttlebutt that's running around the location" (T. 359). Cribb testified

that he followed the same procedure each time with no variation (T. 360, 368). Campbell provided similar testimony regarding the typical procedure before an arbitration vote, stating that Cribb simply provided the grievants the opportunity to speak in order to "explain [their] own situation to the members" (T. 402-403). Campbell also testified that before providing grievants "the floor," Cribb would not make any preliminary statements that would introduce the grievant or what allegations were made against the grievant (T. 402-403).

Cribb denied that he ever would make any recommendations or statements to the membership regarding a grievant's request for arbitration at the union meetings he conducted (T. 314-315, 358-359). He repeatedly denied telling the membership at the September 1, 2015, union meeting that Crespo was wrongfully discharged for poor work performance because he was a mechanic and not trained to clean buses (T. 316, 317, 318-19, 321).<sup>22/</sup> I do not credit Cribb's testimony. After initially denying making any statements regarding Crespo at the union meeting, Cribb testified that he didn't recall making such statements (T. 315-316). He then specifically denied making a statement to the effect that Crespo was a mechanic and not trained to clean buses properly (T. 316). He speculated that he may have asserted such

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<sup>22/</sup> Campbell testified that he did not recall any specific statements that may have been made by anyone at Coley's or Crespo's presentation (T. 400-402).

a defense during one of Crespo's earlier step meetings, but again denied making that particular comment at the union meeting (T. 317-318). Cribb equivocated when asked if other members who would not have been present at those step meetings had access to the statements ATU representatives made during those meetings (T. 318). He testified that when the ATU was seeking information from the membership, the fact that Crespo was a repairman and not properly trained as cleaner "came up," and then was asserted as a defense during the grievance procedure (T. 317-319). But Cribb did not plausibly explain why other union members would have heard what specific statements he may have made in Crespo's defense, particularly since Cribb only attended the third step meeting and according to Cribb's own testimony, no other member, including the grievant, would typically attend that meeting (T. 313-314). In an effort explain why this defense of Crespo would have been attributed to him, Cribb speculated that he may have agreed with a member yelling from the floor that Crespo as a mechanic was not trained to clean buses, but again denied making that statement at the September 1 meeting (T. 321). When asked to explain how he may have agreed with someone yelling that defense from the floor, Cribb testified that he could not remember what was said years earlier at the meeting (T. 322-323). In short, the only specific recollection that Cribb had regarding any statements that were made at the September 1 meetings was

that he did not make any comments about the fairness of Crespo's discharge (T. 313, 347). He was unable to recall anything about the vote for Coley, despite testifying that both Crespo's and Coley's arbitration vote occurring at the same meeting (T. 313, 347). Cribb's equivocal answers to questions about his remarks about Crespo's grievance at the meetings aren't credible; I credit Rice's and Coley's mutually consistent testimonies.

After each session, the members vote whether to permit a grievance proceed to arbitration (T. 359). The president does not vote unless there is a tie (T. 358). The ballots are kept in a locked box, and three volunteers from the membership conduct the count in front of the attendees at the conclusion of the evening session (T. 359, 362-363, 366). It is undisputed that the members did not vote to proceed to arbitration for Coley's discharge (T. 362).

#### Coley's Lunch Break Grievance

Coley claims that on August 19, 2015, the date he allegedly was found sleeping on the job, he worked through his entire lunch break (T. 71; C-1). Coley wanted a grievance filed as a way to acknowledge that he worked through a contractual break the same day that NJT accused him of theft by stealing company time (T. 71-72). He asked Shop Steward Neblett to file a grievance for working through his lunch break (T.72). Steward Neblett told him he would speak to ATU President Cribb about filing a grievance

for working through his lunch break (T. 72-73). ATU President Cribb recalled Coley asking him to file the grievance, and agreed, when asked, whether it would be a contract violation to work through a lunch break (T. 336-337). Cribb initially testified that he did not recall whether he filed Coley's grievance, but then admitted that he probably did not file it (T. 336-337). When asked why the grievance wasn't filed, Cribb testified that he did not know (T. 336, 337). NJT, in its Answer, admitted that the ATU did not file Coley's grievance alleging evidence tampering and not being paid for working through lunch (C-2). Coley testified that ATU did not file the grievance because Campbell and ATU had a vendetta against him (T. 74). No facts in the record indicate the reasoning of ATU representatives in deciding not to pursue Coley's lunch break grievance.

