P.E.R.C. NO. 87-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

N.J. TRANSIT BUS OPERATIONS,
INC.,

Resppondent,

-and-

Docket No. CO-86-44-65

AMALGAMATED TRANSIT UNION,
DIVISION 824,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint, based on an unfair practice charge, filed by the Amalgamated Transit Union, Division 824 against N. J. Transit Bus Operations, Inc. The charge alleges that N. J. Transit violated the New Jersey Employer-Employee Relations Act when it discriminated against, threatened and harassed union members and breached the parties' contract. The Commission, in agreement with a Hearing Examiner, finds that the union did not prove the charge's allegations.

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AMALGAMATED TRANSIT UNION, DIVISION 824,

Charging Party.

Appearances:
For the Respondent, W. Cary Edwards, Attorney General of New Jersey (Jeffrey Burstein, Deputy Attorney General)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs. (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On August 12, 1985, the Amalgamated Transit Union, Division 824 ("ATU") filed an unfair practice charge against N.J. Transit Bus Operations, Inc. ("N.J. Transit"). The charge alleges that N.J. Transit violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4) and (5),[1/] when it discriminated against, threatened and harassed ATU members and breached the parties' contract.

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; (3) Discriminating in regard to

Footnote Continued on Next Page

On October 24, 1985, a Complaint and Notice of Hearing issued on paragraphs nine and ten of the charge. These paragraphs allege N.J. Transit threatened and retaliated against certain employees because ATU insisted on a new pick of bus routes.2/

On November 18, 1985, N.J. Transit filed an Answer denying the Complaint's allegations. It also asserts these defenses: (1) the disputes are being resolved through the grievance procedure; (2) the layoffs involve a managerial prerogative; (3) the Complaint fails to show a nexus between protected activities and employer action, and (4) there are no allegations of conduct that would violate subsections 5.4(a)(2), (4), (6) or (7).

1/ Footnote Continued From Previous Page

hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (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/ In a letter accompanying the Complaint, the Director of Unfair Practices refused to issue a Complaint on paragraphs one through eight and eleven of the charge. Relying on State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), he found the allegations alleged only a dispute concerning contract interpretation.

On February 6 and April 22, 1986, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs. N.J. Transit filed a reply brief.

On December 5, 1986, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 87-37, 12 NJPER ___ (¶_____ 1986) (copy attached). He concluded that ATU failed to prove that N.J. Transit violated the Act by transferring 13 employees in September 1985 or that its supervisor threatened employees with such a transfer or layoff.

On December 22, 1986, ATU filed exceptions. It asserts that N.J. Transit sought to discourage the filing of grievances. Although N.J. Transit's supervisor had no authority to implement manpower cuts, ATU maintains he knew of impending cuts and made a threat to intimidate ATU from filing a grievance concerning summer route picks.

On January 5, 1987, N.J. Transit filed a reply urging adoption of the Hearing Examiner's recommendations, specifically his credibility determinations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are accurate. We adopt and incorporate them here.

Under the two-part test established to analyze allegations of discriminatory conduct, a charging party must first prove, by a preponderance of the evidence, that protected activity was a substantial or motivating factor in the disputed personnel action.

In re Bridgewater Tp., 95 N.J. 235, 242 (1984). In the absence of direct evidence of anti-union motivation, the charging party must show by circumstantial evidence that the employee engaged in protected activity, the employer knew of the activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. If this burden has been met, the employer will be found liable unless it has proved, by a preponderance of the evidence, that it would have taken the same action absent the protected conduct. Id. at 242.

The Hearing Examiner found that ATU failed to prove that protected activity motivated N.J. Transit's decision to transfer 13 employees. We agree. Although filing a grievance is a fundamental example of protected activity, Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986), ATU did not prove that N.J. Transit was hostile toward it because of its grievance.

