

P.E.R.C. No. 91-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and-

Docket No. CO-H-89-214

MUSICIANS PROTECTIVE UNION -
AFM LOCAL 373, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Musicians Protective Union - AFM Local 373, AFL-CIO against the New Jersey Highway Authority. The charge alleged that the Authority violated the New Jersey Employer-Employee Relations Act when it used taped music to accompany Rudolph Nureyev at the Garden State Parkway Arts Center. Under all the circumstances of this case, the Commission finds that the Authority did not refuse to negotiate in good faith or commit any other unfair practice.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and-

Docket No. CO-H-89-214

MUSICIANS PROTECTIVE UNION -
AFM LOCAL 373, AFL-CIO,

Charging Party.

Appearances:

For the Respondent,
Appruzzese, McDermott, Mastro & Murphy, attorneys
(Melvin L. Gelade, of counsel)

For the Charging Party,
Chester A. Just, attorney

DECISION AND ORDER

On January 31, 1989, the Musicians Protective Union - AFM Local 373, AFL-CIO filed an unfair practice charge against the New Jersey Highway Authority. The charge alleges that the Authority 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), (5) and (7),^{1/} when it used taped music to accompany Rudolph Nureyev

^{1/} These subsections prohibit public employers 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, (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment...and (7) violating any of the rules and regulations established by the commission."

at the Garden State Parkway Arts Center. The charge alleges that the employer violated a contractual clause requiring it to secure Local 373's permission before using taped music.

On March 30, 1989, a Complaint and Notice of Hearing issued. The Authority's Answer asserts, in part, that its decision to use taped music was not a mandatory subject of negotiations and that Local 373 had waived any rights it may have had.

On September 7, 1989, Hearing Examiner Jonathon Roth conducted a hearing. The parties introduced exhibits and examined witnesses. They filed post-hearing briefs by November 15, 1989.

On May 16, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-50, 16 NJPER 342 (¶21141 1990). He concluded that the employer had met its negotiations duty by requesting Local 373's permission to use taped music and that Local 373 had waived its right to negotiate further by failing to respond.

On June 4, 1990, Local 373 filed exceptions. It asserts that the contract required the Authority to receive its permission to use taped music and that the Authority committed an unfair practice by not doing so.^{2/}

On June 18, 1990, the Authority filed a cross-exception. It asserts that it has no duty to negotiate over using taped music.

^{2/} Local 373 requested oral argument. We deny that request.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-9) are accurate. We incorporate them. We add to finding no. 7 that Nureyev was booked as the fourth selection in the classical series. The Authority offered a ballet selection to strengthen and diversify its offerings -- without Nureyev the subscription series would have been limited to three offerings featuring the New Jersey Symphony Orchestra (T119-T120).

We usually will not review a case, like this one, centering on a claimed breach of contract. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). But we will do so in a case, again like this one, where a negotiability defense has been interposed. Id. at 422.

We emphasize this dispute's narrowness. While the 1985-1988 contract required Local 373's permission to use taped music, that provision was modified by this later understanding:

Finally, with respect to the paragraph concerning canned music, tape and mechanical devices, it is understood that Local 373 will cooperate with the Authority and will not unreasonably withhold its permission for the use of canned music, tape or mechanical devices. However, it is further understood that the Authority will not seek such permission with the purpose of displacing live musicians and replacing them with canned music, tape or mechanical devices.^{3/}

^{3/} Local 373 asserts that this understanding applies only to special heritage festivals and programs for senior citizens and children, but the wording does not say so and the Hearing Examiner did not credit the testimony of Local 373's president on that point.

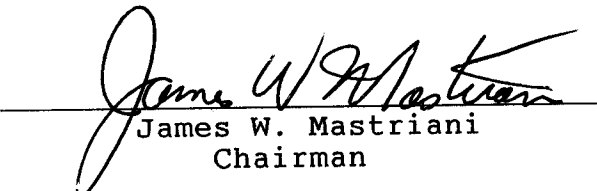
The Authority does not oppose this restriction in general or claim a right to use taped music whenever it wants (T23, T24; post-hearing brief at 12-13). It simply argues that it did not need Local 373's permission in this particular instance and that permission was unreasonably withheld anyway.