### Legal Arguments

Coley argues that ATU breached its duty of fair representation by conducting the vote in a manner that was arbitrary, discriminatory or in bad faith. Coley argues that he had a tumultuous relationship with the union leadership at that time because he continually challenged it. In particular, he accused ATU President Cribb of misappropriating union funds, and he was involved in a serious physical altercation with Union Vice President Campbell that culminated in Coley stabbing him in self-

defense. Coley claims that ATU officers did little to investigate the sleeping-on-the-job claims. He contends that ATU president Cribb's disparate treatment of Jim Crespo's grievance and his grievance at the September 1, 2015, membership vote breached the duty of fair representation. Charging Party contrasts ATU President Cribb's decision to remain silent regarding the merits of Coley's discharge with his decision to inform the members that Jim Crespo's discharge was unjust because he was not trained to clean buses, thereby violating the union officers' purported practice of refraining from commenting before opening the floor to a grievant. Regarding the lunch break grievance, Coley argues that the decision not to pursue it was arbitrary, discriminatory or in bad faith because there was no legitimate reason not to file it. Coley asserts that ATU President Cribb did not file the grievance or notify him of his refusal to do so because of his personal animosity towards him.

Although Coley claims in his amended charge that NJT violated the Act, nothing in his post-hearing brief argues how the record supports that finding. Charging Party Counsel did not provide an explanation for this omission in her post-hearing

brief.<sup>23/</sup> Coley appears to have abandoned all asserted statutory claims against NJT.<sup>24/</sup>

The ATU contends that its refusal to arbitrate Coley's grievances did not breach its duty of fair representation. With respect to the discharge grievance, it emphasizes that two witnesses saw Coley sleeping in a bus at the garage, and that Coley had (what it characterizes as) an extensive disciplinary record. ATU maintains that it is the responsibility of the grievant to persuade the union membership to permit arbitration in a presentation that the grievant makes at a union meeting. It followed that procedure for Coley. It argues that the membership arrived at a reasonable conclusion that NJT would meet its burden of proof at an arbitration hearing and therefore voted against arbitration. ATU speculates that "the probable reason for the vote was that Mr. Coley was found sleeping on the job." It

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<sup>23/</sup> In a November 28, 2018 email from Charging Party Counsel, she acknowledges that her post-hearing brief "contains arguments regarding the Union's breach of duty only. As NJ Transit was not involved in the decision whether to arbitrate his grievance or to file his other grievance a response from NJ Transit may not be warranted."

<sup>24/</sup> Given the Charging Party's failure to make any legal arguments in support of the allegations against NJT in the Complaint, I needn't summarize the arguments NJT made in its post-hearing brief or reply brief. I note only that NJT's post-hearing submissions correctly point out that the two statements provided by Foreman Calabrese and ATU Vice President Campbell are not necessarily irreconcilable. Instead, they could be read to establish that they both saw Coley sleeping at different moments rather than simultaneously observing him asleep.



claims that the failure to provide Coley video footage until the day of the union meeting was inconsequential because the video was detrimental to Coley's case because it showed Hall and Campbell walking off together as they had explained in their statements. It notes that Coley had been discharged previously for sleeping and that the union assisted with his reinstatement at step two of the grievance procedure. ATU claims that Coley's accusation against Cribb, and the decades-old stabbing incident with Campbell have no nexus with Coley's recent discharge. It argues that the fact that Coley cut Campbell in the neck with a knife and left a scar does not necessarily mean that Campbell still held animosity towards him. It notes that Campbell was acquitted in the relatively recent criminal matter in which Coley provided testimony against Campbell regarding his alleged throwing of a chair at another union member at a union meeting. ATU explains that Campbell only searched for Coley because he needed to obtain the drop box that was in Coley's bus, and that Campbell provided a statement because he was instructed to do so. It also notes that both Cribb and Campbell denied being friends, as Coley had claimed and that friendship between union officers does not establish a violation of the Act. It emphasizes that senior employees claimed that Coley was the "troublemaker," rather than Campbell or Cribb. It explains that the normal procedure is for the ATU president to refrain from commenting on

the merits of the grievance, and leave it to the grievant to defend. It further contends that "[i]f Mr. Cribb had actually spoken about the grievance, he would have nothing good to say." It also notes that current Union President Rice testified that Cribb incompetently handled an overtime grievance of his, but that Cribb's conduct was not discriminatory.