The Hearing Examiner did not credit the testimony of two ATU witnesses. They were mistaken about the date of the alleged grievance meeting and disagreed as to what supervisor Bresnahan allegedly said. One admitted he was not "upset" by Bresnahan's alleged statement. The Hearing Examiner instead credited the testimony of Bresnahan and two other N.J. Transit witnesses. They denied a meeting took place and claimed that Bresnahan could not have known at the time of the alleged threat that 13 drivers would be transferred. The Hearing Examiner's credibility determinations are supported by other evidence as to when and by whom the decision

to transfer was made. We will not disturb them. Ocean Cty. Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341 (¶17130 1986). Accordingly, ATU failed to prove N.J. Transit transferred employees in retaliation for an ATU grievance.

Because ATU failed to prove a meeting occurred with Bresnahan or that he made any remarks tending to interfere with protected rights, the Hearing Examiner also recommended the subsection 5.4(a)(1) allegation be dismissed. We agree.[3/]

Finally, we agree with the Hearing Examiner's recommendation to dismiss the allegations concerning subsections 5.4(a)(2), (4) and (5).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 16, 1987
ISSUED: January 16, 1987

3/ In its exceptions, ATU claims that even if Bresnahan did not know about the manpower cutbacks, he did know at the time of the grievance meeting that cutbacks were likely. It further claims the Hearing Examiner erred in finding that the alleged statements were not coercive. We agree with ATU that statements may be coercive even if made by one without the power to carry them out. However, the Hearing Examiner here determined that ATU failed to prove such statements were made. We therefore do not address whether the statements, if made, would have violated the Act.

H.E. NO. 87-37

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-44-65

AMALGAMATED TRANSIT UNION,
DIVISION 824,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that N.J. Transit Bus Operations did not violate the New Jersey Employer-Employee Relations Act by transferring 13 drivers to a different location. The ATU did not prove that a supervisor threatened such action because the union was processing a grievance. The Company, nevertheless, established legitimate business justification for its actions.

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. 87-37

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

In the Matter of

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AMALGAMATED TRANSIT UNION,
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Appearances:

For the Respondent
W. Cary Edwards, Attorney General
(Jeffrey Burstein, Deputy Attorney General, of Counsel)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 12, 1985, by the Amalgamated Transit Union, Division 824 ("ATU") alleging that N.J. Transit Bus Operations, Inc. ("Company") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The ATU alleged that the Company violated §§5.4(a)(1), (2), (3), (4) and (5) of the

"Act" primarily by delaying proceeding to the first and second steps of the grievance procedure regarding a grievance seeking a new pick of bus routes, by threatening union members with layoff if a new pick was agreed upon, by laying off 13 bus drivers, and it raised other allegations.[1/]

A Complaint and Notice of Hearing (Exhibit C-1) was issued on October 24, 1985, and the Company filed an Answer (Exhibit C-2) on November 18, 1985 denying any violation of the Act.[2/]. The Company also asserted several affirmative defenses. In sum it

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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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (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 original Charge contained eleven separate incidents alleged to be violations of the Act. By letter of October 24, 1985 (Exhibit C-1A), which accompanied the Complaint, the Director of Unfair Practices refused to issue a complaint on items 1-8 and 11 of the Charge, and limited the Complaint to items 9 and 10 of the Charge. The Director in C-1A paraphrased items 9 and 10 as alleging that the Company retaliated against the ATU by laying off employees because the ATU insisted on a new pick of bus routes. The Answer specifically denied the allegations in items 9 and 10 of the Charge.

argued that it lawfully transferred, rather than laid off, employees, and it argued that there were no allegations to support claims of §5.4(a)(2), (4) and (5) violations of the Act. Hearings were held in this matter on February 6 and April 22, 1986 at which the parties presented evidence, examined witnesses, and argued orally.[3/] Both parties filed post-hearing briefs by June 24, 1986, and the Company filed a reply brief on July 8, 1986.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

FINDINGS OF FACT

1. N.J. Transit Bus Operations, Inc. is a public employer within the meaning of the Act and is subject to its provisions.

