

P.E.R.C. NO. 2011-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS-MERCER,

Petitioner,

-and-

Docket No. SN-2010-075

AMALGAMATED TRANSIT UNION,
DIVISION 540,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Bus Operations-Mercer for a restraint of binding arbitration of a grievance filed by the Amalgamated Transit Union, Division 540. The grievance involves the denial of a promotion of a part-time bus operator to full-time. The Commission holds that under the broader scope of negotiations standard for New Jersey Transit bus employees, the issue is mandatorily negotiable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Paula T. Dow, Attorney General
(Richard W. Schleifer, Deputy Attorney General)

For the Respondent, Oxfeld Cohen, P.C., attorneys,
(Arnold Shep Cohen, of counsel)

DECISION

On March 23, 2010, New Jersey Transit Bus Operations-Mercer (NJT) petitioned for a scope of negotiations determination. NJT seeks a restraint of binding arbitration of a grievance filed by the Amalgamated Transit Union, Division 540.^{1/} The grievance involves the denial of a promotion of a part-time bus operator to full-time.^{2/} We deny NJT's request for a restraint of binding arbitration.

^{1/} NJT amended its scope petition on March 25, 2010.

^{2/} A Commission designee denied NJT's application for interim relief. I.R. No. 2010-16, 36 NJPER 101 (¶41 2010).

The parties have filed briefs and exhibits. NJT has submitted a certification from its Director of Labor Relations. These facts appear.

The parties entered into a collective negotiations agreement effective from July 1, 2005 to June 30, 2008. The grievance procedure ends in binding arbitration. Article XI, Section 1(k) states that "[p]art-time operators will not accrue seniority except within the unit of part-time operators. This seniority will apply when reducing part-time forces."

On February 6, 2008, a part-time driver applied for a promotion to full-time driver. The completed application form showed that he achieved a specific point total based on consideration of the following factors: Supervisor Rating; Good Record Bonus; Attendance; Customer Complaints; Safety Record; License Suspension and Other Discipline. For reasons not reflected in the record, the promotion was denied.

On February 14, 2008, the ATU filed a grievance alleging a violation of Article XI, Section 1(k).^{3/}

Our jurisdiction is narrow. Ridgefield Park Ed. Assn v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations.

^{3/} Other than a copy of the grievance, the record does not contain any information regarding the treatment of the grievance prior to NJT's filing of its scope petition.

Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations is broader for New Jersey Transit bus employees than for any other employees in the New Jersey public sector because they are covered by the Public Transportation Act, N.J.S.A. 27:25-1 et seq. (PTA), instead of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The labor relations subchapter of the PTA requires this employer and this majority representative "to negotiate collectively with respect to mandatorily negotiable subjects which intimately and directly affect the work and welfare of employees." N.J.S.A. 27:25-14(d). Interpreting the labor relations subchapter as a whole and subsection 14(d) in particular, we held in New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶ 19070 1988), rev'd 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd 125 N.J. 41 (1991) that, as in private sector employment relationships generally, "issues that settle an aspect of the relationship between the

employer and the employee" are mandatorily negotiable unless, unique to this particular employment situation, NJT would be prevented from fulfilling its statutory mission. The Supreme Court approved this test and elaborated on it as follows:

[A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between government and its employees in mass transit. There must be more than some abstract principle involved; the negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. All of the various rulings of PERC . . . have that theme. They look to the actual consequences of allowing negotiations on the ability of NJT to operate and manage mass transit efficiently and effectively in New Jersey. If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test, rather than someone's notion of what government generally should be allowed to unilaterally determine and what it should not.

[125 N.J. at 61]

NJT argues that it has a past practice of using the point system enumerated in the application to determine whether to promote operators from part-time to full-time. It further argues that seniority is not a factor in those determinations. It asserts that the selection of drivers to be promoted affects its statutory mission to provide a safe and efficient public transit

system and therefore the grievance involves a subject that is not negotiable or arbitrable.

The ATU responds that the issue of whether seniority is used in promotions or whether the past practice cited by NJT is the basis for promotions goes to the merits of the grievance and is not relevant in a scope proceeding.

Seniority and other promotional criteria are mandatorily negotiable for New Jersey Transit bus employees and whether a certain criterion should have been considered in a promotion decision is an issue that is legally arbitrable. New Jersey Transit Bus Operations Inc., P.E.R.C. No. 93-42, 19 NJPER 13 (¶24007 1992). NJT has not provided any evidence establishing that using seniority as a factor in considering this promotion would interfere with its statutory mission to provide a coherent public transportation system in the most efficient and effective manner. New Jersey Transit Bus Operations, Inc., 14 NJPER at 174. NJT's abstract notion that its promotion decisions are connected to its mission to provide a safe transit system is not sufficient to cause us to deviate from applying the general legal principle that promotional criteria are mandatorily negotiable for New Jersey Transit bus employees.^{4/} New Jersey Transit Bus

^{4/} None of the cases cited by NJT is persuasive since they involve promotions/appointments of public employees other than non-police NJT employees and thus arise under a

(continued...)

Operations Inc., 125 N.J. 64; New Jersey Transit Bus Operations Inc., P.E.R.C. No. 93-42.

ORDER

New Jersey Transit Bus Operations-Mercer's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: October 28, 2010

Trenton, New Jersey

4/ (...continued)
different scope of negotiations standard. See Egg Harbor Tp., P.E.R.C. No. 86-20, 11 NJPER 518 (¶16181 1985); State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (¶16177 1985), rem'd App. Div. Dkt. No. A-0027-85T1 (4/9/86), P.E.R.C. No. 86-139, 12 NJPER 484 (¶17185 1986); Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995).