

DC 37, 15 OCB2d 11 (BCB 2022)

(IP) (Docket No. BCB-4325-19).

Summary of Decision: The Union claimed that the City, DPR, and DOT violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain over the use of data obtained via vehicle monitoring technology for disciplinary purposes. The Union further argued that the City failed to bargain over the impact of vehicle monitoring technology on employee privacy. The City argued that the use of vehicle monitoring technology falls within the City’s management rights under NYCCBL § 12-307(b), that this technology does not represent a new basis for discipline, and that the City has an overwhelming interest in using such data to minimize dangers to the safety of employees and the public. The Board ruled that the City was obligated to engage in impact bargaining regarding the use of vehicle monitoring technology for discipline and directed impact bargaining upon the demand of either party. The Board dismissed the Union’s remaining claims. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

- and-

**THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, and THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,**

Respondents.

DECISION AND ORDER

On March 29, 2019, District Council 37, AFSCME, AFL-CIO (“DC 37” or “Union”) filed a verified improper practice petition against the City of New York (“City”), the New York City Department of Parks and Recreation (“DPR”), the New York City Department of Transportation

(“DOT”).¹ The Union asserts that Respondents failed to bargain over the use of data obtained via vehicle monitoring technology for disciplinary purposes in violation of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (4). The Union further argued that the City failed to bargain over the impact of vehicle monitoring technology on employee privacy. The City argues that the use of vehicle monitoring technology falls within the City’s management rights under NYCCBL § 12-307(b), that this technology does not represent a new basis for discipline, and that the City has an overwhelming interest in using such data to minimize danger to the safety of employees and the public. The Board finds that the City violated its obligation to engage in impact bargaining regarding the use of vehicle monitoring technology for discipline and dismisses the Union’s remaining claims. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The City operates over 31,000 owned and leased vehicles. Under the City Charter, the City’s Department of Citywide Administrative Services (“DCAS”) is responsible for the acquisition and management of City vehicles operated by the various agencies. Within DCAS, NYC Fleet manages the City’s fleet of vehicles for sixty City agencies and offices that operate vehicles, including ten major fleet operating agencies such as the DOT, DPR, and the Department of Sanitation.

District Council 37, AFSCME, AFL-CIO (“DC 37”) is an amalgam of 63 local unions representing over 150,000 public sector and not-for-profit employees in various agencies,

¹ The petition named the New York City Office of Labor Relations (“OLR”) as a party. OLR is not a proper party to the instant matter, and we amend the petition *nunc pro tunc* to remove OLR as a party and adjust the caption accordingly.

authorities, boards, and corporations throughout the City of New York. DC 37 is the certified bargaining representative of various titles including Motor Vehicle Operator (“MVO”), Assistant Highway Repairer, Traffic Device Maintainer, Administrative Construction Project Manager, and Urban Park Ranger, employed at DOT, DPR, the Department of Environmental Protection (“DEP”), and the Department of Design and Construction (“DDC”).

Vision Zero, GPS Technology and Telematics

Since 2014, NYC Fleet has been involved in promoting and implementing former Mayor Bill de Blasio’s “Vision Zero” program. Vision Zero is a comprehensive plan to reduce pedestrian fatalities in the City. Program components of Vision Zero include increased enforcement of speeding laws, redesign of street intersections, expanded use of speed cameras, and increased public outreach. One of the Vision Zero goals is to “[e]nsure all City fleet vehicles are equipped with technology that record speeding and other dangerous driving behaviors ...” (Rep., Ex. 1) According to the City, since the inception of the Vision Zero program the number of traffic injuries involving City vehicles has gone down 15%, and the number of fatalities has been reduced by 75%.

As part of the Vision Zero program, in 2014 the City began installing a brand of electronic device known as a “CANceiver” in all City vehicles. The CANceiver monitored vehicle location via Global Positioning System (“GPS”) technology, recorded other data including speed, acceleration, braking, and seatbelt use (collectively “telematics”), and transmitted this data to NYC Fleet. NYC Fleet then made the data available to agency fleet managers and other designated agency personnel. When plugged into a vehicle’s dataport, the CANceiver collected data from the vehicle’s internal computer. CANceivers transmitted the data over NYCWiN, a wireless network operated by the NYC Department of Information Technology and Communications (“DOITT”).

The reliability and coverage of the NYCWiN network was limited, and there were dead zones throughout the City. Due to the spotty connectivity, data was not transmitted in real-time, but only when the vehicle was in a location with adequate reception.

In or around 2017, DOITT decided to decommission NYCWiN. The City then contracted with AT&T to provide the wireless network for data transmission from a different telematics device called Geotab. The Geotab device plugs into the same vehicle dataport as the CANceiver and collects the same data. As a result of the much-improved network, the Geotab data is transmitted in real-time.

Vehicles equipped with a telematics device are “always being tracked.” (Tr. 370) The principal difference between the CANceiver and Geotab devices is that with Geotab, the data transmitted from City vehicles over AT&T’s 4G cellular network is available in real-time. This includes the ability to send alert notifications via email to designated agency personnel such as fleet managers and supervisors of field personnel for designated events such as collisions, excessive speed, and unused seat belts. The Union presented email notifications sent from “Geotab.com” to DOT field supervisors advising that DOT vehicles were being operated with a seat belt unbuckled, were exceeding the posted speed limit, or were present in an “Exception Location.”² (Union Ex. 9) Similar information was available from the CANceiver system, but not in real time.