2. ATU, Division 824 is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Company and ATU were parties to a collective agreement (Exhibit J-1) effective from March 1981 through March 1984, and are parties to an extension and modification of J-1 through 1987 (Exhibit J-1A). The agreements cover bus operators

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3/ The Complaint and Notice of Hearing originally set the hearing for January 16 and 17, 1986. By joint request, the hearing was postponed to February 6, 1986.

employed by the Company, and ATU Division Local 824 represents the drivers working out of the "Howell Garage" which includes locations in Old Bridge and Lakewood, N.J. (Transcript "T" 1 p. 23).

The particular drivers for the bus routes (runs) that emanate from the various Company garages are determined through a seniority-based bidding process known as a general pick. Pursuant to Section 10 of J-1 there are four general picks a year: January, April, June and September. The Company is required to post the schedules--bus routes that are assigned to the various garages-for four days prior to requiring drivers to pick their runs. Then drivers pick their runs based upon seniority in a particular garage (T1 pp. 24-25, 28).

4. Donald Mellay is the Company's manager of operations and has been responsible for making (initiating) the manpower determinations for the Howell Garage and other locations since 1983 (T2 pp. 4-6). Mellay makes recommendations to his superior who presents them to the Company's deputy general manager and eventually to the general manager (T2 p. 7). Prior to 1983 garage supervisors and district managers were authorized to make manpower determinations. Since 1982 Charles Bresnahan has been the supervisor at the Howell Garage, and Edward Cunningham, Bresnahan's supervisor, has been district manager over the Howell complex (T1 pp. 48, 69).

Mellay testified that in 1985 garage supervisors did not have any role in making manpower determinations at the respective

garages (T2 p. 6). Mellay indicated that at the beginning of every pick all garage supervisors, such as Bresnahan, are required to submit to his (Mellay's) office statistics showing the total number of bus runs and manpower needs at the respective garages as a cross-reference to the statistics developed by the Company's scheduling department (T2 pp. 15, 37-38).

5. In late April or early May 1985 the Company and the ATU signed J-1A, the new agreement (T2 p. 12). Based upon that agreement, the Company, in the early spring of 1985, changed its manpower requirements and developed a new formula to determine its manpower needs (T2 pp. 11-12). Part of that formula was setting aside ten percent of the work for part-time bus operators (T2 p. 12).

In late April or early May 1985, after the completion of the April general pick, Mellay knew that there were more than a sufficient number of full-time operators at the Howell complex, and knew that there would be some transfers of employees out of Howell and other garages (T2 pp. 13, 38). He testified that he did not transfer drivers out of the Howell complex at the time of the June pick, however, because during the summertime there are more drivers on vacation and because the Howell complex is given an extra 2% of drivers because it has seasonal work to Great Adventure and the Jersey Shore (T2 pp. 14, 24). That extra 2% is not given to Howell during the September pick (T2 p. 24).

6. In June 1985 the scheduling department prepared Exhibit R-1 for Mellay. Mellay knew that there were 216 operators in the Howell complex at that time (T2 p. 21). R-1 showed, however, that based upon the runs operating out of the Howell complex, Howell only needed 203 operators to run the garage (T2 pp. 16-21). For the summer months, however, Mellay allowed an additional four drivers for Howell which was the extra 2% for the summer months bringing the total to 207 (T2 p. 19). Those additional four drivers were disallowed in the Fall because of contractual changes and because of the availability of part-time operators (T2 pp. 19-20).

Mellay cross-checked R-1 with Exhibits R-2 and R-3 which had been prepared by Bresnahan as per Company policy (T2 pp. 37-38, 87). R-2 showed the amount of work and number of drivers in Old Bridge, and R-3 gave that same information for Lakewood. The combination of R-2 and R-3 showed that Howell needed 208 drivers to cover the June pick, and Mellay testified that the garage overestimated by one, but he let them have it for the June pick (T2 p. 46). Thus, after reviewing R-1, R-2, and R-3 Mellay knew that Howell would be overstaffed in the Fall of 1985 (T2 p. 39).

