

P.E.R.C. NO. 87-166

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKESWOOD BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-86-126

TRANSPORT WORKERS UNION, LOCAL
335, AFL-CIO,

Petitioner.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, directs an election among substitute bus drivers employed by the Lakewood Board of Education who worked more than 1/6 of the average number of hours worked by regular bus drivers to determine whether they wish to be represented by the Transport Workers Union, Local 335.

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Appearances:

For the Public Employer, Sharkey & Sacks, Esqs.
(Richard K. Sacks, of counsel)

For the Petitioner, Michael O'Brien, Representative

DECISION AND ORDER

On April 7, 1986, the Transport Workers Union, Local 335, AFL-CIO ("TWU") filed a Petition for Certification of Public Employee Representative. TWU seeks to represent all substitute school bus drivers within its existing unit of full-time bus drivers, custodians and building maintenance workers employed by the Lakewood Board of Education ("Board"). The Board has objected to this inclusion, contending that substitute bus drivers are casual employees and therefore not eligible for representation under the New Jersey Employer-Employee Relations Act ("Act").

On July 25, 1986, a Notice of Hearing issued.

On October 2, 1986, Hearing Officer Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits.

On May 15, 1987, the Hearing Officer issued his report and recommended decision. H.O. 87-17, 13 NJPER _____. Relying on Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982) ("Mt. Olive"), he determined that substitute bus drivers who worked more than 1/6 of the average number of hours worked by regular bus drivers during the 1985-1986 school year and were regularly employed in 1986-1987 qualified for representational rights under the Act. Therefore, he recommended that an election be held among those bus drivers to determine whether a majority wished to be represented by TWU.

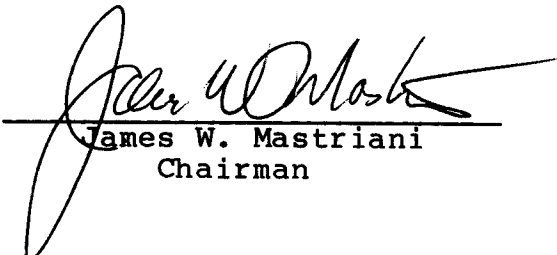
The Hearing Officer served his report on the parties and informed them that exceptions were due by May 29, 1987. The Board requested and received an extension until June 9, 1987 to file exceptions, but did not.

I have reviewed the record. The Hearing Officer's findings of fact (pp. 2-5) are accurate. I adopt and incorporate them here. Under all the circumstances of this case and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his recommendation directing an election among those substitute bus drivers who qualify under the Mt. Olive test.

ORDER

The matter is remanded to the Director of Representation to conduct an election.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
June 24, 1987
ISSUED: June 25, 1987

H.O. No. 87-17

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

In the Matter of

LAKWOOD BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-86-126

TRANSPORT WORKERS UNION, LOCAL 225,
AFL-CIO,

Petitioner.

SYNOPSIS

A Hearing Officer recommends that all substitute bus drivers who worked a requisite number of hours under the Mt. Olive Tp. Bd. of Ed. standard for 1985-86 and who returned to work in 1986-87 share a community of interest with a unit of full-time transportation and maintenance personnel employed by the Lakewood Board of Education. He also recommends that the substitutes be given the opportunity to vote in a secret ballot election to determine whether they wish to be represented by the TWU or no representative.

H.O. No. 87-17

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

In the Matter of

LAKWOOD BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-86-126

TRANSPORT WORKERS UNION, LOCAL 225,
AFL-CIO,

Petitioner.

Appearances:

For the Public Employer
Sharkey & Sacks, Esqs.
(Richard K. Sacks, of counsel)

For the Petitioner
Michael O'Brien, Representative

HEARING OFFICER'S
REPORT AND RECOMMENDED DECISION

On April 7, 1986, the Transport Workers Union, Local 225, AFL-CIO ("TWU") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission ("Commission"). The TWU seeks to represent all substitute school bus drivers within its existing unit of full-time transportation and maintenance personnel employed by the Lakewood Board of Education ("Board").^{1/} The Board contends that the

^{1/} The parties have not asserted any contractual bar to the filing date of the Petition. See N.J.A.C. 19:11-2.8.

proposed negotiations unit is inappropriate because the substitute school bus drivers are temporary employees.

On July 25, 1986, the Director of Representation issued a Notice of Hearing. After one postponement at the Board's request, I conducted a hearing on October 3, 1986. The parties examined witnesses, introduced evidence and argued orally. The parties declined to file post-hearing briefs and the record was closed on December 15, 1986.

FINDINGS OF FACT

1. The Lakewood Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3(c)("Act") and is subject to its provisions. It is the employer of the employees who are the subject of this Petition.