² An “Exception Location” is either an employee outside of their assigned area or in a location “hot spot” being monitored by the employer, such as a shopping mall. One of the email notifications had a follow-up email from an employee in DCAS’s Office of Real-Time Tracking advising the supervisor that the vehicle was parked by the “Queens Center Mall” and asked the DOT supervisor to “contact the driver and confirm with us whether or not this was for official City business.” (Union Ex. 9)

The Geotab device also provides the option to utilize a keyfob system. On March 19, 2019, DPR issued a memo to employees stating that, in the coming weeks, all DPR-authorized drivers would be assigned and issued a Geotab keyfob. The keyfobs are issued to individual drivers and programmed with their identifying information. When a driver enters or leaves a vehicle, the keyfob is swiped against a keyfob reader located by the ignition or steering wheel. The keyfob records the driver's identity, obviating the need for them to complete a paper log known as a "trip ticket." (Tr. 434-435) Prior to the introduction of the Geotab keyfob, employees driving City vehicles manually made a log entry on the trip ticket for every trip taken. These paper forms were used for more than twenty years as the official record of the date and time of vehicle usage, daily locations, destinations, and stops.³

The telematics data from Geotab is transmitted to DCAS Fleet. DCAS Fleet uses the data to analyze various issues, including the types of driving behavior that are more or less likely to cause traffic accidents and injuries, fleet utilization for the purposes of fleet reduction, and fuel economy in connection with environmental impacts. DCAS also collects and provides anonymized data to the U.S. Department of Transportation for a study regarding "autonomous connected vehicles."⁴ (Tr. 296) DCAS Fleet receives data from all vehicles within its fleet while

³ DEP announced the implementation of Geotab keyfobs in November 2020. At the time of the announcement, some vehicles in DEP's fleet used paper trip tickets and mileage logs, but for most of its vehicles it had already implemented a system that was similar to the Geotab keyfob system, which obviated the need for paper forms. Employees had a sticker attached to their employee ID cards which they swiped when taking an agency vehicle. After November 2020, DEP switched to a new sticker that was swiped against the Geotab reader.

⁴ A small speaker and microphone were also placed in certain City vehicles, which the Union speculated was part of the Geotab system. The record shows that these devices are part of the U.S. DOT program and are unrelated to Geotab, and the data collected through these devices is not provided to either DCAS or individual agencies.

individual agencies receive data only from the vehicles operated by their agency. The data from DCAS Fleet is transmitted to a limited number of agency employees authorized by DCAS Fleet.⁵ Authorization for data access by non-DCAS agency personnel is obtained by the submission to DCAS of a request form by an agency's General Counsel or a Deputy Commissioner. Access to data is typically requested for fleet or operations coordinators, health and safety personnel, or analysts. At the request of an agency, DCAS will also transmit Geotab data notifications to field supervisors.

DC 37 and OLR officials met on February 21, 2019, to discuss the impact of the City's implementation of vehicle monitoring technologies. At that meeting, OLR officials informed the Union that the City was in the process of replacing CANceivers with Geotab in all City vehicles and that Geotab devices had been placed in over 8,000 vehicles. OLR stated that, while DCAS still "controls" the data, Geotab has a new system that allows supervisors at City agencies to "manage" the data. (Pet. ¶ 39; Ans. ¶ 39) The City also discussed the tracking capabilities of Geotab and the use of the AT&T wireless network. (Pet. ¶¶ 39-40; Ans. ¶¶ 39-40) The Union submitted a series of questions pertaining to the cost of the Geotab equipment, data access and retention, and whether the devices would actually improve safety. (Pet. ¶ 41, Ans. ¶ 41) The

⁵ Authorized agencies using Geotab receive automated weekly reports based on Geotab data. The weekly reports consist of a "Geotab Safety Scorecard" based on the following categories: hard acceleration, harsh breaking, harsh cornering, seat-belt violations, speeding, and excessive speeding. (City Ex. 6) Geotab also has an "entry system" providing such agencies access to look up data for their own agency. (Tr. 331). More than 300 staff citywide from different agencies have access to Geotab data. The record does not reflect the precise data available to individual agencies to look up through the Geotab entry system.

Union alleges, and the City denies, that the City has otherwise “failed or refused to bargain over this matter.”⁶ (Pet. ¶ 45, Ans. ¶ 45)

Prior History of GPS/Telematics

Sometime after the introduction of CANceivers in City vehicles in 2014, DC 37 demanded bargaining over the impact of the devices on discipline. Thereafter, the City and the Union met to discuss the issue but no agreement was reached. Following a number of instances where CANceiver data was utilized for disciplinary purposes, on April 10, 2017, DC 37 filed an improper practice petition, docketed as BCB-4102-15, against the City demanding bargaining concerning the impact of the City’s decision to install CANceivers in its vehicles and alleging that the City had failed to bargain concerning disciplinary procedures.⁷

On January 25, 2018, OLR’s Senior Assistant General Counsel wrote the Union a letter stating in relevant part as follows:

[T]he City of New York does not have a policy of performing audits of CANceiver data for the purpose of initiating employee discipline. The City will continue to exercise its right to use such data that is relevant to disciplinary matters that involve the operation of City vehicles. In the event there is a change in the City’s policy regarding

⁶ Although the City denies the allegation that it failed to bargain following the February 2019 meeting, it provided no facts to the contrary in the pleadings. Neither party presented additional evidence at the hearing regarding any bargaining subsequent to February 2019.