On July 9, 1985, without having any knowledge of a problem developing between the ATU and Bresnahan at the Howell complex over the June pick (T2 pp. 8-11), Mellay prepared Exhibit R-5 which showed a projected drop in the number of drivers needed in the Howell complex for the September pick. Mellay testified that based upon J-1A the Company was allowed to have ten percent (10%) of its

hours set aside for part-time operators (T2 pp. 30-31). R-5 reflects a 10% reduction in the drivers needed at Old Bridge and Lakewood and brings the projected total number of drivers to 195 for the Howell Complex.

On August 7, 1985 the scheduling department prepared Exhibit R-7 which showed the schedule and manpower needs for the Howell Garage for the September pick. Mellay testified that his final decision to transfer 13 drivers out of the Howell Complex was based upon R-7 (T2 p. 48). Mellay was still unaware of any conflict over the June pick in the Howell Garage. R-7 showed that Howell needed 203 drivers and was overstaffed by 13 drivers for the September pick. The following day, August 8, Mellay prepared Exhibit R-4 which again showed that Howell was overstaffed by 13 drivers (T2 p. 29).

Mellay testified that R-4 had not been given to Bresnahan, but that when the September schedules came out in early August 1985, he told Cunningham of the need to transfer 13 drivers, and that Cunningham told Bresnahan (T2 pp. 42-43).

On August 29, 1985 Mellay posted Exhibit R-6 notifying the 13 employees of a transfer effective August 31, 1985.

7. In mid-June 1985 Bresnahan and ATU Local 824 President and Business Agent Jim Lynch met regarding the June pick. Bresnahan asked Lynch if the ATU would agree to allow the schedule to be posted less than the contractual four days before picking started. Lynch agreed to the request provided the Company would agree to a re-pick if there were problems with the schedules (T2 pp. 27-30).

The pick was held just after July 4, and Lynch noticed mistakes in the schedule just after it went into effect in early July (T1 pp. 31-35). Lynch spoke to Bresnahan about certain schedule problems and Bresnahan apparently refused to make any changes (T1 p. 38). Lynch wanted a repick, but Bresnahan did not authorize a repick at that time. Lynch then spoke to Ed Butler from the Company's public relations office who arranged a first-step grievance meeting with Bresnahan over the scheduling problems (T 1 pp. 38-39).

The grievance procedure in J-1, Section 1(A) provides that a first-step grievance is with the supervisor and a second step is to be held within 48 hours with the next level of supervision.

Lynch had the first-step grievance with Bresnahan at the end of the first week of July (T1 p. 40). Lynch admitted that Bresnahan made some corrections in the schedule but he (Bresnahan) did not authorize a repick (T 1 pp. 68-69). Lynch then requested a second-step grievance meeting with Cunningham (T1 pp. 40-41).[4/]

4/ The Company argued that the meeting with Cunningham was not a grievance meeting because it did not take place within 48 hours of the first-step meeting as required by J-1. (T2 p. 51). Since the question of whether the meeting with Cunningham was a formal second-step grievance meeting is immaterial to a decision on this Charge, I will not resolve that question. It is enough to find that a meeting did occur and seemed to serve the purpose of a second-step meeting.

As evidenced by Exhibit R-8, the grievance meeting with Cunningham was held on July 17, 1985.[5/]

Cunningham, Bresnahan, Lynch, ATU vice-president Joseph McGrath, and ATU shop steward Harry Maskell were present at the second-step grievance (T1 pp. 99-100). Lynch and Cunningham discussed several schedule problems, many of which Cunningham agreed to correct, and Cunningham concluded that if Lynch was not satisfied with the meeting the ATU could conduct a new pick if it could be completed by August 2, 1985 (T1 pp. 44, 75-78, T2 pp. 52-53, R-8).