We dismiss the Complaint. The Authority made an artistic judgment that it needed Nureyev to complete, strengthen and diversify its classical music series. Nureyev's busy schedule made it impossible for him to rehearse with an orchestra; he therefore conditioned his performing on using taped music. The Authority asked for Local 373's permission and was told by its president: "Don't worry, we'll work something out." Under all these circumstances, we cannot say that the Authority refused to negotiate in good faith or committed any other unfair practice.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
August 13, 1990
ISSUED: August 15, 1990

H.E. NO. 90-50

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and-

Docket No. CO-H-89-214

MUSICIANS PROTECTIVE UNION -
AFM LOCAL 373, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a complaint filed by the American Federation of Musicians (AFM) against the New Jersey Highway Authority (Garden State Arts Center). The charge alleged that the Authority refused to negotiate in good faith by hiring a performer with "taped" musical accompaniment in violation of a contractual provision. The employer asserted that the subject was not negotiable and that it had a managerial prerogative to hire the performer.

The Hearing Examiner recommends that the Authority had a managerial prerogative to hire the performer with taped music.

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. 90-50

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and-

Docket No. CO-H-89-214

MUSICIANS PROTECTIVE UNION -
AFM LOCAL 373, AFL-CIO,

Charging Party.

Appearances:

For the Respondent,
Appruzzese, McDermott, Mastro & Murphy, Attorneys
(Melvin L. Gelade, of counsel)

For the Charging Party,
Chester A. Just, Attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 31, 1989, the Musicians Protective Union, American Federation of Musicians Local 373, AFL-CIO ("AFM" or "Union") filed an unfair practice charge against the New Jersey Highway Authority (Garden State Arts Center)("Authority" or "Employer"). The charge alleged that on or about July 31, 1988, the Authority failed to negotiate in good faith with the union by "...providing the services of Rudolph Nureyev and Friends ballet group at the Garden State Parkway Arts Center with the use of taped music rather than...live music..." in violation of parties' collective agreement. The employer's acts allegedly violate

Subsections 5.4(a)(1), (2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq. ("Act").

On March 30, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On April 12, 1989, the Authority filed an Answer denying the allegations and asserting that the disputed contractual provision "covers a non-mandatory subject of negotiations," that the complaint should be dismissed because of "changed circumstances," "economic necessity," and because of laches.

On September 7, 1989, I conducted a hearing in this case. The parties examined witnesses and presented exhibits. Post-hearing briefs were filed by November 15, 1989.

Upon the record, I make the following:

FINDINGS OF FACT

1. The New Jersey Highway Authority is a public employer within the meaning of the Act.^{2/} The Musicians Protective Union,

^{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. (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. (7) Violating any of the rules and regulations established by the commission."

^{2/} The Authority was established in 1952 under N.J.S.A. 27:12B-1 et seq. "in order to facilitate vehicular traffic..." See also Safeway Trails, Inc. v. Farman, 41 N.J. 467 (1964).

AFM Local 373 is a public employee representative within the meaning of the Act.

2. The parties' most recent collective negotiations agreement ran from October 16, 1985 through October 15, 1988 and it "govern[s] all services of musicians at the Garden State Arts Center, Holmdel New Jersey" (J-1).^{3/} It states that the musicians "are to be engaged by a non-performing contractor..." who "shall be promptly notified verbally of all attractions...Thereafter written notification will be sent to the contractor with a copy to Local 363." The agreement also states:

No canned music, tape, mechanical devices may be contracted, advertised or used for any type of performance at the Garden SAC without prior permission from Local #373 AFM.

The agreement incorporates an attached memorandum of understanding excepting musicians in either "self-contained" or "Pamphlet B" groups from the terms of the agreement (T46-T47). It does not have a grievance arbitration provision.