⁷ In connection with the events leading up to the filing of the petition in 2017, Marlene Giga, Treasurer of Local 983, DC 37 (“Local 983”), testified concerning two disciplinary conferences held by DPR. Giga testified that the Parks Advocate’s Office presented CANceiver data as evidence in support of charges that two drivers had falsified their trip tickets and left their assigned work locations without authorization. Giga testified that she could not understand the documentation containing the telematics data and that DPR’s lawyer would not explain the data except to say that “the CANceiver does not lie.” (Tr. 52) Giga explained that the failure to explain the data impaired her ability to represent her members because she could not understand or offer a defense to the charges. Pia Rivera, the Parks Advocate, acknowledged that CANceiver data was presented at the disciplinary conferences, but stated that telematics data was not the only evidence used at the conferences. Rivera further testified that DPR did not take any further disciplinary action against the two drivers.

the use of such data to initiate discipline, the City will provide notice to District Council 37 in advance of that change.

(Pet., Ex. C)

DC 37 subsequently withdrew the improper practice petition stating that, “Based upon the City’s issuance of their letter dated January 25, 2018, which indicates that the City does not have a policy of performing audits of CANceiver data for the purpose of initiating employee discipline, the Union respectfully requests that the above-referenced Improper Practice Petition is withdrawn, without prejudice.” (Pet., Ex. D) Thereafter and until installation of Geotab devices, there is no evidence that the City initiated discipline solely based on telematics data.

Evidence of Discipline Based on Telematics

The record reflects that since the installation of Geotab, drivers have been issued verbal and written warnings based solely on telematics data at certain agencies. Michael DeMarco, President of Local 1455, DC 37, and other Union witnesses, testified that MVOs have received verbal and written warnings based exclusively on Geotab notifications for traffic infractions and location exceptions. The summary that follows describes the evidence by agency.

DOT’s Chief Operations Officer issued a memorandum on December 17, 2018, directed to “Employees Driving DOT Vehicles” with the subject “Implementation of Geotab Telematic Program.” (Pet., Ex. F) The memo states as follows:

The Department of Citywide Administrative Services (DCAS) has begun implementation of its vehicle tracking initiative with the use of the Geotab fleet tracking platform. Geotab is a telematics company which monitors vehicles by combining GPS technology with on-board diagnostics. Some of the features the system can record – and map – are exactly where a vehicle is, its speed, and how it is being operated. This system is being installed in the vehicles of all City agencies.

Under this initiative, DCAS (and other oversight agencies) will have the ability to closely monitor all vehicles in our fleet in real time,

24/7. We will also have access to the system to monitor the same information, which includes:

- Where a vehicle has travelled or was parked, as well as current location
- The speeds at which the vehicle has been traveling in comparison to the posted speed limits
- Hard-braking
- Excessive acceleration
- Seatbelt usage
- Idling
- Accident detection

Over the next several months as our entire fleet will be outfitted with these telematics, we will become more familiar with the information that we are receiving and will provide specific feedback to employees on any concerns with their driving behavior. It is likely that telematics will follow a similar procedure as our camera violations in terms of progressive discipline for infractions. In the meantime, as this initiative is being implemented, it is important that employees drive carefully and responsibly while operating City vehicles.

(Pet., Ex. F)

The December 2018 DOT memo refers to a policy regarding discipline for driving infractions reported through camera violations that required a verbal warning for the first infraction, a written warning for the second, and a referral to formal discipline for the third infraction. The camera violation policy was in effect for approximately 16 months and was rescinded in May 2019.⁸ DeMarco testified that prior to the camera violation policy employees were not disciplined for speeding or other traffic law violations. Instead, employees were simply

⁸ We take administrative notice that on January 9, 2018, DOT issued a memorandum entitled Guidance for Managerial and Supervisory Employees Concerning Camera Violations. Pursuant to the May 20, 2019 settlement of the improper practice petition in BCB-4314-19, that memorandum was rescinded.

obligated to pay fines associated with vehicles they drove.⁹ On rare occasions, if a 311 complaint was received for speeding, employees were called in for an investigation. Wilson Valera, a seasonal Assistant City Highway Repairer at DOT, similarly testified that in his four years of employment prior to Geotab, DOT did not discipline employees for driving infractions. However, Valera was given a verbal warning for allegedly speeding on October 5, 2019, and a written warning for allegedly speeding on October 10, 2019, based exclusively on Geotab data. Indeed, Valera's DOT Record of Progressive Discipline describes both infractions as violations of the "speed limit due to Geotab." (Union Ex. 8).

Gordon Goldberg, DOT's Director of Labor Relations, testified regarding the disciplinary process generally and in relation to telematics data specifically. Goldberg testified that all minor disciplinary infractions follow the same basic procedure: a first infraction receives a verbal warning, a second infraction receives a written warning, and a third infraction "may" be referred for formal discipline. (Tr. 515) Warnings, whether verbal or written, are recorded on an employee's DOT Record of Progressive Discipline form. The disciplinary form has been in use

⁹ The City Vehicle Driver Handbook provides:

Drivers are responsible for payment and adjudication of all summonses, including [DOT] red light violations, and associated fines/penalties received in connection with the use of a City Government Vehicle. Failure to do so may result in disciplinary proceedings and the loss of City Government Vehicle driving privileges...Drivers must resolve in a timely manner all summonses received in connection with moving violations issued to a City Government Vehicle. If the driver does not address such summonses accordingly, driving privileges may be revoked leading to possible suspension of City employment.