After Cunningham made his offer for a general pick the ATU representatives left the room and had an Executive Board meeting including Lynch, McGrath, and Maskell (T1 p. 104). McGrath testified that the Executive Board decided that they would ask Cunningham for a bump pick rather than a general pick, and Lynch went back to Cunningham to make that request (T1 pp. 104-105). Maskell testified, however, that the Executive Board wanted a new pick (which I presume was a general pick), and that Lynch went back to tell Cunningham (T1 pp. 139-141). Cunningham continued to offer

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5/ Lynch testified that he thought the second-step grievance with Cunningham was in early August 1985 (T1 pp. 42, 71), and ATU shop steward Harry Maskell also thought that meeting was in August (T1 p. 137) but ATU vice-president Joe McGrath testified that the meeting was in either late July or early August (T1 p. 100). R-8, Cunningham's written result ofthe meeting, however, fixes the date of the meeting as July 17, 1985. Since there is no evidence to suggest that R-8 was incorrect, I find that the second-step meeting was held on July 17, and I do not credit Lynch and Maskell that the meeting was in August 1985.

a general pick, and on July 24, 1985 he sent Butler a memorandum, R-8, indicating that on July 17, 1985 he granted Lynch's request for a general pick. The ATU started the repick, but did not complete the process because the posting and selection process was too close to the September general pick which was posted and picked in early August 1985 (T1 pp. 123, 131-132).

Both McGrath and Maskell testified that when Lynch went back to arrange the general pick with Cunningham, Bresnahan came out of the room and met with them (T1 pp. 105, 140). McGrath testified on cross-examination that Bresnahan said: "[I]f this pick [the repick of the June general pick] is pursued, there will be 13 people displaced." (T1 pp. 106, 125). McGrath was certain that the word "displace" was used (T1 pp. 106, 125). Maskell testified, however, that Bresnahan's "exact words" were: "If you have this pick, you are going to lose 13 men" (T1 p. 147). Maskell did not allege that Bresnahan used the word "displaced," and Maskell testified that he was not upset by the alleged statement (T1 p. 148). McGrath testified that he asked Bresnahan the reason for the transfers and he alleged that Bresnahan said: "Management rights" (T1 p. 113). McGrath also testified that no one told Cunningham what Bresnahan allegedly said (T1 p. 130).

Bresnahan denied ever meeting separately with McGrath and Maskell about the request for a repick, and denied telling them that 13 drivers would be transferred (T2 pp. 79, 80). Bresnahan testified that he would not have known about the transfers in July

because he did not learn of them until after the September pick was posted in August of 1985 (T2 pp. 79, 84). He further testified that he was not involved in the decision to transfer the employees (T2 pp. 82-83). Cunningham also testified that he was not involved in the decision to transfer 13 employees and he was not aware of the transfers until after the September pick was posted (T2 pp. 56, 57).

Bresnahan did testify that sometime after the meeting of July 17 he met with Maskell concerning changes on the "extra-board" (T2 pp. 81, 91-92). The extra board is a group of operators who are available on a daily basis without specific runs, and Bresnahan can shift them between Lakewood and Old Bridge (T2 p. 81). Bresnahan testified that he thought that the repick gave him the opportunity to add two more drivers to the extra-board in Lakewood (T2 p. 81). But that shift of drivers between Lakewood and Old Bridge occurs within the "Howell complex" and did not involve the 13 drivers who were transferred out of the Howell locations.

I credit Bresnahan's testimony denying ever telling McGrath and Maskell that as a result of the repick grievance, employees would be transferred. There was no evidence to contradict Bresnahan or Cunningham that they were not aware of the transfers until August 1985. I find that McGrath and Maskell were wrong about the timing (date) of the grievance meeting and they could not even agree on what Bresnahan allegedly said. That difference demonstrates uncertainty in their testimony making it impossible to rely upon their assertion that Bresnahan threatened to transfer employees.

ANALYSIS

The Company did not violate the Act by transferring thirteen employees in September 1985, nor did the ATU prove that any remarks by Bresnahan violated the Act.

