

P.E.R.C. NO. 2024-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC.,

Public Employer,

-and-

Docket No. RO-2023-041

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 701,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants NJTBO's request for review of the Director or Representation's decision, D.R. No. 2024-5, 50 NJPER 339 (¶80 2024). The Director's decision certified a unit of operational training instructors finding that they were not statutory supervisors with the meaning of the Labor Relations Management Act, 29 U.S.C. 141, et seq., and are therefore not employees as defined by the New Jersey Public Transportation Act, N.J.S.A. 27:25-14 et seq., which precludes supervisors of NJ Transit from being included in any negotiations unit. The Commission remands the matter for an evidentiary hearing because a substantial question of law remains unresolved due to disputed material facts regarding the extent to which the instructors utilize independent judgment in their evaluations of new operator performance to effectively qualify or disqualify them from being NJTBO operators.

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

For the Petitioner,
Cohen, Leder, Montalbano & Connaughton, LLC, attorneys
(Brady M. Connaughton, of counsel)

DECISION

On May 30, 2023, International Brotherhood of Teamsters Local 701 (Teamsters) filed a representation petition seeking to be certified as the exclusive representative for a collective negotiations unit of operational training instructors (Instructors) employed by NJ Transit Bus Operations, Inc. (NJTBO). NJTBO opposed the petition, arguing that the Instructors are supervisors within the meaning of the Labor Relations Management Act (LRMA), 29 U.S.C. 141, et seq., and are therefore not employees as defined by the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-14 et seq., which

precludes supervisors of NJ Transit from being included in any negotiations unit.^{1/}

The Teamsters' unit of all regularly employed NJTBO operational training instructors, excluding the Chief Instructor among others, was certified on February 2, 2024 by the Director of Representation (Director) in D.R. No. 2024-5, 50 NJPER 339 (¶80 2024). The Director's decision was based on an administrative investigation with a factual record that consisted of the following: NJTBO's position statement, the certification of NJBTO's Director of Bus Operational Training with exhibits, the Teamster's position statement, and the certification of 12 Instructors with exhibits. The Director found that an evidentiary hearing was not required because there were no disputed substantial material facts. The Director's decision found that the instructors were not supervisors because the guidelines, forms, and checklists they used for assessments were comprehensive and detailed enough that they did not exercise the degree of discretion required for independent judgment, and because NJTBO had not presented sufficient evidence that the instructors' assessments acted as decisions or recommendations

^{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).

that effectively caused operators to be disciplined or discharged.

On March 1, 2024, NJTBO filed the instant request for review pursuant to N.J.A.C. 19:11-8.1 that was supported by a brief and the certification of NJTBO's Director of Bus Operational Training with exhibits (that had been submitted to the Director for his decision below). On March 15, 2024, the Teamsters opposed the request for review with a brief that incorporated the submissions for the Director's decisions, including the certifications of several Instructors.

Summary of Facts

We incorporate the Director's findings of fact, which are supported by information from both parties' certifications. D.R. at 4-12. The following facts are pertinent to our analysis.

All newly hired bus operators are required to undergo a multi-week training program conducted by the Operational Training Department. During this program (which spans 21 or 25 days depending upon the type of bus the operator will be using) operators learn everything they need to know about driving a NJ Transit bus. Operators learn how to use all of the equipment, how to inspect the bus before and after using it, how to handle money, how to interact with customers, how to accommodate disabled customers, and how to drive in a defensive and professional manner. These skills and techniques are taught to

bus operators both in the classroom and on the road as part of the new hire program. (NJTBO Cert. at ¶3).