With respect to the claim that ATU breached its duty of fair representation in handling Coley's lunch break grievance, it contends that it acted properly in not pursuing the grievance. ATU claims that Coley did not work through lunch, but instead slept through lunch, and therefore, NJT wasn't obligated to pay for Coley's lunch break. Therefore, ATU continues, it made a good faith evaluation of the grievance and rejected it. ATU also argues that the failure to notify a member that it will not pursue the member's grievance is inconsequential since the member was not harmed. It claims that Coley could have asked the ATU about the status of his grievance rather than filing an unfair practice charge.

### **ANALYSIS**

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a collective negotiations agreement. With that power comes the duty to represent all unit employees fairly in both contexts. The standards in the private sector for determining a union's

compliance with the duty of fair representation were set forth in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. That standard has been adopted in our public sector. Saginario v. Attorney General, 87 N.J. 480 (1981); see also, Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Edison Tp. Ed. Assn. (Ziznewski), P.E.R.C. No. 2014-86, 41 NJPER 49 (¶13 2014).

A union is allowed a wide range of reasonableness in servicing its members. A majority representative must evaluate an employee's request to arbitrate or otherwise appeal discipline on the merits and decide, in good faith, whether it believes that the employee's claim has merit. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005), citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953). The majority representative must exercise reasonable care and diligence in investigating, processing and presenting grievances, but proof of negligence, standing alone, does not establish a breach of the duty. OPEIU Local 153 (Johnstone), P.E.R.C. No.84-60, 10 NJPER 12 (¶15007 1983). The duty of fair representation does not require a union to arbitrate every grievance. Passaic Cty. Support Staff Assn. (Ernst), P.E.R.C. No. 2015-23 43 NJPER 203

(¶69 2014); Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987).

ATU's Processing of Coley's Discharge Grievance

The Commission has recognized that performance of the duty of fair representation may properly include a membership's consideration of and vote on whether a grievance should be taken to arbitration. ATU, Div. No. 821, P.E.R.C. No. 91-26, 16 NJPER 517 (¶21226 1990), aff'g H.E. No. 91-3, 16 NJPER 467, 470 (¶21201 1990) (union complied with duty of fair representation in part by providing grievant opportunity to present his case before members and answer their substantive questions about grievant's conduct and to "campaign" in favor of membership approval to arbitrate; grievant brought about his own "demise" by having made no effort to seek favorable vote in close election); Distillery Workers Local No. 209, P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987) aff'g H.E. No. 88-8, 13 NJPER 683 (¶18254 1987) (hearing examiner finding that grievant was kept "thoroughly apprised" of discharge grievance at all steps of the procedure and union officer prepared an agenda outlining grievant's case based on documentation it received for union meeting where members voted against proceeding to arbitration); New Jersey Transit, D.U.P. No. 90-12, 16 NJPER 256 (¶21106 1990). Stated another way, the duty of fair representation encompasses obligations that cannot

be avoided by a union delegating the authority to make decisions and when those decisions are delegated to the membership, the union is not immune from the consequences, since, by having selected the method for determination, it is underwriting its inherent fairness. General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.), 217 NLRB 616 (1975), enf'd 545 F.2d 1173 (9<sup>th</sup> Cir. 1976).

The National Labor Relations Board (Board) similarly has examined the circumstances surrounding an arbitration vote in determining whether a union breached its duty of fair representation in its delegation of the arbitration decision. In ATU Division 822 (Trujillo), 305 NLRB 946 (1991), the Board adopted an Administrative Law Judge's (ALJ) determination that a membership's secret ballot vote not to arbitrate four grievances separately contesting the terminations of four unit employees for theft of revenue complied with the duty of fair representation, despite the executive board's recommendation to proceed to arbitration because the grievances had a "50-50" chance of success and questions from members seeking disclosure of their financial costs for arbitrating the four grievances and the impact on their seniority in the event that the grievances were sustained. The membership was told that they would be assessed the costs of any grievance sent to arbitration and if the grievants were successful, they would be reinstated to their

former positions and those who now held those jobs would be returned to their prior jobs. The ALJ dismissed arguments from the General Counsel that the two concerns raised by the membership led to an arbitrary decision not to arbitrate, violating Vaca standards.