The 5.4(a)(3) Allegation - The Alleged Discriminatory Transfer

The legal standard for analyzing (a)(3) cases was established by the N.J. Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). Under that standard the ATU must make a prima facie showing that protected activity was a "substantial" or a "motivating" factor in the Company's decision to transfer the 13 employees. In order to make a prima facie showing the ATU must prove the existence of a protected activity, it must prove that the Company was aware of the activity, and it must prove that the Company was hostile toward the ATU because of the exercise of the protected activity, 95 N.J. at 246. If the ATU proves those items, the Company has the burden to prove that the same action would have occurred based upon legitimate business considerations--even absent the protected activity. 95 N.J. at 242.

Not only did the ATU fail to make a prima facie case, but the Company proved that the transfers would have occurred even in the absence of the protected activity.

It is well established that the filing or processing of a grievance is protected activity, Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459 (¶ 4208 1978); Dover Municipal Utilities Auth.,

P.E.R.C. No. 84-132, 10 NJPER 333 (¶ 15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶ 17161 1986); and Hunterdon County Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶ 17259 1986), and the ATU's "grievance" or complaint regarding the June pick was such protected activity. The Company certainly had knowledge of the "grievance," but the ATU did not prove that the Company or its agents were hostile because of the ATU's exercise of the protected activity.

In order to comply with the Bridgewater standards the ATU attempted to prove that Bresnahan was hostile to the ATU and the employees because of the grievance regarding the June pick. The ATU relied upon testimony from McGrath and Maskell to prove what Bresnahan allegedly said, but I cannot rely on their testimony to prove hostility by Bresnahan.

First, the alleged meeting with Bresnahan, McGrath and Maskell would have occurred on the day of the grievance meeting with Cunningham which was held on July 17 as evidenced by R-8. But Maskell testified that the meeting had been in August, and McGrath testified it was in late July or early August. The timing of the alleged meeting was critical in relationship to when Mellay decided to transfer the employees, and in relationship to when Bresnahan learned of the transfer. Since McGrath and Maskell were mistaken about the timing of the alleged meeting, it creates an inference that their recollection of the events was not clear.

Second, the most critical element in proving hostility by Bresnahan is that he said something of a threatening or coercive nature because the ATU pursued a grievance and sought a new pick. McGrath and Maskell, however, could not even agree as to what Bresnahan allegedly said, and both remarks could be interpreted as informational only--that a new pick will result in transfers--and not as a threat because the ATU filed a grievance. McGrath was certain that Bresnahan used the word "displace," yet Maskell testified as to Bresnahan's "exact words" which did not include the word "displace." Assuming that such a meeting took place, it is clear to me that neither McGrath nor Maskell really remember what Bresnahan said.

In order for any employer remark to be considered threatening or coercive it must have the reasonable "tendency" to interfere with employee (or union) rights. Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶ 13253 1982) aff'd App. Div. Dokt. No. A-1642-82T2 (12/8/83); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶ 4096 1978), aff'd App. Div. Dkt. No. A-3562-77 (3/5/79). Since neither McGrath nor Maskell could be certain as to what Bresnahan allegedly said, and since the remark(s) they did attribute to Bresnahan could be interpreted as informational only and did not appear to be threatening on their face, I cannot conclude that any remark by Bresnahan had the "tendency" to interfere with the ATU's processing of a grievance.

In addition, Maskell admitted that he was not "upset" by the statement he attributed to Bresnahan and did not tell Cunningham. Since the ATU did not prove what--if anything--Bresnahan said, and since Maskell was not upset by it in any event, I could hardly conclude that Bresnahan's alleged comment tended to threaten or coerce Maskell or McGrath.

Third, Bresnahan denied ever having such a meeting with McGrath and Maskell regarding the transfer of employees, and denied even knowing about the transfer of 13 drivers until August. Having prepared R-2 and R-3 in June, Bresnahan certainly had some idea at that time that the Howell Garage was overstaffed and that it might result in some transfers. But the uncontroverted evidence was that Mellay did the scheduling of the bus routes and did not post those routes until August. Bresnahan did not know in July what the September schedules and manning needs would be; thus, he could not have known at that time that 13 drivers would be transferred. Cunningham also testified that he did not know of the transfers until August; thus, he could not have told Bresnahan of the transfers in July. Similarly, Mellay testified that he did not even make a final decision on the number of transfers until August 7, 1985, when he issued R-7, and he did not earlier discuss with Bresnahan his (Mellay's) decision to transfer the drivers.

