P.E.R.C. NO. 89-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT
BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-168-180

NEW JERSEY STATE COUNCIL,
AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by New Jersey State Council, Amalgamated Transit Union against New Jersey Transit Bus Operations, Inc. The charge alleges that NJT Bus violated the New Jersey Employer-Employee Relations Act when it unilaterally transferred certain service on the 166 bus line to a garage represented by a different union. The Commission finds that ATU did not have a right to the disputed work.

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NEW JERSEY STATE COUNCIL,
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Charging Party.

Appearances:

For the Respondent, Cary Edwards, Attorney General
(Jeffrey Burstein, Deputy Attorney General)

For the Charging Party, Weitzman & Rich, Esqs.
(Richard P. Weitzman, of counsel)

DECISION AND ORDER

On December 30, 1985, the New Jersey State Council, Amalgamated Transit Union ("ATU") filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. ("NJT Bus"). The charge alleges NJT Bus violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (5),[1/] when it unilaterally transferred certain

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

service on the 166 bus line to a garage represented by a different union. ATU further alleges that all work on the 166 line has traditionally been assigned to garages represented by ATU and that the transfer caused layoffs of employees represented by ATU.

On May 7, 1986, a Complaint and Notice of Hearing issued. On May 20, NJT Bus filed its Answer. It admits that it added additional service on the 166 line from the Fairview garage where employees are represented by another union, but claims a managerial prerogative and a contractual right to decide where to originate bus service.

On October 1, 1986, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. ATU argued that although the Commission has jurisdiction to hear this dispute, the applicable law should be private sector, not New Jersey public sector labor law. It also requested a

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (5) Refusing 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."

monetary remedy. The parties filed post-hearing briefs and replies.[2/]

On June 29, 1987, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 87-75, 13 NJPER 593 (¶18223 1987). He found that ATU and the Transport Workers Union ("TWU") represent drivers working out of particular garages, not working on particular lines. He also found that NJT Bus had never previously offered the added service and that there was no harm to ATU-represented drivers or benefit to TWU-represented drivers. He applied standards for jurisdictional disputes developed by the National Labor Relations Board and concluded that the employer could determine that the disputed service should originate from the TWU garage. He also applied New Jersey public sector labor law and found a managerial prerogative to determine from which garage new service should operate. He found no intent to harass ATU.

On July 27, 1987, ATU filed exceptions. It claims the Hearing Examiner erred when he found that: (1) Manhattan Transit operated from the Fairview garage or along the 166 line; (2) NJT Bus's decision had no impact on the four drivers laid off from Union City; (3) unit work does not include additional trips or hours on bus lines originating from ATU garages; (4) New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 86-21, 11 NJPER 520 (¶16182 1985)

2/ ATU asserted that if the scope of negotiations issues raised in SN-84-89, SN-84-90 and SN-84-91 (now withdrawn) had to be considered in this case, it wanted to reopen those cases and press for a decision.

("NJT Bus I") is inapplicable; (5) NJT Bus is a new employer; (6) the 13 to 14 year hiatus in all-night service meant its addition was "new work"; (7) the NLRB decisions cited in H.E. No. 85-46 are inapplicable; (8) no evidence showed that ATU represented all service that may be offered on a particular line; (9) there were persuasive NLRB cases about operation elimination; (10) whether NJT Bus had legitimate reasons was relevant, and (11) standards governing jurisdictional disputes were relevant given that TWU never entered a dispute over this work. It also excepts to any analysis of the issues under New Jersey public sector labor law absent a prior determination of the issues presented in the withdrawn scope of negotiations petitions.3/

On August 3, 1987, NJT Bus filed an answering brief supporting the recommended decision. It agrees that the Hearing Examiner erred in finding that Manhattan Transit operated out of the Fairview garage, but claims it is irrelevant. It agrees with the Hearing Examiner that negotiations units are based on bus garages. It argues that NJT Bus has often changed the garage origin of its bus lines, including transferring lines operated from garages represented by TWU and UTU to those represented by ATU. It also argues that New Jersey public sector labor law controls and that NJT Bus's decision was non-negotiable.

3/ ATU requests oral argument. We deny that request.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-10) are generally accurate. We adopt and incorporate them with this correction. Manhattan Transit did not operate out of the Fairview garage. We also add that in 1983, the 194 line was moved from the UTU-represented Madison Avenue garage to the ATU-represented Market Street garage. About ten drivers moved with the line and changed representatives. In January 1984, the 163, 164 line was transferred from the UTU Madison Avenue garage to the ATU Oradell garage. More than 20 drivers changed representatives. In September 1985, the Meadowlands service was transferred to the ATU Union City garage from the ATU Oradell garage. Previously, it was transferred from the UTU Madison Avenue garage (T74-78; T140-T147).