(City Ex. 3 at 8)

for at least 15 years and is used for disciplinary infractions that DOT does not consider “egregious.” (Tr. 521-22)

Goldberg acknowledged that DOT’s December 2018 memorandum stated that “telematics will follow a similar procedure as our camera violations in terms of progressive discipline for infractions.” (Tr. 515) He testified, however, that around the time Geotab devices were being installed, he and the DOT Deputy Commissioner for Human Resources and Facilities Management met to discuss how DOT would approach discipline based on telematics data and decided that driving infractions, unless “severely egregious” would not be treated as a disciplinary matter.¹⁰ (Tr. 518) Rather, DOT would notify employees of reported infractions and counsel them not to repeat them. He further testified that when DOT is informed about a traffic infraction based on telematics data, through a 311 call, or the observation of DOT personnel, it takes the same approach to discipline: a supervisor would investigate the alleged infraction before imposing discipline. Goldberg also testified that the DOT has not brought any formal disciplinary charges based solely on telematics. He noted that telematics have been relied on for formal discipline, but only with respect to location data “as confirmed by visuals by a supervisor.”¹¹ (Tr. 539)

At DPR, Local 983 Treasurer Giga testified that she attended a disciplinary conference on February 13, 2019. She was informed at the conference by a Deputy Inspector that a DPR employee monitors the Geotab data and sends out emails to supervisors regarding infractions.

¹⁰ We note that Goldberg testified that verbal and written warnings recorded on a DOT Record of Progressive Discipline form were not “discipline” because discipline only occurs when a matter is referred to the Advocate’s office.

¹¹ Keith Kerman, Deputy Commissioner and Chief Fleet Officer at DCAS, also testified that although DCAS has no role the disciplinary process, he was aware that agencies were using telematics data “as part of evidence in disciplinary cases ...[a]long with other potential fleet data like trip tickets or crash records as well.” (Tr. 419)

Further, an Urban Park Ranger received a “Supervisor’s Conference With Employee” memorandum on February 13, 2019, confirming “a conversation” with her supervisor regarding an allegation of excessive speeding. (Union Ex. 4) The memorandum was accompanied by a “Geotab Speeding Alert” email from Geotab to DPR on January 28, 2019 at 8:08 p.m. The e-mail identified the DPR vehicle by number, stated that the vehicle “broke the Excessive Speeding rule at 20:02:04 01/28/19... [by] traveling at 75 mph where the speed limit is 45 mph,” and provided the location of the occurrence.¹² (Union Ex. E) There is no evidence that DPR relied upon anything other than the Geotab email in issuing the memorandum.

Giga further testified that, prior to Geotab, DPR had not disciplined employees for location violations, nor initiated discipline based solely on telematics data.¹³ Rivera, the DPR Parks Advocate, testified that DPR employees were subject to discipline for driving infractions prior to the introduction of telematics for speeding, reckless driving, going to unauthorized locations, and operating a vehicle for personal use.¹⁴ Rivera explained that formal discipline is subject to a three step appeal process that concludes in arbitration or a disciplinary hearing while a discussion with a supervisor or a supervisor’s conference memo is “less formal discipline.” (Tr. 221)

¹² The employee submitted a rebuttal letter contesting the validity of the violation stating that except for being told by her supervisors that they “received a notification from the vehicle’s geotab,” no proof of the violation was provided. (Union Ex. E)

¹³ As indicated in footnote 7, there were two instances of discipline in 2017 at DPR in which CANceiver data was introduced, but the telematics data was not the only evidence DPR relied upon.

¹⁴ Prior to the introduction of telematics, DPR would learn of such infractions based on 311 calls, observation by supervisors, or through law enforcement. Reports would be investigated by Rivera’s office through various means, such as interviews, surveillance, or documentary evidence like a driver’s log. Rivera testified that infractions discovered through telematics are investigated the same way.

At DEP, there was also a change in the use of telematics data for discipline after the introduction of Geotab. Kyle Simmons, President of the New York City Laborers, Local 924, testified that he was told by OLR and DCAS representatives at a meeting in 2018 or 2019 that information from CANceivers would not be used “for disciplinary purposes...just to monitor” and that “there were not going to be any disciplinary actions with this.” (Tr. 589) However, in March 2021 Simmons attended a meeting at DEP regarding the Geotab alert notifications, at which point DEP advised the unions in attendance that the notifications may be used for discipline.

Aaron Feinstein, DEP’s Executive Director of Labor and Discipline, testified that DEP did not “troll” the Geotab data to initiate discipline, but that it may discipline employees based on “DCAS alerts.” (Tr. 740) He also testified that the data could be used for investigatory purposes based on complaints received from DOI or through 311. Feinstein also noted that Geotab data may be used to exonerate an employee if it did not substantiate a complaint.

