

P.E.R.C. NO. 2024-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NJ TRANSIT BUS OPERATIONS, INC.

Petitioner,

-and-

Docket No. CU-2022-015

NATIONAL ASSOCIATION OF TRANSPORTATION
SUPERVISORS, LOCAL 354,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies NATS' request for review of the Director of Representation's decision granting NJTBO's clarification of unit petition to exclude Foremen I and Foremen II from the NATS units. The Commission finds that Foremen I and II are precluded from collectively organizing under the New Jersey Public Transportation Act because they are supervisors within the meaning of 29 U.S.C. §152(11) of the NLRA and LMRA. Specifically, the Commission finds that the record demonstrates that Foremen I and II exercise independent judgment in responsibly directing the work of maintenance employees and in effectively recommending discipline. The Commission therefore finds NATS failed to demonstrate any compelling factual, legal, or policy reason warranting review of the Director's determination.

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, McElroy, Deutsch, Mulvaney &
Carpenter, LLC, attorneys (John J. Peirano, of counsel)

For the Respondent, Isaacs, Devasia, Castro & Wien,
LLP, attorneys (Howard G. Wien, of counsel)

DECISION

On May 16, 2022, NJ Transit Bus Operations, Inc. (NJTBO) filed a clarification of unit petition seeking to exclude the position of Foreman I from one negotiations unit and the position of Foreman II from a second negotiations unit represented by the National Association of Transportation Supervisors, Local 354 (NATS). NJTBO asserts that Foremen I and Foremen II are not employees under the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et seq., which incorporates the definition of "employee" in the National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act (LMRA), 29 U.S.C. §141 et seq. NJTBO alleges that, under that definition, Foremen I and

Foremen II are statutory supervisors precluded from organizing.^{1/} Both NATS units were certified on December 7, 2020. The Foremen I unit consists only of Foremen I and excludes non-supervisory employees and Foremen II. The Foremen II unit consists only of Foremen II and excludes non-supervisory employees and Foremen I.

On December 8, 2021, NATS filed an unfair practice charge (Docket No. CO-2022-131) against NJTBO for refusing to negotiate towards collective negotiations agreements for the two units. NJTBO admittedly refused to negotiate and filed the instant clarification of unit petition (CU Petition) after learning that the Foremen I and Foremen II may be ineligible for inclusion in any negotiations unit based on their alleged supervisory status. The parties filed and served positions statements and replies concerning the unfair practice charge.

On May 17, 2022, a Commission staff agent assigned to the CU Petition sent the parties specific questions and requests for information relevant to this case. On July 22, 2022, the NJTBO submitted a certification of Deputy General Manager of Vehicle Maintenance John McCarthy with exhibits, and NATS submitted an affidavit of counsel from Howard Wien with exhibits. On

^{1/} Other New Jersey public sector supervisors, by contrast, are allowed under the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., to be in supervisory negotiations units with other supervisors. Under the Act, supervisors may not be in a unit with nonsupervisors "except where dictated by established practice, prior agreement, or special circumstances . . ." N.J.S.A. 34:13A-6(d).

September 30, 2022, NATS submitted a letter brief in rebuttal to McCarthy's certification, along with certifications from multiple Foremen I and Foremen II all certifying that paragraphs 6 through 15 of the Wien Certification are accurate based on their personal knowledge with respect to their positions.

The Director of Representation (Director) conducted an administrative investigation to determine the facts and found that with respect to establishing supervisory status under the NJPTA, there were no disputed material facts that required him to conduct an evidentiary hearing. See N.J.A.C. 19:11-2.2 and 2.6.^{2/3/} On August 10, 2023, the Director issued a written decision granting NJTBO's CU Petition to exclude Foremen I and Foremen II from their respective NATS units. D.R. No. 2024-1, 50 NJPER 76 (¶20 2023). The Director found that because Foremen I and Foremen II "use independent judgment in responsibly directing and in effectively recommending discipline of maintenance employees" they are supervisors under the NLRA, are not employees under the NJPTA, and are therefore precluded from organizing collectively. D.R. at 23-24.

2/ N.J.A.C. 19:11-2.2(a) provides: "Upon the filing of any petition, the Director of Representation shall investigate the petition to determine the facts."