3. On May 13, 1986, the attorney for the Authority mailed a letter to an executive assistant to the president of the AFM (R-2) "confirming certain understandings reached in negotiations...for the 1986, 1987 and 1988 seasons." One "understanding" states:

Finally, with respect to the paragraph concerning canned music, tape and mechanical devices, it is understood that Local 373 will cooperate with the

^{3/} J refers to joint exhibits; T refers to transcript page number; R refers to respondent exhibits; and CP refers to charging party exhibits.

Authority and will not unreasonably withhold its permission for the use of canned music, tape or mechanical devices. However, it is further understood that the Authority will not seek such permission with the purpose of displacing live musicians and replacing them with canned music, tape or mechanical devices.

On May 21, 1986, the AFM executive assistant mailed a letter to the attorney for the Authority, "agree[ing] that the content of [the May 13th letter] [is] [sic] in accordance with our discussions."

4. In January and February of each year, Ron Delsener Enterprises, Ltd. books evening performances for the summer season at the Garden State Arts Center. Delsener is the Authority's exclusive booking agent and discusses prospective shows with Vincent Seminara, the Authority's administrative assistant to the executive director (T112-T113; T134).^{4/} Delsener communicates with the performers through their agents and submits "booking sheets" or offers to the Authority proposing fees, musical requirements, and ticket prices as well as the date and time of the performance(s) (R-11; T114). Seminara negotiates fees with the agent of the prospective performer. When Seminara receives a sheet, he discusses its terms with the executive director. If the terms are approved, a formal contract is drawn up and mailed to the performer, who signs and returns it at his or her leisure, sometimes after further dickering on the evening of the performance (T113, T129-T130, T144-T145).

^{4/} The record does not reveal under what circumstances the Authority could use another booking agent (T136-T137).

5. The Authority also sponsors a "Heritage Festival," a series of free daytime ethnic shows. Most shows are "self-contained"; that is, they require no musical accompaniment from the Authority (R-3). "Cultural Center Fund Programs" are also free to senior citizens, school children, and other groups. In 1988, for example, the Authority had 38 free programs, most of which were "self-contained." Twelve programs had Authority musicians hired under the terms of J-1, and four programs had "taped" accompaniment (R-3; T74-T75). The AFM "permitted" the Authority to use taped music for free daytime performances (T27, T60).

6. In early January 1988, Seminara was informed by Delsener and Columbia Artists Management Inc. that "Rudolph Nureyev and Friends" was available to perform at the Garden State Arts Center. Columbia Artists Managements Inc. is Nureyev's agent (T113). On or about January 18 Delsener sent Seminara the "booking sheet" for the act proposing the fee, ticket prices and a performance date of July 31. It also has a handwritten notation under "musical requirements" stating, "music on tape" (R-11). Nureyev's agent told Seminara over the phone that "the only way that Nureyev would appear was only by tape." Seminara advised Delsener of the "no tape without permission" provision (T138). Nureyev and

his troupe apparently did not have enough time to rehearse with an orchestra at the Garden State Arts Center (T98).^{5/}

7. On or about January 22, Seminara contacted AFM Local president Frank Kriesel through the "non-performing contractor" to set up a luncheon meeting to discuss the Nureyev show (T115). Seminara, the contractor, Kriesel and Andy Kuchtyak, the union's secretary, attended the meeting (T56).

Seminara told the union that the Authority "had" the show and that it would have taped music (T116). He also said that the Nureyev show would be part of the "classical" series and that the Authority had a deadline to "finalize" the booking so that it could advertise the show to subscribers in March and to the general public a short time later (T116-T117; T80).^{6/} No one rebutted Seminara's testimony that it was "very very difficult" to hire a fourth show to complete a "classical" series in 1988 (T119). The Authority's previous ballet performance was in 1986 (T120). Delsener did not

^{5/} "Nureyev and Friends" performed with a symphony orchestra on July 15, 1988 in Richmond, Virginia. He had no other scheduled performance either the day before or after the Virginia appearance. Nureyev performed in Binghamton, New York, on July 30 and in Saratoga Springs, New York on August 1 (R-10). The record does not show when those dates were confirmed.