The ALJ acknowledged that “. . . a pecuniary interest coupled with a job interest in the outcome of a vote regarding whether to process a grievance to arbitration might exert more influence on the membership voting than if only one such interest were involved.” The ALJ found however, that the membership had given consideration to the merits of the grievances and decided that they lacked sufficient merit to justify the expense of arbitration. Specifically, the ALJ found that the ATU representative explained the grievances to the membership and answered their questions about costs and impact on seniority truthfully; the grievants were given the opportunity to present their cases to the membership; that the membership knew about the reasons for discharge; and considered the merits of the grievances in the decision-making process.

Relying on the rationale in ATU Division 822, I previously recommended dismissal of a complaint alleging that a majority representative breached its duty of fair representation where the record established that the membership that ultimately voted against contesting a grievant's discharge at arbitration,

considered rational and objective criteria in reaching that conclusion. New Jersey Sports & Exposition Authority, H.E. No. 2016-001, 42 NJPER 124 (¶36 2016) (members knew the circumstances of the incident leading to the grievant's discharge, numerous documents were made available to them, and they discussed whether union counsel's advice not to proceed to arbitration should be followed).

I find in this case that the ATU breached its duty of fair representation by arbitrarily handling Coley's discharge grievance at the union meeting(s) at which the membership vote was cast. The ATU, through its officers, particularly then-President Cribb, failed to undertake any meaningful efforts to ensure that the members voting on whether to arbitrate Coley's discharge grievance were making that determination based on at least some rational and objective criteria. There is no dispute that Cribb did not inform the membership about the most fundamental aspects of Coley's discharge grievance. He didn't provide an overview or summary about the events leading to Coley's discharge. He didn't provide any explanation of the evidence NJT presented or what transpired at previous steps of the grievance procedures. Nor is it clear whether any ATU representative actually reviewed the video that NJT provided in discovery.

The record also shows that ATU failed to ensure that Coley had a meaningful opportunity to advocate on his own behalf and to educate the membership about the details of his discharge grievance. Although the ATU's processing of Coley's grievance up to Step 2 was not legally deficient under Vaca,<sup>25/</sup> Coley was never provided any details about what transpired at the step 3 grievance, although he had asked. ATU did not typically permit grievants to attend the Step 3 meeting with President Cribb, in this case rendering Coley entirely dependent on ATU for information regarding that meeting. Despite asking for a copy of the video since his step 2 meeting on August 26, Coley did not actually receive a copy of it until immediately before the morning session of the September 1 union meeting, when the first round of voting occurred. Although the video would ultimately prove to be largely inconsequential, Coley had no way of knowing what the video did or didn't reveal about his conduct and the witnesses's conduct until he watched it. Since the ATU did not

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<sup>25/</sup> Although much of the Charging Party's case was devoted to the exceedingly problematic history between Coley, Campbell and Cribb, little evidence supports the conclusion that the contentious and at times violent nature of their relationship impacted the initial processing of Coley's discharge grievance under the deferential standards of Vaca. While the union officers certainly could have done more to effectively represent Coley, such as by talking to Coley before the step meetings, the record shows that it timely filed and processed Coley's discharge grievance and conducted a slightly more than superficial investigation of the circumstances leading up to his discharge.



provide him the video until immediately before the morning meeting or make any effort to educate him about what the video revealed, and since then-President Cribb rejected Coley's request (without any explanation) to show the video to the members, Coley was not in a position to educate the members about one of the pieces of evidence NJT submitted through discovery in support of his discharge. Though Coley was able to watch the video before the second round of voting at the evening union meeting, many, if not a majority, of the voting members had attended the morning meeting and voted.

President Cribb's defense of Crespo's discharge grievance at the morning union meeting further underscores ATU's arbitrary conduct. Cribb either broke from his long-time practice of refraining from commenting on grievances when he defended Crespo, or he, as Coley claimed, would typically comment on the merits of the grievance before members voted on whether to proceed to arbitration. Either way, Cribb's comments regarding Crespo's grievance show disparate treatment. Such treatment also supports the conclusion that Cribb harbored animus towards Coley because he challenged him to provide documentation regarding union-related expenses, accused him of misappropriating funds, and generally acted as a "jailhouse lawyer" or "concerned coworker" depending on one's perspective. More importantly, though Cribb's defense of Crespo was simple, it had the benefit of informing the

membership about the basic aspects of the dispute, such as Crespo's job title, the work that he performed at the time of his discharge, the reason for his discharge, and his training history with NJT.