Since McGrath and Maskell were obviously uncertain as to when the alleged meeting with Bresnahan occurred, and were uncertain

as to what Bresnahan allegedly said, I cannot rely on their testimony.Rather, I credit Bresnahan, Cummingham and Mellay.[6/]

Even assuming that the ATU made a prima facie case, the evidence was overwhelming that the transfers would have occurred in any event. The uncontroverted evidence shows that Mellay, not Bresnahan, made the decision to transfer 13 drivers, and Mellay was totally unaware of the events regarding the June general pick and the grievance for a repick at the time he decided to effectuate the transfers. The Company proved through the submission of R-1, R-4, R-5, R-7 and Mellay's testimony that there was a legitimate business need to transfer the drivers. Accordingly, the 5.4(a)(3) allegation should be dismissed.

The 5.4(a)(1) Allegation - The Alleged Threat by Bresnahan

Unlike the Bridgewater (a)(3) standard, the standard for proving 5.4 (a)(1) violations of the Act does not require proof of an anti-union motive. N.J. College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶ 4189 1978); N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶ 10285

6/ In choosing which testimony to credit the trier of fact is not necessarily choosing which witness(es) is (are) telling the truth, but is often deciding which testimony is more reliable and plausible. I am not finding that McGrath and/or Maskell is (are) intentionally lying. Rather, since they could not agree on such a critical element of their proof - what Bresnahan allegedly said - then I cannot rely on their testimony. The testimony of Bresnahan, Cunningham and Mellay is consistent with each other and with the physical evidence, thus their testimony is considerably more reliable and plausible.

1979). The reasonable tendency to interfere with protected activity is the controlling standard. Commercial Twp. Bd. of Ed., supra; City of Hackensack, supra.

The ATU maintained that the alleged remark(s) by Bresnahan violated the Act, but for the reasons expressed above, I found that the ATU did not prove that a meeting occurred with Bresnahan regarding transfers, or that he made any remark(s) which had the tendency to interfere with the ATU rights.

The ATU relied on several cases to prove its point. Middletown Twp., P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984); Ridgefield Public Library, P.E.R.C. No. 84-11, 10 NJPER 255 (¶ 15122 1984); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-120, 10 NJPER 266 (¶ 15130 1984); Mercer County, P.E.R.C. No. 86-33, 11 NJPER 589 (¶ 16207 1985). In all of those cases the Commission found an independent 5.4(a)(1) violation of the Act because an employer representative made a statement or distributed a document which tended to interfere with a charging party's protected rights. In Middletown, supra, the language tending to interfere with protected activity was contained in a letter that was not disputed. In Ridgefield Public Library, supra, employer representatives made certain uncontested remarks which tended to interfere with protected rights. In Ridgefield Park, supra, the unlawful language was contained in an evaluation form, and In Mercer County, supra, an employer representative threatened a union president with reassignment if he won his grievance. The Commission in Mercer

concluded that the statement was made in a loud, angry and threatening manner.

None of the cases relied upon by the ATU show that there was a discrepancy regarding the language leading to the violation. In the instant case, however, Bresnahan denied making any statements to McGrath and Maskell regarding transfers and denied even knowing about the number of transfers in July 1985. Cunningham and Mellay corroborate his testimony. McGrath and Maskell could not even agree as to what Bresnahan allegedly said, and given these facts it is not possible to conclude that Bresnahan said anything having the reasonable tendency to interfere with ATU rights. Accordingly, the 5.4 (a)(1) allegation should be dismissed.

The 5.4 (a)(2), (4) and (5) Allegations

Since the Director in C-1A limited the Complaint to the transfer and alleged threat, and since no facts were presented in support of an (a)(2), (4) or (5) charge, those allegations must be dismissed.

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

RECOMMENDATION

The Commission should ORDER that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: December 5, 1986
Trenton, New Jersey