The New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et seq., authorized N.J. Transit Corporation, the parent corporation of NJT Bus, to acquire public or private entities providing public transit service, N.J.S.A. 27:25-13, provided continuing representation for collective negotiations was assured, N.J.S.A. 27:25-14e, and an entity's labor contracts were assumed and observed, N.J.S.A. 27:25-14f. In 1980, NJT Bus acquired Transport of New Jersey ("TNJ") and Maplewood Equipment Company ("Maplewood"), assumed their collective bargaining agreements and entered into agreements with their unions to preserve and continue the collective bargaining rights of employees covered by the agreements.

TNJ had operated several garages including those at Oradell and Union City. The 166 was one of its routes. It operated all-night service prior to 1972. After 1972, it discontinued service at 1:30 a.m. and resumed at 5:30 a.m. TNJ employees were represented by ATU.

Orange and Black Bus Lines, a part of the Washington Corporation, formerly operated the Fairview garage. It filed for bankruptcy and was bought out by Maplewood Equipment which continued to run the garage. Maplewood was then acquired by N.J. Transit Corporation. Maplewood employees were represented by TWU.

The formation of NJT Bus created the unusual situation of identical classifications of employees, formerly employees of private companies, working for the same public employer but represented by different unions. Had TNJ restored all-night service, the work would have gone to its ATU-represented employees. Had Maplewood increased service out of Fairview, the work would have gone to TWU-represented employees. But NJT Bus operates bus service out of a number of garages, represented by a number of unions. The start of any new service presents issues unique to the multi-union unit structure of NJT Bus.

ATU claims the all-night service on the 166 line traditionally had been ATU's and that therefore it is entitled to the disputed work. NJT Bus claims that there is nothing in the unit certification, contract or parties' practice to support ATU's claim.

We look first to the unit definition. ATU's recognition clause states, in part:

> Pursuant to and in conformity with the Public Employment Relations Commission the Company recognizes the Union as the sole and exclusive bargaining agency for the employees in the units certified by the Public Employment Relations Commission.

The units were certified, however, not by us but by the National Labor Relations Board in the 1930's when the employees worked for private companies (T30-T31). There was no need to designate garages or lines because each company operated its own lines with employees represented by one union. Thus, the recognition clause does not support ATU's claim.

We look next to other parts of the contract. Clauses that attempt to protect work traditionally performed by unit employees are negotiable under both private and New Jersey public sector labor law.[4/] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); City of Newark, P.E.R.C. No. 88-105, 14 NJPER ___ (¶19125 1988); Washington Tp., P.E.R.C. No. 83-166, 9 NJPER 402 (¶14183 1983); Rutgers, The State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd. App. Div. Dkt. No. A-468-81T1 (1983); Rutgers, The State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), mot. for recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979),

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4/ In N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), app. pending App. Div. Dkt. No. A-4136-87T3 ("NJT Bus II"), we determined that the Legislature intended that the scope of negotiations for NJT Bus employees to be similar to what they had before the takeover, limited only by NJT Bus's statutory mission to provide "a coherent public transportation system in the most efficient and effective manner." N.J.S.A. 27:25-2.

aff'd App. Div. Dkt. A-3651-78 (1980); Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pert. part, App. Div. Dkt. No. A-3564-78 (6/19/80). ATU could have negotiated for a clause attempting to protect work traditionally performed by ATU employees. Disputes about unit work could then have been placed before an arbitrator charged with interpreting the parties' contract. See Carey v. Westinghouse, 375 U.S. 261, 55 LRRM 2042 (1964). But there is no evidence the parties agreed to a clause defining or protecting unit work.

We thus turn to the parties' practice concerning work allocation to decide whether NJT Bus had to negotiate with ATU before assigning the work to the TWU-represented Fairview garage. The Hearing Examiner found that ATU and TWU represent employees working out of particular garages. Work performed out of a particular garage becomes unit work for the union representing that garage. He also found that ATU did not prove that it represents all service offered on a particular bus line.

NJT Bus has transferred lines between garages and representation has changed accordingly. Evidence of three such transfers is in the record. We recognize that the three examples cited involved transfers to ATU-represented garages. Aquiescence to those transfers may not be a waiver of negotiations rights, but it is a factor in determining what the practice has been.

Also important is that the service had not been performed by ATU-represented employees in over 13 years.[5/] Even work preservation clauses must seek to preserve work traditionally done by unit members. Although ATU-represented employees once performed all-night service, the 13 year hiatus supports our finding that they have not traditionally performed that work.