3/ N.J.A.C. 19:11-2.6(f)(1) provides: "(f) A hearing shall be conducted: 1. If it appears to the Director of Representation that substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing;"

Arguments

On August 28, 2023, after receiving consent for a one-week extension from NJTBO's counsel, NATS filed a request for a review of the Director's decision with the Commission. On August 30, NATS filed an amended request for review. NATS asserts that the Director's decision raises substantial questions of law concerning the administration of the Act and that his decision on substantial factual issues was clearly erroneous. NATS argues that the Director confused merely routine, clerical supervisory job duties for discretion and independence in exercising supervisory authority. It contends that Foremen I and Foremen II do not possess supervisory status based on the authority to discipline or to effectively recommend discipline, because their exercise of disciplinary authority allegedly requires independent investigation by upper management and does not involve them making and submitting actual recommendations that are followed on a regular basis. NATS also asserts that Foremen I and Foremen II do not assign work in a supervisory manner as contemplated by the NLRA or responsibly direct the work of other employees.

On September 13, NJTBO filed a brief opposing the request for review. NJTBO asserts that NATS does not raise substantial questions of law and fails to demonstrate any substantial factual issues that were clearly erroneous. NJTBO contends that the Director's decision correctly applied Commission precedent in

finding that if any of the statutory factors for supervisory status are present, then the employee is a supervisor under the LMRA and excluded from collective negotiations under the NJPTA. NJTBO asserts that Foremen I and II have even greater indicia of supervisory authority than the NJTBO regional supervisors whom the Commission found were supervisors in New Jersey Transit and CWA, Local 1032, P.E.R.C. No. 2002-9, 27 NJPER 363 (¶32132 2001). It argues that the foremen regularly assign work, ensure the assigned work is completed in accordance with NJTBO standards, and evaluate employees' work performance. NJTBO asserts that the disciplinary authority of foremen does not just include reporting violations, but also includes serving as first step hearing officers and as decision-makers in the discipline process. NJTBO argues that these supervisory duties indicate that Foremen I and II regularly make independent judgments concerning whether and to what extent discipline should be imposed.

Summary of Facts

We incorporate the Director's findings of fact, which are supported by information from both the Wien Certification supplied by NATS and the McCarthy Certification and accompanying exhibits supplied by NJTBO. D.R. at 16-23. We summarize the pertinent facts as follows.

NJTBO employs two types of foremen in its maintenance department - Foremen I and Foremen II. Foremen I and II assign

work functions, including emergency repairs. Foremen I and II are responsible for oversight and quality control of maintenance staff to ensure adherence to NJTBO's Maintenance Standard Operating Procedures and that safety guidelines and PPE requirements are followed. Foremen I inform Foremen II of the repair and maintenance work that needs to be completed and review the work of Foremen II to ensure that repair and maintenance work is complete. Foremen II, in turn, ordinarily inform other maintenance workers of repair and maintenance work that needs to be completed and follow up with them to verify that the work was performed. Foremen I verify with Foremen II that they have confirmed that the workers performed the work. Foremen I also ensure repair and maintenance staff have proper equipment to perform their work and assess the work to be performed to determine whether it should be performed by building maintenance staff or other NJTBO staff who perform heavy repairs.

Foremen II are required to recognize violations of NJTBO rules and report rules violations through a disciplinary slip form on which the Foreman II selects the violation he or she believes to be applicable. That disciplinary slip is reported by the Foreman II to the Foreman I and may trigger the disciplinary grievance process. When witnessing a serious incident, Foremen I and II have the independent authority to determine whether to issue a disciplinary "see-me" slip that is recorded in the

Employee Performance System (EPS). The Foremen I and II use independent judgment to determine whether the witnessed incident may fall under, among other things, one of the following violations: conduct unbecoming; creation of a hostile work environment; respect for authority; unauthorized absence from work location; uncivil or discourteous behavior; or abuse of equipment. Both Foremen I and II serve as hearing officers on behalf of NJTBO at the first step of the disciplinary grievance process. NJTBO supplied evidence of disciplinary cases against employees in which Foremen I and Foremen II performed in one or more of the following disciplinary roles: initiation of discipline and imposition of discipline; first step hearing officer; and witness testifying on behalf of management at the disciplinary arbitration hearing.

Standard of Review

Pursuant to N.J.A.C. 19:11-8.2(a), "a request for review will be granted only for one or more of these compelling reasons:"

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may

have resulted in prejudicial error; and/or

4. An important Commission rule or policy should be reconsidered.

As further explicated below, we deny NATS' request for review as it has not advanced any compelling reasons to review the Director's factual findings or legal conclusions.

Analysis

The NJPTA empowers the Commission to enforce the rights and obligations of NJTBO and its employees for purposes of labor relations and directs that we be guided by the federal or state labor law and practices developed under the LMRA. NJTBO and CWA, P.E.R.C. No. 2002-9; N.J.S.A. 27:25-14c. The Supreme Court has held that the Legislature "intended to confer such rights on [NJTBO] employees as would place them in the same position they had in the private sector" subject to the responsibility of government to accomplish the goals of the NJPTA. New Jersey Transit Bus Operations, 125 N.J. 41, 45 (1991).