New hires are assigned to an Instructor at the outset of the program. The Instructors preside over all classroom sessions and oversee the four written tests administered during the program. Instructors also ride on the buses with the new hires during the practical, on-road portions of the course. (NJTBO Cert. at ¶4). Instructors are responsible for evaluating and grading the new hires in their class each day. Instructors use their independent judgment to determine whether each operator should be graded "satisfactory" or "unsatisfactory" on various performance metrics. Instructors make these judgments based on metrics such as the operator's pre-and post-trip inspection procedures, reversing skill, left turns, right turns, pull-ins and pull-outs, steering wheel grip and posture, lane control, braking control, attention while driving, intersection safety, pedestrian safety, use of directional signals, railroad crossing procedures, acceleration control, recognition of hazards, and pedestrian interactions. (NJTBO Cert. at ¶5, Exhibits A and B).

If an Instructor determines an operator is "unsatisfactory" in any aspect of their training, the Instructor has the authority to order counseling for that operator, and will perform the counseling. If, after the counseling, the Instructor determines the operator remains unsatisfactory, the Instructor has the

authority to disqualify the operator from the course, which results in the automatic termination of an operator. (NJTBO Cert. at ¶6). Approximately 10% of new hires do not complete the new hire program. In 2023 (as of the date of NJTBO's certification), 36 operators have been disqualified by Instructors, resulting in their termination. In 2021, 60 operators were disqualified by Instructors, resulting in their termination. In 2021, 42 operators were disqualified by Instructors, resulting in their termination. In 2020, 34 operators were disqualified by Instructors, resulting in their termination. In 2019, 56 operators were disqualified by Instructors, resulting in their termination. (NJTBO Cert. at ¶7)

In addition to the new hire course, Instructors also preside over re-trainings and return-to-work evaluations. Re-trainings occur when a bus operator is involved in an accident or engages in misconduct that a manager believes warrants further training. Return-to-work evaluations occur when an operator has been out of service for an extended period of time (typically due to a medical leave) and must be evaluated prior to resuming bus operations. (NJTBO Cert. at ¶8). Instructors preside over the training/evaluation process and exercise their independent judgment to determine whether the operator can safely return to driving a bus. If the Instructor concludes the operator cannot safely return to driving a bus, the operator's manager will be so

advised, the operator will be held out of service and, where necessary, discipline will be imposed. (NJTBO Cert. at ¶8).

In contrast, the Teamsters certify that an Instructor does not have the authority to assign work, alter work schedules or recommend discipline. The "New Instructor Training Materials" packet (i.e. Exhibit C) contains no references to being a supervisor or any guidance on supervisory duties. (Teamster Cert. at ¶5). Instructors cannot issue discipline, though they can "recommend" counseling for a student operator, which must be reviewed and is subject to the complete discretion of the Chief Instructor. Counseling is not considered to be discipline or a violation, it only gets applied to the checklist while the student is in training, and the counseling does not follow the operator after the training is over. (Teamster Cert. at ¶7).

When determining whether a bus operator will be qualified to drive (where disqualification leads to termination), the Instructor uses an "instructors special instructions report form" (i.e. Exhibit A). This form has a checklist which the Instructor fills out based upon what is "observed" and consists of a skills assessment of the student's operation of the bus. The student must pass all items on the checklist to be qualified to drive. The form has a section with remarks; however, the Instructor is not required to include remarks. (Teamster Cert. at ¶3). The Chief Instructor must sign off on the Special Instructions Report

in order for a bus operator to be qualified or not qualified, and the Instructor has no final authority to make such decision. The Chief Instructor has full discretion to ignore the Instructor's checklist and recommendation and assign the operator to a different Instructor, or the Chief Instructor could perform the assessment. (Teamster Cert. at ¶3). The Teamsters submitted Exhibit B, which is a written memorandum addressed to Instructors from a Chief Instructor of "Team Expectations" emphasizing that Instructors must not disqualify students without calling and speaking to the Chief Instructor first.

The Teamsters further certify that Instructors do not monitor a bus operator's compliance with NJTBO work rules, and this responsibility is reserved for the regional supervisor, garage supervisor, or garage manager. An Instructor only fills out the "checklist and Special Instructions Form." (Teamster Cert. at ¶8). However, the Teamsters also certify that Instructors may go under cover to observe bus operators, but they only fill out an Instructors Special Report Form and checklist to report objectively what is observed. (Teamster Cert. at ¶8).