Had ATU negotiated a work preservation clause, disputes could have been resolved by an arbitrator. Absent a showing that ATU has a certification or contractual right to the disputed work, and in light of the parties' practice of moving lines and the length of time since the service was provided, we dismiss the Complaint alleging NJT Bus unlawfully assigned work to the Fairview garage without negotiations.[6/]

N.J. Transit Bus I is inapposite. There, NJT Bus treated ATU as the majority representative of certain ticket agents and later transferred those employees and "recognized" TWU as the ticket agents' representative. The Hearing Examiner rejected NJT Bus's reasons for the change in "recognition" and recommended an order restoring ATU representation. In the absence of exceptions, we

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5/ Had NJT Bus originated service out of Union City, certain laid-off/transferred drivers might have been able to return to that garage sooner. That fact does not, however, create a right to have the service originate at an ATU garage.

6/ There was no allegation of illegal motive for the work transfer.

agreed that NJT Bus violated the Act. TWU had no greater representation claim to the new duties than ATU. The deciding factor for the Hearing Examiner was the treatment of ATU as majority representative for 9 1/2 months. Here, ATU's claim to the all-night service is based primarily on the fact that it represents employees who once provided that service many years ago. In light of the 13 year hiatus and the practice of allocating work, that claim is not sufficient to find the NJT Bus violated the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
July 15, 1988
ISSUED: July 18, 1988

H.E. NO. 87-75

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

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-168-180

NEW JERSEY STATE COUNCIL AMALGAMATED
TRANSIT UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that New Jersey Transit Bus Operations, Inc. did not violate the New Jersey Employer-Employee Relations Act when it implemented 2:00 a.m. - 5:00 a.m. service on the 166 bus route originating out of the Fairview Garage. The Hearing Examiner concluded that such service was not ATU bargaining unit work, and that the Company had legitimate business considerations for implementing the work at Fairview.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-75

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

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-168-180

NEW JERSEY STATE COUNCIL AMALGAMATED
TRANSIT UNION,

Charging Party.

Appearances:

For the Respondent
W. Cary Edwards, Attorney General of New Jersey
(Jeffrey Burstein, D.A.G., of Counsel)

For the Charging Party
Weitzman & Rich, Esqs.
(Richard P. Weitzman, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on December 30, 1985 by the New Jersey State Council, Amalgamated Transit Union (ATU) alleging that New Jersey Transit Bus Operations, Inc. (Company) violated subsections 5.4(a)(1), (2), and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act").[1] The ATU alleged that the Company violated the Act by unilaterally transferring certain service on the 166 bus line to a garage represented by a different union. The ATU maintained that all work on the 166 line has traditionally been assigned to garages represented by the ATU, thereby making that bus line ATU bargaining unit work. The ATU argued that as a result of this work transfer, certain layoffs occurred at garages it represented. The ATU did not specifically seek any monetary award in its Charge.

A Complaint and Notice of Hearing was issued on May 7, 1986. The Company filed an Answer on May 20, 1986 denying having violated the Act. The Company asserted affirmative defenses arguing that it had a managerial prerogative to decide where to schedule the service, and arguing that its actions were in compliance with the management rights clause of the parties' collective agreement.

A hearing was held in this matter on October 1, 1986 at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.[2] In his opening remarks, counsel for the ATU first

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (5) Refusing 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."

2/ The transcript from the hearing will be referred to as ("T").

argued that the facts were not disputed (T15). He then argued that although the Commission has jurisdiction over the parties in this proceeding, not all public sector law that has evolved in this State applies to these parties. He maintained that the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et seq. (Transportation Act), which invested the Commission with jurisdiction over the labor relations covering employers and employees involved with certain public transportation services in this State, contemplated the application of private sector (Federal) labor laws, rather than New Jersey public sector labor law, to the Company's operations. He explained that the question of which law applies was first raised by the parties in scope of negotiations petitions filed with the Commission on April 6, 1984, Docket Nos. SN-84-89, SN-84-90, SN-84-91. The parties, however, subsequently agreed not to seek a Commission decision regarding those matters and those cases were closed on July 16, 1986. ATU counsel argued that if the issue raised in the above scope cases had to be considered in this case, the ATU wanted to reopen the above scope of negotiations cases and press for a Commission decision thereon.[3/] The ATU requested the opportunity to submit the briefs from the above scope cases to me

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3/ In Section 16S (p. 59) of J-1, the parties' collective agreement, there is a series of clauses under the heading of "Scope of Negotiations." In that section the parties reserve their respective legal positions raised in scope cases SN-84-89, 84-90 and 84-91, regarding the statutory construction of the relevant statutes.

for consideration in this matter. Finally, in his opening remarks ATU counsel requested a monetary remedy for those employees who allegedly were adversely affected by the Company's actions.

Counsel for the Company agreed that there were no serious factual disputes, and that the Company did unilaterally institute new service on the 166 line and unilaterally decided to assign the work to a non-ATU garage (T21-T22). But the Company argued it had the right to assign that "new" work and that that assignment did not cause any layoffs.