At DDC, Michael Kenny, Chapter 4 President of Local 375, testified that he received four warning memoranda for excessive speeding based on CANceiver data dated between March and August 2019. The memoranda provide that “repeated speeding violations that exceeds three occurrences, may result in the suspension of your driving privileges.” (Union Ex. 7) Efthia Pasagiannis, the Director of the DDC’s Office of Compliance and Ethics, who is responsible for discipline, testified that the DDC has never disciplined employees for traffic infractions and that her office has not disciplined employees based on Geotab data. Pasagiannis testified that she had no knowledge of the warning memoranda issued to Kenny, which were issued by the DDC’s fleet operations unit. Further, she stated that the loss of driving privileges does not constitute discipline.

DeMarco also raised concerns about how the Geotab devices are being used including tracking employees “24 hour[s]/7 day[s] a week” and using the data collected for discipline.¹⁵ (Tr. 71) He expressed a concern over “false positives,” a situation where a telematics device misinterprets the vehicle location and incorrectly reports an infraction. For example, a portion of Third Avenue in Brooklyn runs directly beneath the Brooklyn-Queens Expressway. If a vehicle is driving at highway speed on the BQE, the telematics devices have incorrectly read the vehicle as driving on Third Avenue and issued notifications for excessive speed. Witnesses from both DOT and DCAS acknowledged that such errors occur. DOT notes, however, that affected employees would have the opportunity to contest a false positive through the disciplinary process.

Similarly, at an April 2021 meeting regarding Geotab, Simmons raised concerns about the accessibility of the data and the use of Geotab data for discipline at DEP. Specifically, he feared the possibility “of abuse of people just monitoring certain people that they didn’t like.” (Tr. 606) He was also concerned that employees would be called in for questioning because they washed up or ate lunch at a park or shopping mall or had to travel out of their area to get supplies. He feared that when questioned, employees would not likely remember details about where or when they went to the bathroom or got supplies. He further testified that employees on a job site would take whatever vehicle was available if required to leave the site and that the tracking data would be attributed to whomever was assigned the vehicle. He conceded, however, that he was unaware of anyone having been disciplined under such circumstances.

¹⁵ Similarly, Robert Spiro, Vice President of Local 1455, testified about concerns over how Geotab data was transferred and the fact that DOT did not explain how the data was stored or who had access to it. He also raised a safety concern about the device emitting radio signals inside the vehicle. He further noted that there are employees with take home vehicles and that Geotab remains engaged during their off-duty hours.

The Union also raised questions at the February 2019 meeting regarding third-party access to the Geotab data based on transmission over AT&T's wireless network. DCAS Deputy Commissioner Kerman testified that there is no third-party access to the Geotab data; however, it is subject to the Freedom of Information Law. Spiro testified that he expressed concerns about how Geotab data was transferred and stored, but that DOT never informed him where the data was stored or who had access. Simmons testified that when Geotab was discussed at labor-management meetings, DEP only represented that access to data was limited, but would not identify who had access. Feinstein similarly testified that he was not aware of who had access to Geotab data and referred such questions to DCAS. Feinstein testified that Geotab data would be subject to "subpoena or other legal process." (Tr. 730) Richardson acknowledged that third-party access to data was discussed in meetings with DC 37 and DCAS but could not recall the substance of DCAS's response.¹⁶

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City violated NYCCBL § 12-306(a)(4), and derivatively NYCCBL § 12-306(a)(1), by unilaterally utilizing vehicle tracking data for disciplinary purposes. It contends that this represents a change from the policy that the City would not use CANceiver data for disciplinary purposes, which the City enunciated in January 2018 in connection with an earlier improper practice petition, and that the City failed to notify it or bargain regarding the

¹⁶ We acknowledge that the Union and City presented considerable evidence regarding the amount of notice the Union and its locals were provided regarding the implementation of CANceiver and Geotab devices, and the training, or lack thereof, provided to employees. Because this evidence is not relevant to our findings, we have not summarized it in detail.

change. Citing *Municipal Highway Inspectors Local Union 1042*, 2 OCB2d 12 (BCB 2009), the Union argues that changes in methods of discipline are a mandatory subject of bargaining because they concern disciplinary procedures.

The Union asserts that the City did not provide notice, instructions, or answers regarding Geotab, its keyfob, or its microphone and speakers because Geotab installation was never intended to address employee safety. According to the Union, this demonstrates that the “sole purpose” of the Geotab device is as a method to discipline bargaining unit members. (Union Br. at 49) Indeed, it contends that DOT’s memo about the Geotab Telematics Program expressly provided that Geotab’s tracking data would be used for progressive discipline similar to the disciplinary procedures used for traffic cameras. Further, the City’s witnesses acknowledged that they have used or may use Geotab data to initiate discipline for traffic violations and/or alleged misuse of City vehicles. They also acknowledged that CANceiver and Geotab have issues with accuracy and can make errors regarding driving infractions.

In addition, the Union argues that Respondents have violated the NYCCBL by refusing to bargain over the privacy impact of CANceiver and Geotab data. According to the Union, Respondents have violated the privacy rights of bargaining unit members by engaging in 24/7 real-time tracking and allowing a third-party vendor to have access to employees’ Geotab data. Simmons and Spiro testified that, on occasion, City employees use their vehicles to drive to overtime hours and/or take their work vehicles home during off hours. In addition, the DCAS Deputy Commissioner and DEP Executive Director of Labor Relations testified that they did not know whether AT&T, Geotab’s wireless provider, had access to the employees’ driving information.