Like any majority representative, ATU was under no obligation to concoct a defense for a unit member if it did not honestly believe that a viable one existed. ATU was legally required to ensure that the members' voting determinations were at least partially informed to avoid arbitrary decision-making. To that end, the ATU leadership took no action, and according to Cribb, intentionally "le[ft] everything blank. . . ." Such conduct stands in contrast to a union's obligation set forth in Commission and Board case law, as discussed earlier. Compliance with the duty of fair representation in this context should demonstrate that the voting members were educated about the merits of the grievance, including the various considerations that weighed in favor of or against proceeding to arbitration. In short, ATU abdicated that responsibility and passed it entirely to Coley, thereby breaching its duty of fair representation. To the extent that a majority representative could conceivably and lawfully place the entire responsibility of educating the membership before an arbitration vote on a particular grievant, the ATU failed to put Coley in a position

that would have enabled him to do so before the membership voted on his request for arbitration.

ATU's Processing of Coley's Lunch Break Grievance

ATU also acted arbitrarily in failing to file Coley's lunch break grievance. The record establishes that Cribb, as ATU President, determined whether a grievance should be filed; that Cribb believed working through a lunch break would violate the contract; that Cribb knew Coley wanted the ATU to file a grievance for working through his lunch break; that this grievance was not filed, and that Cribb was unable to articulate any justification for not doing so. No evidence indicates that President Cribb or the other ATU representatives simply made an error in failing to file Coley's lunch break grievance. Although ATU claims in its post-hearing brief that Coley did not work through lunch but instead slept through it, no evidence in the record indicates that the merits of Coley's claim actually served as a justification for ATU's decision not to file it. Instead, President Cribb testified that through his conversation with Campbell, he learned that Coley was sleeping on the bus "prior to his break" and that he did not know why the lunch break grievance was not filed (T. 330-331; 336-337). The ATU cannot defend its handling of Coley's lunch break grievance by now asserting a reason that it failed to produce in the hearing. There is simply no support in the record for the claim that ATU made a good faith

evaluation of the grievance. Given the absence of reasoned decision-making in the record, the ATU's failure to file Coley's lunch break grievance was necessarily arbitrary, and therefore violated its duty of fair representation.

#### NJT's Liability

Based on the record adduced at the hearing, I conclude that no facts support the allegations that NJT violated Section 5.4a(1), (3) or (5) of the Act. The Charging Party submitted a business record that established that Coley vaulted the last bus after 3:00 a.m. In the hearing, Coley didn't offer any justification for why he was late or why he failed to respond to repeated paging. Instead, there are two written statements providing that Coley was observed sleeping inside of a bus, and though there are some discrepancies between them, they aren't necessarily irreconcilable (Foreman Calabrese's statement doesn't aver that he and Campbell jointly discovered Coley asleep). The Charging Party had the opportunity to explore the ambiguity regarding who, if anyone, Calabrese accompanied when he observed Coley sleeping on a bus; it ultimately declined to call Calabrese to testify. Campbell's testimony about his discovery of Coley sleeping was largely consistent with his writing that he provided years earlier to NJT. The record simply doesn't set forth Coley's version of events that would account for his late vaulting on August 19<sup>th</sup>, or otherwise refute the truthfulness of

the written statements. Even if I wholly discount Campbell's statement (given his troubling prior assault on Coley, albeit decades ago, and his celebratory cigar at the garage following Coley's discharge), there yet remains Calabrese's written statement about his discovery of Coley sleeping. Accordingly, NJT's version of events is more consistent with the evidence produced at the hearing than Coley's theory of collusion between NJT and ATU in causing his discharge.<sup>26/</sup> Additionally, there is no dispute that sleeping on the job is a dischargeable offense. Regarding the lunch break grievance, there is insufficient evidence to establish that Coley in fact worked through his lunch break as claimed or that he was not properly paid for it.

I find insufficient evidence in the record to conclude that NJT's discharge of Coley and failure to pay him for work during a break was in retaliation for or otherwise connected to any type of protected activity that Coley may have engaged in over his many years at NJT. Other than unproven allegations of retaliation and collusion, Coley's complaints against NJT essentially amount to contractual disputes. The Commission has

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<sup>26/</sup> The NLRB has recognized that employers who participate in union conduct that violates 8(b)(2) of the NLRA may violate Section 8(a)(3) when for arbitrary reasons "the union attempts to cause or does cause an employer to derogate the status of an employee." However, there are no facts that show the ATU caused NJT to discharge Coley or work through his lunch break. Miranda Fuel Company, Inc., 140 NLRB 181, 185-88 (1962).

long-held that mere contractual breaches do not violate the Act.