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.

Arguments

NJTBO argues that the request for review should be granted because the Director disregarded longstanding precedent that bus instructors are considered statutory supervisors, akin to NJTBO's regional supervisors and Foremen that the Commission has previously deemed statutory supervisors. NJTBO argues that the Director ignored the certified evidence that Instructors exercise independent judgment when evaluating new operator performance and that their disqualification of new operators is the basis for their terminations. NJTBO further argues that the Director should have held an evidentiary hearing pursuant to N.J.A.C. 19:11-2.6(f) because there were numerous disputed facts regarding whether the Instructors use independent judgment in evaluating new operators, resulting in their possible termination, or whether the Instructors are merely observers noting "objective" criteria that is then used by upper management to determine

whether new operators are terminated or further instructed. NJTBO requests that the Commission grant its request for review, reverse the Director's decision, and deem the Instructors statutory supervisors, or in the alternative, remand the matter for an evidentiary hearing.

Teamsters argues that NJTBO's request for review should be denied because it fails to meet the standard of N.J.A.C. 19:11-8.2. Teamsters asserts that the Director's decision properly found that there was no evidence in the record that Instructors actually make recommendations to discipline or discharge operators. Teamsters maintains that the Director conducted a fact-intensive review, comprehensively applied the applicable legal precedent, and properly determined that the Instructors were not statutory supervisors. Teamsters further argues that there were no material facts in dispute, and thus, no evidentiary hearing was necessary.

Analysis

For the reasons further explained below, we find review of the Director's decision is warranted and remand the matter for an evidentiary hearing. We find that a substantial question of law remains unresolved due to the disputed material facts regarding the extent to which Instructors utilize independent judgment in their evaluations of new operator performance to effectively qualify or disqualify them from being NJTBO operators.

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). 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).

The Director’s decision makes several factual findings that are strongly disputed by the parties, and thus, further fact finding through an evidentiary hearing is needed to properly resolve these disputed material facts. The Director found that the use of detailed preprinted checklists and forms demonstrates that the Instructors do not use independent judgment in their evaluation of new operator performance, stating “It would seem that each driving task is either accomplished correctly or not, and there are detailed guidelines that the instructors follow in determining whether the task has been completed.” (Director’s decision at 16. Emphasis added). The Director concludes that “the lists are comprehensive and detailed enough that the instructors’ assessments are more ministerial than an exercise of independent judgment and that the instructors are therefore not supervisors under the NJPTA.” (Director’s decision at 19. Emphasis added).

However, NJTBO Director of Bus Operational Training certified that the Instructors are required to use independent judgment as to whether the new operators properly performed, not simply whether they accomplished, a left turn, reversing skill, or other maneuver/procedure. The NJTBO forms, submitted as Exhibit A, contain many subjective guidelines where Instructors must use their experience and judgment when training new operators. That the grading scale is pass/fail or satisfactory/unsatisfactory does not obviate the Instructors expertise and experience in bus operations to determine this grade. In contrast, the Teamsters claim that the Instructors are merely utilizing the checklists and forms to mechanistically note what they observe. The parties also dispute the extent to which the Instructors direct new operators on how to perform the requisite maneuvers and procedures based on the Instructors' experience implementing NJTBO's policies and guidelines. To responsibly direct employees is one of the statutory indicia of supervisory status. We find that an evidentiary hearing will serve to properly establish the extent to which Instructors' use their "independent judgment" to evaluate new operator performance and/or "responsibly direct" new operators towards compliance with NJTBO's policies and procedures. See 29 U.S.C. §152(11).

The Director's decision also found that the Instructors are not supervisors because "NJT has not presented evidence that the

instructors' assessments act as decisions or recommendations that effectively cause operators to be disciplined or discharged."