As a remedy, the Union seeks an order enjoining the City from using CANceiver and Geotab data for random checks of employees¹⁷ and as a basis to initiate and impose discipline; directing the City to bargain over the use of such data and the imposition of discipline based on such data; directing the City to expunge all disciplinary action taken against DC 37 members based on the information gathered via CANceiver or Geotab; and directing the City to restore all wages and benefits lost as result of discipline imposed against DC 37 members based on CANceiver or Geotab data.

City's Position

The City argues that it has no duty to bargain because the installation of vehicle-tracking technology and the use of data acquired by these devices fall within the City's management rights under NYCCBL § 12-307(b) to "determine the method, means and personnel by which governmental operations are to be conducted" and to "exercise complete control and discretion over its organization and the technology of performing its work." The City further contends that the use of Geotab data does not represent a new basis for discipline because the record reflects that there has been no change to its well-documented requirement that employees operate City vehicles safely and in compliance with traffic laws.

The City maintains that it has a long-standing policy of counseling and disciplining employees who operate City vehicles in an unsafe or unlawful manner. Such conduct, the City says, is subject to the same penalties regardless of whether the employer becomes aware of it via direct observation, citizen complaints, Geotab data, or law enforcement. According to the City, the fact that new technology allows for timely notification of unsafe or unlawful conduct does not

¹⁷ The record was not developed regarding this claim, nor was it addressed in either parties' brief. As such, we do not address it further.

alter its interest in the safe operation of its fleet or create a duty to bargain. The City asserts that Geotab is merely an advancement to existing technology and, like other electronic devices used by City employees, it does not materially change the responsibilities of the employer and employees.

According to the City, the testimony from each agency establishes that discipline relating to vehicle operation is administered in the same manner as it was prior to the introduction of the Geotab system. The City asserts that DOT's December 2018 memo did not announce a new disciplinary procedure and that no new procedure related to discipline based on Geotab information was implemented. The City notes that the examples of counseling in the record are not discipline. It argues that the testimony suggesting that employees could be disciplined based on false reports from Geotab has no support in the record. There is no evidence that any employee has been disciplined based on a "false positive."¹⁸ In addition, employees who think that discipline is unwarranted have due process protections under the collective bargaining agreement and the Civil Service Law.

The City also argues that, under a balancing of interests analysis, its interest in public safety, employee safety, and the safe and lawful operation of City vehicles prevails over employee privacy, especially considering the size of the City's fleet and the number of miles driven by City employees. According to the City, there is no evidence in the record that employees' privacy rights are implicated by the placement of Geotab devices on City vehicles. The City asserts that access to Geotab data is limited to agency designated employees and requires approval from DCAS, and those with access are expressly advised that the sharing of Geotab data is forbidden and will make

¹⁸ Further, it contends that Geotab keyfobs eliminate the possibility of misidentifying drivers because employees sharing driving duties during a shift are each required to swipe in.

them “subject to disciplinary or other legal action.” (City Ex. 13) The City contends that there is no policy or practice of providing public access to Geotab data and no evidence that the cellular provider has access to this data. In addition, regarding Geotab keyfobs, the City notes that they reduce record-keeping by obviating the need for employees to fill out a paper trip log.

Finally, the City argues that the record does not support either a derivative or independent violation of NYCCBL § 12-306(a)(1). Accordingly, the City requests that the petition be dismissed in its entirety.

DISCUSSION

NYCCBL § 12-306(a)(4) makes it an improper practice to fail to bargain in good faith “on matters within the scope of collective bargaining, which generally consist of certain aspects of wages, hours, and working conditions.” *Local 621, SEIU*, 2 OCB2d 27, at 10 (BCB 2009); *see also CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009). “It is well established that ‘a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith.’” *DC 37*, 14 OCB2d 16, at 9 (BCB 2021) (quoting *UFA*, 10 OCB2d 5, at 13 (BCB 2017)). To prove that a violation has occurred, a petitioner “must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy.” *DC 37, L. 436 & 768*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)).

The Board has long held that, while it is an employer’s prerogative to take disciplinary action, the procedures necessary for the administration of discipline are a mandatory subject of bargaining. The “methods, means, and procedures which may be used in effectuating disciplinary

action” are subject to mandatory bargaining. *COBA*, 12 OCB2d 3, at 12 (BCB 2019) (disciplinary penalties are mandatory subject of bargaining). For example, the Public Employment Relations Board (“PERB”) has held that the use of video surveillance tapes in disciplinary proceedings is a mandatory subject of bargaining. *See Niagara Frontier Transit Metro System, Inc.*, 36 PERB ¶ 3036 (2003) (holding that the use of video tape footage in disciplinary proceedings is “a demand limited to disciplinary procedures, which are mandatorily negotiable”).