I granted the ATU's request to allow the briefs from the prior scope cases to become part of the instant record.

The Company filed a post-hearing brief on February 2, 1987. The ATU mailed a post-hearing brief in this matter and a Request for Evidentiary Hearing in the scope cases on February 4, 1987, but they were not received until February 11, 1987.[4/] On February 10, 1987, I received the Company's February 4, 1987 letter reply brief. On February 13, 1987, I received the ATU's reply brief in this Charge case, and the ATU's brief on the above scope cases. On February 20, 1987, I received the Company's February 18, 1987 letter reply to the ATU's brief, and the Company's scope brief and scope reply brief. On May 20, 1987 I received the Company's

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4/ The request for an evidentiary hearing was made in view of the ATU's position that disputed factual issues exist related to the Transportation Act, and in view of its request that if the Transportation Act is considered herein that the issues raised in the scope cases also be considered.

legislative history of the Transportation Act related to the Company's scope brief(s).

Since I have no jurisdiction over the particular scope cases, and no jurisdiction to order an evidentiary hearing in those cases, the ATU's motion for an evidentiary hearing regarding those cases is dismissed.

Upon the entire record I make the following:

Findings of Fact

1. The Company is a public employer within the meaning of the Act, and the ATU is an employee representative within the meaning of the Act.[5/]

2. Pursuant to the Transportation Act, by October, 1980, N.J. Transit had acquired two bus companies, Transport of New Jersey and Maplewood Equipment Co. (T40, T97-T98). Transport of New Jersey had several garages from which buses emanated including the Oradell and Union City garages. The ATU represented, and continues to represent, the bus drivers driving bus routes out of those locations (T32, T65). Maplewood Equipment had a garage in Fairview and drivers from that location were, and are, represented by the Transport Workers Union (TWU)(T40, T70).

3. Prior to January 1986, the 166 line operated out of the Oradell or Union City garage or occasionally another garage also

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5/ While the ATU agreed that it is an employee representative within the meaning of the Act, it reserved the right to raise the legal issues discussed above (T8).

represented by the ATU (T35-T37). There had been no 166 service out of Fairview (T39-T40). The record shows, however, that Manhattan Transit Co., another predecessor employer to the Company, had operated service out of Fairview - whose drivers were represented by the TWU - which service operated in the same area as a portion of the 166 service (T121).

Prior to 1972, while Transport of New Jersey was operated as a private company, there was all-night (early morning) or around-the-clock service on the 166 line out of an ATU garage (T37, T41-T42). In 1972, however, Transport of New Jersey cut back service on the 166 line by discontinuing the all-night (early morning) service (T37-T38, T41-T42). After the cutback in all-night service, the 166 line was run until 1:30 a.m., with no service until 5:30 a.m. (R-1, T125-T126).

Thus, when the Company assumed control over Transport of New Jersey there had been no all-night service on the 166 line for several years.

4. In October 1985 the Company planned, for the first time in its operation of bus service, to offer all-night or 24-hour service on the 166 line by adding hourly service between 1:30 a.m. and 5:30 a.m. (R-1). In January 1986, the Company implemented all night service on the 166 line on a half-hourly basis (T108), with buses leaving at 2:00 a.m., 2:30 a.m., 3:00 a.m., 3:30 a.m., 4:00 a.m., 4:30 a.m. and 5:00 a.m., headed in both the eastbound and westbound directions (T126). This resulted in adding 14 trips weekdays, 18 trips on Saturday, and 26 trips on Sunday (T125).

Benjamin Feigenbaum, the Company's Deputy General Manager of Operations for the Northern Division, decided to place the all night (2:00a.m.-5:00 a.m.) service of the 166 line at the Fairview Garage (T98). He explained that Fairview had an unusually high number of trippers,[6/] which resulted in the Company paying many drivers a week's pay for less than a week's work (T104-T107). Feigenbaum testified that Fairview had the most imbalanced garage of full runs to trippers, and of a.m. to p.m. trippers (T107). He explained that by assigning the 2:00 a.m.-5:00 a.m. 166 service to Fairview, it reduced the number of trippers in that garage and reduced the ratio of a.m. to p.m. trippers, thus, making their operation more efficient (T108).

Feigenbaum testified that the 2:00 a.m.-5:00 a.m. service on 166 could have been assigned to Oradell or Union City if he hired more drivers at those locations (T134). But he explained that the Company did not need to hire additional drivers at Fairview since there were already drivers available from doing the trippers, and the Company merely gave them a fuller day of work (T109).

Feigenbaum also explained that it was more efficient to assign the late night service to Fairview because there was less

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6/ A tripper is less than a full-day of work. It is a piece of bus driving that occurs during rush hours that cannot be combined into a run. A run is a full-day piece of work (T102).

dead-head time from Fairview than from Union City (T108),[7] which enabled the Company to offer half-hourly service rather than just hourly service which would have been implemented at Union City (T109).