State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The Charging Party also consciously failed to articulate any basis for finding a statutory violation in its post-hearing brief, apparently abandoning its claims against NJT. Accordingly, I recommend dismissal of the allegations against NJT in their entirety.

In sum, I find that ATU violated section 5.4b(1) of the Act by arbitrarily handling Coley's discharge and lunch break grievances. I recommend the dismissal of all other claims against ATU and all claims against NJT.

**RECOMMENDED ORDER**

I recommend that the Commission ORDER:

A. That Respondent Amalgamated Transit Union Division 540 ("ATU") cease and desist from:

1. Arbitrarily processing grievances, particularly by failing to inform members about the merits of Jamar Coley's discharge grievance before they voted on his request to proceed to arbitration and by failing to file his grievance regarding working through his lunch break.

2. In any like or related manner, restraining, or coercing employees in the exercise of the rights guaranteed to the by the Act.

B. Respondent ATU take the following affirmative action:<sup>27/</sup>

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<sup>27/</sup> I decline to recommend a make-whole remedy. Commission case law on the issue of when a make-whole remedy may be awarded when a union breaches its duty of fair representation by improper grievance handling is largely undeveloped. The Commission has frequently sought guidance from the NLRA in such circumstances. In duty of fair representation cases under the NLRA, if it is not possible for a grievance to be processed and the grievance is shown to have had merit, the offending union is required to make the employee whole for losses caused by its improper handling of the grievance. Ironworkers Coal Union 377 (Alamillo Steel), 326 NLRB 375 (1998); Rubber Workers Local 250 (Mack-Wayne II), 290 NLRB 817 (1988), modifying 279 NLRB 1074 (1986) (Mack-Wayne I). However, the question of whether a grievance has merit is typically adjudicated in a separate compliance proceeding after the unfair practice proceeding results in a determination that the duty of fair representation was

(continued...)

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

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27/ (...continued)

breached. There have been competing models over the years regarding the proper burden allocation between the employee and the offending union that should be followed to resolve such disputes about the ultimate merits of the grievance at issue. Compare Mack Wayne II (if union unsuccessful in obtaining relief for the grievant from the employer, then the union would be required to make the grievant whole if the General Counsel established that the underlying grievance was not clearly frivolous and the union failed to prove that its conduct did not cause any injury because the grievance was not meritorious) with Alamillo Steel (if union unsuccessful in obtaining relief for the grievant from the employer, the union must make the grievant whole for the increase in damages caused by its unlawful conduct if the General Counsel establishes that the grievance would have been meritorious). Under either model, it is clear that there needs to be some threshold showing regarding the merits of the grievance for there to be an opportunity to be awarded a make-whole remedy. As explained above, there is a notable lack of evidence to support the conclusion that either of Coley's grievances had arguable merit under Mack Wayne or would have resulted in a favorable determination at arbitration under Alamillo Steel. Therefore, I do not have sufficient facts based on this particular record to conclude there was any nexus between the ATU's arbitrary conduct and any damages that would justify ordering a separate proceeding to determine the amount of damages. There may certainly be cases involving breaches of the duty of fair representation that present important questions regarding whether this agency should follow either of the NLRB's remedial approaches and the proper forum for determining damages. In this matter, a notice posting will sufficiently remedy the Commission should follow either of the NLRB's remedial approaches and the proper forum for determining damages. But in this matter a notice posting will sufficiently remedy the union's arbitrary conduct.



Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent ATU has taken to comply with this Order.

/s/ Jonathan Roth  
Jonathan Roth  
Hearing Examiner

DATED: June 7, 2021  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 17, 2021.



# NOTICE TO EMPLOYEES

## PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

**We hereby notify our employees that:**

Respondent Amalgamated Transit Union Division 540 ("ATU") **will cease and desist from:**

Arbitrarily processing grievances, particularly by failing to inform members about the merits of Jamar Coley's discharge grievance before they voted on his request to proceed to arbitration and by failing to file his grievance regarding working through his lunch break.

**WE WILL** cease and desist in any like or related manner, from restraining, or coercing employees in the exercise of the rights guaranteed to the by the Act.

Respondent ATU will take the following affirmative action:

**WE WILL** post in all places where notices to employees are customarily posted, copies of the attached notice as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

**WE WILL** notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent ATU has taken to comply with this Order.

Docket No. CI-2016-035

New Jersey Transit, Mercer  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830