First, we address whether the Union has demonstrated a change from existing policy to one where employees are being disciplined based solely on Geotab alerts for driving infractions. The record contains sufficient evidence to demonstrate that in or around December 2018, after the City began transitioning to Geotab, multiple agencies began disciplining employees based solely on Geotab alerts. The Union provided both witness testimony and documentary evidence demonstrating that employees received discipline based solely on Geotab data, which we credit. There is no specific evidence to rebut these witness assertions that warnings were not issued solely based on telematics data in the past. Although City witnesses testified that telematics data had previously been used for disciplinary purposes, they either acknowledged that use of such data was relied upon in combination with other evidence, such as witness testimony, interviews or documentation, or in the case of DDC, asserted that their employees are not disciplined for driving infractions. None of this evidence directly rebutted the evidence that employees received discipline based solely on Geotab data and those similar warnings were not issued solely based on telematics data in the past.

With respect to the City’s claim that the Union failed to prove that any employee has been disciplined based exclusively on telematics data, this argument is based on the erroneous premise that verbal and written warnings are not “discipline.” However, the Board has held that such

employment actions constitute discipline. See *Municipal Highway Inspectors Local Union 1042*, 2 OCB2d 12 (BCB 2009) (verbal and written warnings contained in the DOT’s Record of Progressive Discipline were the first and second steps in a three-step disciplinary process). Moreover, here DPR’s Parks Advocate acknowledged that a supervisor’s conference memo is “less formal discipline,” and that the February 2019 disciplinary conference was held based on a Geotab alert for speeding. (Tr. 221) Similarly, DEP’s Director of Labor Relations and Discipline testified that its employees may be disciplined based on Geotab alerts from DCAS. Therefore, while warnings may indeed be informal as opposed to formal discipline, we do not find this distinction significant. As stated earlier, the Union’s evidence that Valera, Kenny, and other employees received verbal and written warnings based solely on Geotab data was un rebutted. Further, with respect to the City’s contention that the warning letters issued by DDC were not discipline because they only threatened a loss of driving privileges, the Board in *Municipal Highway Inspectors*, 2 OCB2d 12, found that the loss of driving privileges after a third red light violation constituted discipline. *Id.* at 9-10. For these reasons, we reject the City’s argument that the Union has failed to prove that employees are not subject to discipline based solely on Geotab data.

Inasmuch as there is sufficient evidence to show that since 2018, the use of telematics data is being used solely as a basis for discipline, we turn to the issue of whether this change requires bargaining. This Board has not previously addressed the use of GPS data for disciplinary purposes in the context of impact bargaining. However, the Board recently addressed that issue in the context of decisional bargaining, stating that “[t]he potential use of GPS data collected ... to discipline employees may affect employees’ job security, which bears a relationship to employees’ terms and conditions of employment under the NYCCBL.” *DC 37*, 14 OCB2d 16, at 12 (citing

DC 37, L. 1457, 77 OCB 26, at 16 (BCB 2006)).¹⁹ Moreover, as noted earlier, PERB found that an employer violated its obligation to bargain in good faith by refusing a union's demand for impact bargaining regarding the use of video surveillance footage in disciplinary proceedings. *See Niagara Frontier*, 36 PERB ¶ 3036. Similarly, PERB found the use of the information obtained through GPS technology to be subject to impact bargaining. *See County of Nassau*, 41 PERB ¶ 4552 at 4640 (ALJ 2008) (holding that "the scope of the impact of the information [obtained through the use of GPS in vehicles] and the implications which arise therefrom may be addressed in the context of a demand to bargain impact"); *County of Nassau*, 41 PERB ¶ 4553 (ALJ 2008) (noting that the employer negotiated the impact of its decision to require employees to carry GPS-equipped cell phones, although not the decision itself); *Village of Hempstead*, 41 PERB ¶ 4554 (ALJ 2008) (same). Accordingly, we find that the use of telematics data as the sole basis for discipline is subject to impact bargaining.

We also find sufficient evidence of a change to a mandatory subject of bargaining with respect to the City's imposition of disciplinary penalties for driving infractions. It is well settled that a unilateral change in disciplinary penalty violates the duty to bargain in good faith. *See Municipal Highway Inspectors, Local Union 1042*, 2 OCB2d 12 (holding that unilaterally changing the penalty for a driving infraction from the payment of fines to discipline violated NYCCBL § 12-306(a)(4)); *COBA*, 12 OCB2d 3, at 12 (noting PERB precedent holding that disciplinary penalties are mandatory subjects of bargaining). Union witnesses DeMarco, Valera, and City witness Pasagiannis consistently testified that in the past, employees were not disciplined for driving infractions. Rather, the penalty imposed for a driving infraction was that employees

¹⁹ The Board addressed the introduction of GPS technology in *DC 37*, 14 OCB2d 16. The Board reached the issue of decisional bargaining but did not address impact bargaining. *Id.* at 10 n.6.

were obligated to pay any fines associated with such infractions. This testimony is also consistent with the City Vehicle Driver Handbook, which provides that “[d]rivers are responsible for payment and adjudication of all summonses...received in connection with the use of a [City] vehicle.”²⁰ (City Ex. 3 at 8) While witnesses for DOT and DPR testified that employees at their agencies were subject to progressive discipline for driving infractions prior to the use of GPS tracking devices, their testimony focused on the fact that prior to telematics a reported traffic infraction would be subject to an investigation and, at least at DOT, only subject to discipline if “severely egregious.” (Tr. 518) As a result, that testimony did not specifically rebut the fact that issuance of verbal and written warnings for Geotab reported driving infractions is new and done without investigation or limited to egregious situations.