5. In late 1985, the Company called a meeting with the ATU to give it a copy of CP-1, a list of bus schedule changes to be effective January 11, 1986. That list included certain schedule changes in the 166 line, other than the 2:00 a.m.-5:00 a.m. changes, which resulted in an increase in bus service on the 166 line from both Oradell and Union City in January 1986 (T112-113, CP-1, R-3). Louis Sneyers, President and Business Agent for Local 820 of the ATU, testified that when the Company gave him CP-1 in 1985, they did not inform him of any other change in service on the 166 line, particularly the addition of the 2:00 a.m.-5:00 a.m. service, nor did they inform him that some 166 service would be assigned to the Fairview Garage (T45, T50-T51).[8] Thus, the Company did not

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7/ Dead-head time is the amount of time a bus driver must drive a bus from the garage to the beginning of the route (T108). The dead-head time from Fairview to the beginning of the 166 service is less than it is from Union City (T109).

8/ Feigenbaum testified that a Company official, Ed Butler, did inform the ATU State Council of its plan to place the all-night service on 166 at Fairview (T122-T123). However, Feigenbaum was not sure whether it was Butler, not sure when the ATU was advised of the Company's actions, and there was nothing in writing to support his testimony (T122-T123). Absent Butler's direct testimony, I find that the Company did not sufficiently establish that the ATU had been advised of the Company's plan to institute all night service on 166 prior to its implementation.

negotiate with the ATU regarding the placement of the 2:00 a.m.-5:00 a.m. 166 service at Fairview (T21-T22).[9/]

Feigenbaum testified regarding R-3 which compares the work in the 166 line before and after the implementation of all the January 1986 changes (T133-T119). Exhibit R-3 shows that in 1985 there was no 166 service out of Fairview. Exhibit R-3 further shows that in January 1986, despite placing some 166 service at Fairview, there was an increase in 166 service at both Oradell and Union City as compared to September 1985. Exhibit R-3 also shows that in January 1986, as a result of the 166 service, Fairview had a decrease in the number of a.m. and p.m. trippers, and an increase in the number of runs in comparison to September 1985.

6. In September 1985, four drivers from Union City were bumped out of that location (as a result of a layoff) and were employed as drivers in other locations (T53-T54). Those four employees were still in those other locations when the all night service on 166 was implemented at Fairview in January 1986 (T53). Although four people continued to be laid off or bumped out of Union City until September 1986 (T57-T58), the original four people had, by then, either returned to Union City or opted to stay where they were (T56). The layoff of those four drivers occurred before the implementation of the 166 all-night service, and there was no

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9/ In his opening statement counsel for the Company admitted that the Company unilaterally decided to institute the all night service at Fairview without negotiations (T21-T22).

showing that any of those drivers were transferred or laid off as a result of the Company's decision to add the 166 all-night service and place it at Fairview (T109). As of September 1986, those four employees had the opportunity to return to Union City (T58).

In July 1986 the Company hired approximately eight additional drivers at Union City to handle summer service (T86-T87). Those eight drivers were laid off in September 1986 after the summer service ended (T86-T87, T121). The placement of the 166 all-night service at Fairview did not cause those layoffs, and there was no showing that the placement of the all-night service would have had any impact upon the layoffs of the eight drivers.

7. There is nothing in J-1, the parties' collective agreement, to show that the ATU represents Company employees based primarily upon the work performed on any particular bus line, as opposed to representing employees based upon their garage location. In fact, on direct testimony Snyers was asked: "how many garages [emphasis added]...are represented by the ATU?" and Snyers responded that there were fourteen locations (T31). Thus, I find that the ATU represents employees based primarily upon their garage locations. That does not mean that the ATU does not represent, as unit work, service performed on a particular bus line or part thereof. It only means that a particular piece of work becomes unit work because it is performed out of an ATU garage, rather than a particular garage becoming an ATU garage because particular work is performed there.

Analysis

In its post-hearing charge brief, the ATU stated that it does not question the Company's right to increase (or decrease) bus service on any particular bus line. It contends, however, that all service on the 166 line was its bargaining unit work, and that the Company could not unilaterally remove any part of that work and transfer it to another bargaining unit. The ATU, therefore, is operating under the assumption that the 2:00 a.m. - 5:00 a.m. 166 service was its bargaining unit work.