2. The Transport Workers Union, Local 225, AFL-CIO is a public employee representative within the meaning of the Act and is subject to its provisions. The TWU represents a unit of all bus drivers, bus aides, custodial workers and building maintenance workers employed by the Board. At the time of hearing the parties submitted a collective negotiations agreement between the Board and the TWU which ran from July 1, 1984 to June 30, 1987 (J-4).

3. The Board also negotiates terms and conditions of employment with a unit of principals and administrators and a larger unit of teachers, aides, and secretaries. Substitute employees are not members of these bargaining units, but are hired, placed on

lists, and called in as necessary to temporarily replace teachers, aides and secretaries. Substitutes employed by the Board are paid on an hourly or daily basis and do not receive health, vacation, or sick leave benefits (T11, T12).

4. The TWU unit consists of 135 employees of which 49 are bus drivers, 11 are van drivers, 13 are bus aides, and the remainder are custodial employees (T21, T40, T41). Substitute bus drivers employed by the Board are not included in the unit and it is these employees which the Petition seeks to add to the TWU unit.

5. Substitute bus drivers are hired or re-hired each year. Normally substitute drivers are called in or call in and are assigned work on an as-needed basis. There are no permanent substitutes, but when regular drivers are absent for long periods there are spells of regular full-time substitute work. There is a consistent daily need for substitute drivers; at the time of hearing about 8 drivers were needed on a daily basis to fill in for both long and short term absences. There has been a history of the use of substitute bus drivers in the Lakewood School District; every full-time driver now on the seniority roster was previously a substitute driver (T29, T30).

6. Substitute bus drivers are called in by the Transportation Coordinator based upon her assessment of their availability and knowledge of particular routes needed to be covered. The most available and most knowledgeable substitutes are called first (T64).

7. The regular full-time bus drivers work about four and one-half hours per day and are paid the contractual rate (T26) In other words, regular drivers work 810 (4 1/2 x 180 days) hours per year.

8. There are two or three employees who are in the regular job title of bus aide but who act as substitute drivers about 90 percent of their time (T25, T27, T55, T66). When these employees act as drivers they are paid the first step of bus drivers' contractual rate (T26).

9. Substitute bus drivers are supervised by the Transportation Coordinator and Assistant Transportation Coordinator, who also supervise the regular bus drivers and bus aides. Substitutes perform the same job duties as regular drivers (T28). These duties include driving a school bus or van to pick up children and deliver them to school in the morning, and returning them from the school to their respective bus stops in the afternoon. Regular drivers are assigned to drive one bus and the majority drive 3 runs in the morning and 3 in the afternoon. Some drive only 2 runs in the morning and 2 in the afternoon. Regular drivers may be asked to drive to athletic events and other locations; substitutes are not asked to drive on these special occasions, but may fill in for regular drivers assigned extra work. Extra work assignments are rare because of the shortage of buses in the district (T60). There are 50 buses and 13 vans, and 49 regular bus runs and 11 regular van runs.

10. Substitute drivers are paid a fixed hourly rate of \$7.25 with no minimally guaranteed number of hours when called in to work. They do not receive any fringe benefits (T47, T36).

11. Substitute drivers work under the same State guidelines and rules as do regular bus drivers and are required to have the same appropriate bus or van drivers licenses as regular drivers (T55-63). There is no piece of equipment substitute drivers are prohibited from operating which is operated by regular drivers (T63).

12. The number of hours worked by substitute bus drivers varies substantially. Data supplied by the parties shows that while a substitute driver worked more than 810 hours in a year, some substitutes worked fewer than 20 hours in a year (J-1, J-2, J-3). This variation is a function of the availability of work, the availability of individual substitute drivers and the degree of expertise of individual substitutes (T47, T64, T65).

ANALYSIS

The issue is whether substitute bus drivers are too temporary or irregular in their employment relationship with the Board to be included in the unit of regular bus drivers represented by the TWU. The Board argues that substitutes are too temporary to be properly included in a unit; that no other Board substitutes are in bargaining units; that placing substitute drivers in a unit would be a hardship on the Board because these employees do not share the same pay scale or hiring conditions as unit employees; and that

there are not enough substitutes to be covered by the bargaining unit. The Board argues that the two bus aides who also act as substitute drivers are already in the TWU unit, and should not be permitted to vote if an election is conducted.

There is no express statutory prohibition against the inclusion of temporary employees in collective negotiations units; however, the Commission has on a case-by-case basis developed a test to determine whether or not substitute employees have the requisite regularity and continuity of employment to warrant their inclusion in a unit.