^{6/} Of the 55 performances during the 1988 season, four were considered "classical." In April 1988, for example, the Authority advertised a summer "classical series" in the Sunday edition of the Newark Star-Ledger. Three performances included the New Jersey Symphony Orchestra; "Rudolph Nureyev and Friends" was advertised without any musical accompaniment (CP-1). Subscriptions were available for all four performances.

mention or recommend another prospective "classical" performer (T133).

Seminara advised the union representatives, "we got the show, this will complete our subscription...we only got about a month-and-a-half...Now, we're letting you know about it and is it okay..." (T126).^{7/}

Kriesel's response was, "we'll see" and "don't worry, we'll work something out"^{8/} (T117, T126).

Between January and May 22, 1988, neither party confirmed or denied in writing to the other that Nureyev was "booked" with or without the AFM's permission (T37; T127-T128). The record does not show when the formal contract between Nureyev and the Authority was signed.^{9/}

^{7/} Kriesel testified that Seminara stated that "Rudolph Nureyev and Friends" was "booked." When asked if Seminara asked for the union's "permission," Kriesel stated: "He asked, yes he did, certainly, after telling you also that Nureyev was booked and he's going to use tape" (T57). Kriesel denied that Seminara stated that the Authority was advising the union about Nureyev because it needed "permission" before advertising the show (T57).

^{8/} When Kriesel was asked on direct examination if he gave the Authority any reason to believe that the "[AFM] would work it out with [the Authority]," he answered, "no" (T37). I credit Seminara's version because his testimony was consistent and specific on direct and cross-examination and because the AFM did not specifically rebut Seminara's recollection of the colloquy.

^{9/} Seminara repeated on cross-examination that he "did not know" when the contract was signed, but conceded that it "could have

8. On April 10, 1988, the Authority ran a full-page advertisement in the Sunday edition of the Newark Star-Ledger for the 1988 "classical series" (see footnote 6), and "contemporary series." Subscription fees for the four performance classical series were \$96.50 or \$77.50, depending on seat location (CP-1).

9. On May 23, 1988, counsel for the AFM mailed a letter to the executive director of the Authority, advising that the Authority "violated the ban on taped music without prior Local permission in scheduling the Rudolph Nureyev program for 7/31/88 with tape accompaniment." Counsel asked for a written response (C-1).

10. On June 2, 1988, counsel for the Authority responded to the May 23 letter, advising that "because of the nature of this act, its musical requirements are dictated by the performer for artistic reasons. The Authority will attempt to work this out with local union representatives" (C-1).

11. On July 31, 1988, "Rudolph Nureyev and Friends" performed at the Garden State Arts Center with taped musical accompaniment only. The performers comprised neither a "self-contained" nor "Pamphlet B" group (T32-T33). The "statement

9/ Footnote Continued From Previous Page

been signed" a week or two weeks after R-11 was issued (T130-T133). Although the contract was available to the charging party, and was subject to informal discovery arrangements, the date of the signing was never entered into the record. Accordingly, I cannot determine when the contract was signed.

of unaudited income and estimated expenses," a business document, shows a deficit for the performance of about \$44,000 (R-5; T81). The three other classical performances showed losses of about \$22,000, \$28,000 and \$64,000^{10/} (R-7, R-8, R-9).

12. A New Brunswick State Theatre multi-page mailer advertised an October 16, 1988 Rudolph Nureyev performance with the Princeton Ballet (CP-2). The advertisement stated that the "performance includes works from both 'Nureyev and Friends' and the Princeton Ballet Repertory" (CP-2). Nureyev was accompanied by about 15 musicians represented by the AFM (T33, T65).^{11/} The New Brunswick performance was not considered part of Nureyev's 1988 summer tour itinerary (R-10).