In its scope brief, the ATU set forth its legal argument regarding the Transportation Act and our Act, and why it believes that private sector law applies to the Company. The Company argued that New Jersey public sector law applies in this case and relied on its legal arguments set forth in its scope and charge briefs. In its charge brief the ATU relied upon the Commission's decision in N.J. Transit Bus Operations, P.E.R.C. No. 86-21, 11 NJPER 520 (¶16182 1985), and the private sector decisions cited in the hearing examiner's decision that resulted in the above PERC decision, H.E. No. 85-46, 11 NJPER 406 (¶16142 1985), to support its position herein. In N.J. Transit Bus, the Company began a new park and ride operation at a particular location and employed two ticket agents represented by the ATU for the park and ride operation. The Company subsequently transferred those two employees to other locations and assigned those particular park and ride jobs to two employees originally stationed at the Fairview garage and represented by the TWU. The Company then recognized the TWU as the majority

representative of the park and ride ticket agents. The Commission concluded that the Company violated the Act. It held that the Company had granted de facto recognition to the ATU as the majority representative of the park and ride ticket agents, and that the Company unlawfully unilaterally withdrew that de facto recognition. The Commission ordered the Company to withdraw recognition from the TWU and to negotiate with the ATU over the park and ride ticket agents.

N.J. Transit Bus is not applicable here to prove that the Company violated the Act by assigning the disputed work to Fairview. While there are some factual similarities between that case and the instant case, there are two critical differences - timing and a change of employers. In N.J. Transit Bus, there was a de facto recognition of the ATU, followed a short time later by a withdrawal of that recognition and a recognition of the TWU. There was no lengthy break in the performance of the disputed work. In the instant case, however, there was a 13- to 14-year hiatus in the Company's offering of the disputed work, and there was a different employer than had existed when the disputed work was last offered. Although 2:00 a.m. - 5:00 a.m. 166 service had been ATU bargaining unit work prior to 1972, after that date the work ceased to exist, and when it emerged 13 to 14 years later it was new work.

The Commission's decision in N.J. Transit Bus was based upon the legal conclusions developed by the hearing examiner. The hearing examiner in that case referred to and relied on several

private sector National Labor Relations Board (NLRB) decisions to support his legal conclusions that the Company violated the Act by withdrawing recognition from one union and granting it to another.[10/] In those cases employers violated the law by signing collective agreements with one union while it was under contract or agreement with other unions representing the same employees. Those cases, however, did not present factual scenarios similar to the instant case, and are not applicable here to show that the Company violated the Act. The ATU did not cite any other NLRB or Federal Court cases here to support its position.

It is unnecessary for me to resolve the legal issue raised by the ATU regarding the applicability of Federal law to the Transportation Act, because even by applying Federal law in this case, I find that the Company did not violate the Act.

There are significant facts which are present here which distinguish this case from the NLRB cases relied upon in N.J. Transit Bus, and which form the basis for my concluding that the Company here did not violate the Act.

The testimonial evidence here shows that the ATU (and the TWU) represents drivers working out of particular garages. To that extent, work being performed out of a particular garage becomes unit

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10/ Mountain State Construction Co., Inc., 207 NLRB No. 4, 85 LRRM 1111 (1973); Argano Electric Corp., 248 NLRB No. 49, 104 LRRM 1093 (1980); Pacific Erectors, Inc., 256 NLRB No. 66, 107 LRRM 1284 (1981); Ana Colon, Inc., 266 NLRB No. 112, 112 LRRM 1434 (1983).

work. But there is nothing in the ATU's contract, J-1 (or the TWU's contract, R-2), and no testimonial evidence to show that the ATU (or the TWU) represents all service that may ever be offered on a particular bus line such as 166. The ATU does not represent the 166 line as a whole, but the 166 line service that has been operated out of ATU garages since 1980 is certainly bargaining unit work.

The issue here turns on whether the 2:00 a.m. - 5:00 a.m. service on the 166 line is ATU bargaining unit work. I find that it is not. First, the Company has never offered that service and that service has not been offered by any company or performed by ATU-represented employees in over 13 years. Second, the implementation of that service out of the Fairview garage had no adverse affect on drivers out of ATU garages, and gave no benefit to TWU represented employees at Fairview.

The record clearly shows that 2:00 a.m. - 5:00 a.m. service on the 166 line was last offered in 1972 by the private sector predecessor employer to the Company. That service was not offered for the eight or more years prior to the Company assuming the operations of the 166 line, and the Company, itself, never offered that service for the first five-plus years of its existence. Although 2:00 a.m. - 5:00 a.m. service on 166 may not have been "new" in the history of the 166 line, it was new for the Company,

and new in the perspective of what is "reasonable time."[11/] ATU-represented employees may have performed 2:00 a.m. - 5:00 a.m. service on the 166 line prior to 1972, but I find that a 13 to 14 year hiatus in the performance of that service, coupled with a change in employers and management operations midway through those 13 to 14 years, does not support a conclusion that that service constituted bargaining unit work for the ATU or any other union. By adding 2:00 a.m. - 5:00 a.m. service on 166 in 1986 the Company was changing its operations only by adding a new service, not by changing a pre-existing service.