(Director's decision at 19). The Director's decision states, "I do not consider marking the performance of scheduled training tasks as unsatisfactory on a written checklist that must be turned in to be akin to recommending that the trainee be discharged or to choosing whether to report rule violations that will institute the disciplinary process." (Ibid.) However, this is contradicted by NJTBO's certification that an Instructor's assessment of a new operator's performance as unsatisfactory, particularly after further counseling or instruction, directly leads to the operator's discharge in the majority of cases - 228 new operator discharges between 2019 and June 2023. The Director's decision also found that the Instructors do not have authority to discipline because the Chief Instructor or other higher level supervisor has final authority or sole discretion to discharge the new operator or order further instruction. A hierarchy of supervision does not necessarily negate that an Instructor's assessment of an unsatisfactory operator performance constitutes effective recommendation for discharge.

The Director's decision further found that Instructors do not have the authority to discipline because their evaluations do not trigger the disciplinary process and there is no evidence that disciplinary hearings result from their observations of new

operator performance. The Director's decision critiques NJTBO for not providing examples of discipline other than discharge, stating "a termination because of a lack of qualification is different from a termination because of misconduct or rule violation." The Director's decision provides no cases to support this proposition. Moreover, there is no other disciplinary process afforded to these probationary operators and the Instructors' assessments may be the sole process used to determine whether these new operators will be terminated, which is considered discipline. Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, Inc., 200 N.J. 105 (2009) (reinstating an arbitration panel's decision that a probationary NJTBO operator could not access the grievance procedure in a CNA to dispute his disciplinary termination.) We find an evidentiary hearing can determine the extent to which the Instructors' evaluations of unsatisfactory new operators can result in "discharge", "discipline", or the "effective recommendation" of such action. See 29 U.S.C. §152(11).

The Director's decision dismisses NJTBO's reliance on the NLRB's decision in Public Service Coordinated Transport and Amalgamated Transit Union, Case No. 22-RC-4405 (1969), which decided that bus instructors were statutory supervisors for a public transportation company that was later acquired by NJ Transit when it was formed in 1979. The Director's decision also

dismisses NJTBO's reliance on NJ Transit, P.E.R.C. No. 2002-9, 27 NJPER 363 (¶32132 2001), where the Commission found that NJTBO regional supervisors are supervisors within the meaning 29 U.S.C. §152(11) because they exercise independent judgment in suspending bus drivers; responsibly directing their work; and disciplining them.

However, the factual record is unclear as to the extent the Instructors are similar or dissimilar to the PSCT instructors or NJTBO's regional supervisors. The Teamsters distinguish the PSCT case from the instant matter, claiming that NJ Transit is a vastly different organization than PSCT, that the role of instructors has dramatically changed, that upper management has more oversight of the instructors, and the use of the detailed checklists and forms were not relied on by the PSCT instructors. However, the Director's decision notes that the record is not clear as to the Teamsters' claimed differences between the PSCT instructors and the present NJTBO Instructors. Distinguishing the regional supervisors' case, Teamsters certify that Instructors have no role in enforcing NJTBO policies and procedures as the regional supervisors do. However, the Teamsters also certify that the Instructors will perform undercover rides, like the regional supervisors, and report what they observe, which can lead to operator discipline for an observed violation. Additionally, NJTBO certifies that the

Instructors have a significant role in NJTBO's return-to-work and retraining protocols, where they assess whether an operator can safely return to driving a bus. We find an evidentiary hearing will serve to clarify the record regarding the extent to which the current NJTBO Instructors are functionally equivalent to the PSCT instructors and similar to the regional supervisors, which were previously deemed statutory supervisors.

For all the foregoing reasons, we grant NJTBO's request for review and remand the matter for an evidentiary hearing to resolve the disputed issues of material fact.

ORDER

New Jersey Transit Bus Operations' request for review is granted, and we remand the matter for an evidentiary hearing.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Eaton, Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed.

ISSUED: April 25, 2024

Trenton, New Jersey