13. In December 1988, counsel for the AFM mailed a letter to the Authority's executive director, demanding \$14,078.87 in lost wages to unit employees "consequent upon the Rudolph Nureyev dance performance on or about 7-31-88 with tape accompaniment..."

ANALYSIS

The AFM alleges that the July 31, 1988 hiring of Nureyev to perform with the taped music violates the collective agreement and

^{10/} Indirect expenses such as advertising, ticketing and production costs were averaged and distributed equally among all 55 1988 performances and repeated on each expense sheet.

^{11/} Kriesel testified that he was aware of this fact because the AFM local union which represents the "New Brunswick" musicians is "next door" to Local 373 (T34). I credit his unrebutted testimony.

the Act.^{12/} The Authority is "not opposed to the restriction in general" and has agreed not to seek the AFM's permission "for the purpose of displacing live musicians" (see Authority post-hearing brief at p. 12). It asserts, however, that to the extent the "permission" provision limits its ability to hire a performer, it is beyond the scope of negotiations.

Under all the circumstances, I find that the Authority did not violate the Act by hiring "Nureyev and Friends" to perform at the Garden State Arts Center on July 31, 1988 with taped musical accompaniment.

The Act requires that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." N.J.S.A. 34:13A-5.3. The Authority had the duty to negotiate with the AFM before hiring a performer with taped musical accompaniment. Reading the clause narrowly in light of this statutory requirement, I find that the "permission" provision requires that the parties reach some agreement for the use of taped or canned music. It cannot vest the AFM with the power to deny the Authority the right to contract with a prospective performer - such a "veto" power could

^{12/} The union presented no facts suggesting that the Authority violated subsections 5.4(a)(2), (3) and (7) of the Act. I recommend that those charges be dismissed. The Commission considers allegations under 5.4(a)(5) when an employer repudiates a contract clause based on the belief that the clause is "outside the scope of negotiations." State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

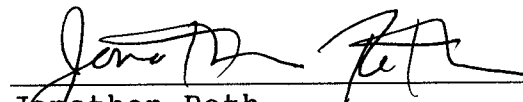
impinge on the Authority's ability to fulfill its governmental mission - specifically, providing diverse cultural entertainment to New Jersey citizens.

The AFM did not meet its burden of proving that the Authority failed to negotiate in good faith before hiring Nureyev. The Authority sought the AFM's "permission" in January 1988, emphasizing that it needed a prompt decision so that advertisements for the 1988 "classical series" could be mailed to subscribers and the general public. The AFM's response was at best, equivocal and suggests that it was amenable to a negotiated settlement. The AFM did not communicate with the Authority again about the Nureyev show until May 1988, more than two months after the performance had been advertised. Even if the Authority had "booked" the show before its meeting with the AFM in January, no formal agreement was reached until some time after that meeting. By seeking the AFM's "permission" to use taped music, the employer fulfilled its duty to seek negotiations prior to implementing a change. Once the employer sought permission the burden shifted to the AFM to come forward with proposals to resolve the issue. Having failed to respond to the employer's request, the AFM waived its right to negotiate. Accordingly, the Authority did not act unlawfully.

The circumstances of this case do not suggest that the Authority acted in bad faith. The Authority needed a fourth performer to complete its "classical series;" Delsener had not recommended an alternative performer; and few classical performers

were available during the summer of 1988. Nureyev and not the Authority set the "taped music" condition for the performance, a fact corroborated by Nureyev's summer tour itinerary, which shows that he performed to live music once only - when his show had a one-day interval for rehearsal between performances. Nureyev had performances the day before and after the July 31 Arts Center show. These facts show that the Authority could not otherwise hire a "live" show, whether "self-contained," "Pamphlet B," or one permitting the Authority to employ its musicians.^{13/}

Accordingly, I recommend that the complaint be dismissed.



Jonathon Roth
Hearing Examiner

DATED: May 16, 1990
Trenton, New Jersey

^{13/} In light of the constraints of the July 31 performance, the AFM did not show how other Nureyev performances scheduled before or after the summer 1988 tour were relevant to this case.