In addition, contrary to the ATU's assertions, the implementation of the 2:00 a.m. - 5:00 a.m. 166 service in Fairview did not cause any layoffs or transfers of any ATU represented employees. The layoff-transfers of four drivers out of Union City in September 1985 occurred several months prior to the implementation of the 2:00 a.m. - 5:00 a.m. service for reasons unrelated to that service. Similarly, the layoff of eight drivers

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11/ I recognize that Feigenbaum testified on cross-examination that when trips are added on a particular line it is not always characterized as "new service" (T124). Although such additions may not always be characterized as "new service," when such service has not previously been performed, or has not been performed by the existing company, and not been performed by any company for a long period of time, it is reasonable to describe the service as "new" service. Feigenbaum, in fact, testified that this was a "new service" in terms of the Company assuming a financial risk (T100). Thus, I conclude that it is appropriate to characterize the service as a "new service."

in Union City in September 1986 was totally unrelated to the 166 service. Those eight drivers were hired for seasonal work and laid off when the summer season ended.

The NLRB has held that where an employer's unilateral change in operations has no significant affect on the bargaining unit, no loss of employment and no change in working conditions, it does not violate the law (National Labor Relations Act - NLRA). Coca-Cola Bottling Works, Inc., 186 NLRB 1050, 75 LRRM 1551 (1970), enforced in part and remanded 466 F.2d 380, 80 LRRM 3244 (CA DC 1972); Rochester Telephone Corp., 190 NLRB 161, 77 LRRM 1190 (1971). Here, the Company was not even changing a pre-existing service that ATU employees performed, such as moving a service from one garage to another. Rather, it was creating a new service and locating it at a particular garage. To the extent that it was changing its operations by adding this new service, there was no adverse affect on ATU-represented employees operating 166 service out of Union City and Oradell. In fact, 166 service at Union City and Oradell increased in 1986.

Moreover, the placement of the 2:00 a.m. - 5:00 a.m. 166 service at Fairview did not directly benefit the TWU. No new employees were hired at Fairview to perform the new service, and no employees at Fairview received overtime or additional pay to perform that service.

The facts of this case differed from the facts of N.J. Transit Bus and the NLRB cases cited therein. In the NLRB cases,

the employers withdrew recognition from existing unions. There was no such withdrawal in this case. If anything, however, the facts in N.J. Transit Bus support the result here. In that case, the Company began a new park and ride service and assigned the work to ATU employees. It violated the Act because it reassigned the work to TWU employees, and recognized the TWU as the majority representative. The timing in that case was critical. Just months after it assigned the ticket work to ATU-represented employees, it reassigned the work and recognized the TWU.

That was not the case here. The work in question, 2:00 a.m. - 5:00 a.m. 166 service, had not been bargaining unit work for any unit for almost 14 years, and had never been offered by the Company. Thus, in 1986 that service was a "new service" similar to the new park and ride service in N.J. Transit Bus, and the Company assigned the new work to Fairview based upon legitimate business considerations. The timing element here is the reverse of that in N.J. Transit Bus. As a result of the almost 14-year hiatus, the ATU had no greater claim to the 2:00 a.m. - 5:00 a.m. 166 service than did the TWU.

When a dispute arises in the private sector over which union is entitled to represent a particular type of work, it is normally called a "jurisdictional dispute." Section 10(k) of the NLRA requires the NLRB to make an affirmative award of disputed work after considering various factors. NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573, 47 LRRM 2332

(1961). The NLRB has held that its determination in a jurisdictional dispute is an act of judgment on a case-by-case basis based on common sense and experience, reached by balancing the factors involved in a particular case. Machinists Lodge 1743 (J.A. Jones Construction), 135 NLRB 1402, 49 LRRM 1684 (1962).[12/] Those factors include, but are not limited to, consideration of:

1. Certifications and collective bargaining agreements
2. Past practice
3. Area practice
4. Industry practice
5. Relative skills

12/ Jurisdictional disputes most commonly involve different trades or crafts unions who claim to represent the work performed by particular employees. There is almost never a situation in either the private or public sector where more than one union represents employees who perform the same type of work for the same employer because the NLRB, and indeed the Commission, will normally order an election for the employees to choose which union should represent them. Due to the method by which the Company was created - the takeover of several private companies who each had a relationship with a union representing their employees - three different unions, the ATU, TWU, and the United Transportation Union (UTU), represent bus drivers employed by the Company.
Although the dispute here may be termed a jurisdictional dispute between the ATU and the TWU over the 2:00 a.m. - 5:00 a.m. 166 service, it would be inaccurate to conclude that the TWU actually entered into a dispute with the ATU over that work, or that it participated in these proceedings. This case was brought by the ATU simply challenging the Company's assignment of the work to a TWU garage. It is relevant, however, to use the jurisdictional factors to assist in reaching a conclusion herein.