Accordingly, the Board finds that the use of telematics as the sole basis for discipline and for the imposition of new penalties for driving infractions requires impact bargaining. We direct, upon the demand of either party, that the parties to engage in impact bargaining regarding the use of telematics data for discipline. We decline, however, to find a violation of the City’s duty to bargain in good faith regarding the practical impact of using Geotab data for discipline. *Local 1182, CWA*, 5 OCB2d 41 at 8 (BCB 2012) (until the Board has found that a practical impact exists, a refusal to bargain practical impact will not be found to violate NYCCBL § 12-306(a)(4)) (citations omitted).²¹

²⁰ The manual further provides that employee may be subject to discipline for failure to pay the associated fines but makes no reference to discipline for the underlying traffic infraction. We have also previously found that a DOT standard operating procedure provided that an employee “who received a summons for a red light camera violation was only required to pay the fines and penalties assessed as a result of the violation.” See *Municipal Highway Inspectors*, 2 OCB2d 12, at 3.

²¹ We also find the Union’s assertion that the City’s use of Geotab is “solely” for the purpose of discipline is unsupported and irrelevant to our analysis. (Union Br. at 2) The City provided

We find that the Union had not established any of its other claims, and for the reasons set forth below, we dismiss the remainder of the petition.

We find that the Union has not established that it is entitled to impact bargaining regarding employee privacy. We acknowledge that that GPS tracking technology has the potential to reveal information about a person's private activities. The potential for surveillance type technologies to interfere with personal privacy has been recognized by recognized by PERB. *See, e.g., Nanuet Nanuet Union Free School District*, 45 PERB ¶ 3007 at 3013 (“[I]n general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable under the Act because it ‘bears a direct and significant relationship to working conditions.’”). However, we are not prepared to find that GPS in City vehicles has a *per se* impact on employee privacy as a matter of law. We have held that where a union has demonstrated that an employer's actions have had “an adverse effect on terms or conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact.” *Local 1182, CWA*, 5 OCB2d 41 (citing *NYSNA*, 71 OCB 23, at 11 (BCB 2003)). However, “conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact.” *UFA*, 5 OCB2d 3, at 14 (BCB 2012) (citations omitted). Here, the Union has broadly asserted that GPS tracking implicates employee's privacy rights but has presented no specific facts to establish these assertions. While a number of Union witnesses expressed concerns that employees were being tracked “24/7” and while off-duty, these concerns were speculative and based solely on the fact that the GPS device is in the vehicle. There was no

unrebutted testimony regarding the various ways the City utilizes Geotab to study and inform policy related traffic safety, vehicle utilization, and environmental impacts, among other things. Indeed, the Union recognized that the installation of telematics devices was part of the City's “Vision Zero Initiative” to promote traffic safety and decrease the amount of traffic fatalities. (Pet. ¶ 9)

evidence presented upon which the Board could discern the nature of these concerns or the effect on employees' terms and conditions of employment. Accordingly, we find that impact bargaining in connection with employee privacy is not warranted.

We now turn to the Union's claim that the introduction of a keyfob constitutes a unilateral change in a term and condition of employment in violation of NYCCBL § 12-306(a)(1) and (4). In determining whether a unilateral change that warrants bargaining took place, this Board distinguishes between a material change and one "that is, a change in form only, which does not require increased participation on the part of the employee or alter the substance of the benefit to the employee." *DC 37*, 4 OCB2d 43, at 8-9 (BCB 2011) (citing *CEU, L. 237*, 2 OCB2d 37, at 12-13 (BCB 2009); *UFA*, 4 OCB2d 3, at 7 (BCB 2011)).

There is no dispute that the City has implemented keyfobs for at least two City agencies and at the time of the hearing was in the process of rolling out the technology more broadly throughout the City's vehicles. This technology is akin to an electronic sign-in and replaces written records completed by employees to record the time and place of their vehicle use each day. Rather than complete a paper form where the employee fills in each stop, the employee instead swipes a sensor in the vehicle with a keyfob whenever they drive their vehicle to a new location. There is no evidence that keyfob use had any effect other than eliminating the employee's need to record their location and time of arrival on a paper form. The Board has previously found that the replacement of a paper form with an electronic version is not a mandatory subject of bargaining. *See PBA*, 11 OCB2d 20, at 22 (2018). Accordingly, we find that the replacement of the paper trip log with a keyfob does not constitute a material change in a term or condition of employment. We

therefore dismiss the Union's claims that the introduction of the keyfobs constitutes a violation of NYCCBL § 12-306(a)(1) and (4).²²

²² Having found that the replacement of paper forms with an electronic keyfob did not constitute a change in a term or condition of employment, we need not address whether it relates to a mandatory subject of bargaining. *See, e.g., UFADBA*, 12 OCB2d 30, at 20 n.12 (BCB 2019) (declining to address whether an alleged change was related to a mandatory subject of bargaining where the petitioner had not met its burden of establishing a change in past practice); *DC 37*, 14 OCB2d 16, at 12 n.8 (BCB 2021) (same).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-4325-19 is granted as to the Union’s practical impact claim regarding the use of telematics data for discipline, as set forth here; and it is further

ORDERED, the improper practice petition docketed as BCB-4325-19 is denied in all other respects; and it is further

DIRECTED, the parties to bargain, upon demand by either party, regarding the City’s use of telematics data for discipline.

Dated: April 6, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. PAMELA S. SILVERBLATT
MEMBER