The Director's decision analyzed this CU Petition under the applicable state statute, the NJPTA, and the federal statutes incorporated therein, the NLRA as amended by the LMRA. See NJTBO and CWA. Specifically, N.J.S.A. 27:25-14a(2) of the NJPTA provides that the term "employee" does not include "supervisors" as defined under the LMRA. 29 U.S.C. §152(3) of the LMRA excludes supervisors from the definition of employee. 29 U.S.C. §152(11) in turn defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

Employees are statutory supervisors if: (1) they have authority to engage in one of the listed supervisory functions; (2) their exercise of such authority is not routine or clerical, but requires independent judgment; and (3) their authority is held in the employer's interest. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001); NJTBO and CWA. Assessment of supervisory status is fact-intensive, and the burden of proof is on the party asserting that an employee is a supervisor. Kentucky River; NJTBO and CWA. However, "[o]nly one of the twelve statutory indicia need be shown to support a finding of supervisory status." Passavant Retirement and Health Center v. NLRB, 149 F.3d 243, 247 (3rd Cir. 1998), citing NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 573-4 (1994).

In NJTBO and CWA, the Commission found that, under the U.S. Supreme Court's Kentucky River standard, the NJTBO regional supervisors exercise authority to responsibly direct others because, in their role of overseeing bus operations and ensuring safe and on-time service and adherence to work rules, they may take actions such as: altering route schedules; removing an

operator from service for sickness or impairment; correcting employees when they observe an infraction; issuing violation notices; and completing forms requiring employees to see their supervisors before being allowed to return to service. The Commission also found the regional supervisors have the authority to effectively recommend discipline through their issuance of disciplinary slips, even though they do not recommend penalties. The Commission found that the violation reports effectively recommend discipline because they may be the only way that bus operator performance is monitored, they are given weight and are an integral part of the disciplinary process, and they almost always result in a disciplinary sanction. See Glenmark Assocs., Inc., 147 F.3d 333, 341-341 (4th Cir. 1998).

Here, the record indicates that Foremen I and II perform many similar "responsible direction" duties as the supervisors in NJTBO and CWA, such as overseeing (maintenance) operations, ensuring safe and timely completion of (maintenance) service, monitoring of (maintenance) workers' adherence to work rules, correcting employees' work rules infractions, and issuing violation notices to employees for work rules violations. Furthermore, the Foremen I and II in this case exercise even greater responsibility and discretion in the disciplinary process for NJTBO mechanics than the regional supervisors in NJTBO and CWA exercise vis-a-vis NJTBO bus operators. While the

supervisors in NJTBO and CWA only issued the initial disciplinary slips which recorded incidents that were relied upon for the issuance of discipline by higher level supervisors, the Foremen I and II here initiate and impose discipline and serve as first step hearing officers during the disciplinary grievance process.

Applying these legal standards and precedents to the factual record in this case, we find that the level of independent judgment exercised by the Foremen I and II in responsibly directing and effectively recommending the discipline of NJTBO maintenance employees in the interest of NJTBO requires that they be excluded from their collective negotiations units. NJTBO and CWA; Kentucky River. These job duties comprise two distinct statutory indicia of supervisory status under 29 U.S.C. §152(11) of the LMRA which, in turn, mandates the exclusion of these job titles from collective negotiations under the NJPTA.

While NATS cited many NLRB cases in which certain employees were found not to be statutory supervisors under the LMRA based on the factual circumstances therein, it has not demonstrated that the supervisory duties performed by the foremen in this case are analogous to or less than the level of supervisory authority exercised in the cases relied upon. NJTBO's opposition brief underscored various ways in which the NLRB cases relied on by NATS are distinguishable from the factual record in this case which establishes that Foremen I and II use independent judgment

in responsibly directing employees and effectively recommending discipline. Moreover, NJTBO highlighted two cases cited by NATS in which the NLRB found the employees were statutory supervisors. See Sheraton Universal Hotel, 350 N.L.R.B. 1114 (2007); ITT Lighting Fixtures, 265 N.L.R.B. 1480 (1982). In those cases, the positions at issue exercised independent authority to recommend discipline and/or to assign and direct work at levels similar to or, in some respects, less than the Foremen I and II here.

Based on the foregoing, we concur with the Director's factual findings and legal conclusions in granting NJTBO's CU Petition and excluding Foremen I and II from their respective units based on their statutory supervisory status under 29 U.S.C. §152(11) as applied under the NJPTA. We therefore deny NATS' request for review.

ORDER

The request for review filed by the National Association of Transit Supervisors Local 354 is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, Papero, and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: November 21, 2023

Trenton, New Jersey