6. Economy and efficiency of operation

7. Employer preference[13/]

1. Certifications and Collective Negotiations Agreements

The ATU did not prove that it has a certification to represent all of the work performed on any particular bus line. In addition, there was no proof that the TWU's certification included work performed on particular bus lines. Similarly, neither the ATU's nor the TWU's collective agreements refer to particular bus lines. If anything, the facts show that the ATU and TWU represent employees working out of particular garages. Thus, this factor favors neither union.

2. Past Practice

There are at least three parts to the past practice analysis in this case. First, the 166 line generally has always been operated out of an ATU garage, and when 2:00 a.m. - 5:00 a.m. service on 166 was offered, the work was performed out of an ATU garage. But second, the 2:00 a.m. - 5:00 a.m. 166 service has not been performed by ATU-represented employees since 1972, and the Company has never offered that specific service. Third, TWU-represented employees have performed a portion of what is the 166 bus route when that portion of that route was operated out of Fairview prior to 1980. This factor as a whole favors the ATU, but cannot be given great weight because the 2:00 a.m. - 5:00 a.m. 166

13/ See, for example, Carpenters, Local 623 (Atlantic Exhibit Services) et al., 274 NLRB No. 14, 118 (LRRM 1358 (1985), where the NLRB applied these exact factors.

service has not been performed by ATU-represented employees in over 13 years.

3. Area Practice

This factor favors the ATU because apparently all of the 166 service had been operated out of ATU garages. But this factor is somewhat diminished by the fact that service over a portion of what is the 166 bus route had been operated out of Fairview represented by the TWU. This factor standing alone is not enough to support a finding that the work belongs to the ATU. NLRB v. Radio Engineers Union.

4. Industry Practice

This factor is not applicable here.

5. Relative Skills

Since both the ATU and TWU represented employees are bus drivers their skills are equal. Thus, this factor favors neither union.

6. Economy and Efficiency of Operation

It is both more efficient and more economical to operate the 2:00 a.m. - 5:00 a.m. 166 service out of Fairview. First, there is less dead-head time out of Fairview than out of Union City which enabled the Company to offer half-hourly service out of Fairview, rather than just hourly service out of Union City. Second, the Company minimized its expenses by offering this service from Fairview rather than Union City. It was unnecessary for the Company to hire additional drivers to perform this service at Fairview, but

it may have had to hire additional drivers to perform the service out of Union City. Third, by operating this service out of Fairview, the Company made its Fairview operation more efficient by decreasing the number of trippers and increasing the number of runs. If the service went to Union City or Oradell the Fairview operation would have remained seriously inefficient.

This factor thus favors the implementation of the work at the Fairview Garage.

7. Employer Preference

The Company obviously prefers assigning this 2:00 a.m. - 5:00 a.m. 166 service to Fairview for all of the economic and efficiency reasons found above. Thus, this factor favors implementation of this service at the Fairview garage.

After considering all of the relevant factors, I conclude that the disputed work should be implemented at Fairview. Factors 6 and 7, favoring implementation at Fairview, far outweigh factors 2 and 3 which favor the ATU's position. The fact that the ATU handled this service prior to 1972 is not dispositive of where this service now belongs. Noting that the Company's actions did not actually benefit the TWU nor result in any layoff or transfers of ATU-represented employees, common sense dictates that the service should be implemented at Fairview based upon operational efficiency and economy.

In the event this case were analyzed under New Jersey public sector labor law the result would be the same. Absent

illegal motivation, the Company has a managerial prerogative to determine whether to add new bus service to a particular route, and to determine out of which garage such new service should operate. Local 195, IFPTE v. State of N.J., 88 N.J. 393 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. Ed., 78 N.J. 144 (1978). Having found that after a 13-year hiatus in the performance of the disputed service, the presence of a new employer, and that there were no layoffs/transfers or changes in working conditions of ATU-represented employees caused by the implementation of the new service at Fairview; there is no basis here to find that the Company violated the Act.

Finally, I note that there was no evidence to show that the Company's decision to implement the new service at Fairview was done with the intent of harassing or punishing the ATU, or done to diminish its bargaining unit or adversely affect its ability to represent its membership.

Accordingly, based upon the entire record and the above analysis I make the following:

Recommendation

I recommend that the Commission ORDER that the Complaint be dismissed.[14/]

Arnold H. Zudick
Hearing Examiner

Dated: June 29, 1987
Trenton, New Jersey

14/ This case is limited to the facts here. This decision is not intended to suggest that it would not be a violation to remove bargaining unit work from one union obtained by virtue of the fact that it was assigned to a particular garage, and unilaterally reassign that work to another garage represented by a different union. The decision here rests upon the finding that the work in question was new work and therefore could be assigned to a particular garage based upon other considerations.