In Mt. Olive Board of Education, P.E.R.C. No. 82-66, 8 NJPER 102, 103 (¶13041 1982), the Commission articulated the standard:

We have previously differentiated "casual" employees from "regular" part-time or full-time employees. The former, in contrast to the latter, work on an occasional or sporadic basis; their contact with the employer is too tenuous and infrequent to warrant inclusion in the same unit with regular employees. In determining whether a particular individual has casual status, we focus on whether the employee has a fair degree of regularity and continuity of employment. See In re Rutgers, The State University, E.D. No. 76-35, 2 NJPER 176 (1976), aff'd. and modified, P.E.R.C. No. 76-49, 2 NJPER 229 (1976), aff'd. App. Div. Docket No. A-1652-76 (1977), cert. denied 76 N.J. 234 (1978); In re Clearview Reg. Dist. Bd. of Ed., E.D. No. 76-24, 2 NJPER 63 (1976); Bridgewater-Raritan Reg. Bd. of Ed., D.R. No. 79-12, 4 NJPER 444 (¶4201 1978).

In Mt. Olive, the Commission upheld and approved the Director of Representation's determination that substitute bus drivers who worked more than 1/6 of the average number of hours

worked by regular full-time and part-time bus drivers were sufficiently regular employees to qualify for representational rights under the Act. This test originated in the Bridgewater-Raritan case where substitute teachers who worked at least 30 days out of a possible 180 and expressed a willingness to do so for the following year were considered to be public employees within the meaning of the Act and eligible voters. In Rutgers University, coadjunct faculty who worked one semester during the prior year and who expressed a willingness to teach during the next year were found to have sufficient regularity and continuity of employment to have rights under the Act. There, the Commission found that regularity of employment was demonstrated by employment for more than one semester coupled with a willingness to be rehired. In City of Rahway, D.R. No. 83-9, 8 NJPER 538 (¶13247 1982) crossing guards, holding temporary Civil Service positions, were terminated and rehired each year. The Director held that they formed an appropriate unit for collective negotiations because a significant percentage of employees (85%) returned to work each year.

Applying these principles to this case, I find that six substitute bus drivers worked more than one-sixth (135 hours) of the 810 hours worked annually by regular bus drivers during the school year 1985-86. Of these six employees, two were hired into full-time bus aide positions in 1986-87 year and three were rehired as substitute bus drivers for at least the first month of the 1986-87 school year. Thus, 82% of the individuals who meet the

Bridgewater-Raritan test have shown a willingness to return and a high actual rate of return to work.

The Board argued that substitutes are temporary employees and ineligible to be included in any collective negotiations unit. Its position is untenable in light of the holdings in Mt. Olive, Bridgewater-Raritan, and City of Rahway. That there are no substitutes in any other collective negotiations unit employed by the Lakewood Board of Education is irrelevant especially in view of Mt. Olive.

In Borough of Avalon, H.E. No. 79-30, 5 NJPER 71 (¶10044 1979), specifically adopted by the Commission in Borough of Seaside Park, P.E.R.C. No. 81-18, 6 NJPER 392 (¶11203 1980) the Hearing Examiner noted the factors on which the National Labor Relations Board relies in determining employment regularity and continuity:

...when the employees are drawn from the same labor force each season Kelly Brothers Nurseries Inc., 140 NLRB 82, 51 LRRM 1572 (1962); where former employees are given preference in rehiring Aspen Skiing Corp., 143 NLRB 707, 53 LRRM 2397 (1963); and where there is a relatively stabilized demand for and dependence on such employees by the employer and likewise a reliance on such employment by a substantial number of employees who return each year, California Vegetable Concentrates, Inc., 137 NLRB 1779, 50 LRRM 1510 1962), Avalon at p. 74.

That the substitute bus drivers of Lakewood are drawn from the same labor force each season is evidenced by the requirement that they have the appropriate bus or van drivers license and by the fact that those drivers who have been available when called and are familiar with bus routes are recalled more often than others.

Another example of continuity of employment is the tendency of the Board to hire into regular full-time driver jobs those who have previously worked as substitute drivers. In fact, the entire unit of bus drivers were substitutes at one time. Further, Article VIII B. of the collective negotiations agreement states that "after permanent employees, qualified substitute employees in order of seniority shall be given first opportunity to fill openings in their classification." The Board's dependence upon some substitute drivers is underscored by its desire to avoid calling in substitutes who are unfamiliar with any particular bus route.

The Board has not shown that the substitute drivers lack a sufficient community of interest with regular bus drivers. Although the regular and substitute bus drivers' rates of pay differ and the latter have no fringe benefits, both groups share the knowledge, skills and abilities needed to operate buses and use equipment. Their supervision and job duties are identical. Bus routes are the same for both groups and both work under the same State and Board rules and regulations. (Difference in rates of pay and fringe benefits may very well be a by-product of collective negotiations.) Furthermore, if the eligible substitute drivers vote to be represented by the TWU, their inclusion in the unit of full-time employees means only that there is an obligation to negotiate the terms and conditions of employment of the substitute employees. It does not follow the substitute drivers, newly added to an existing unit, are entitled to the benefits already negotiated for full-time employees under the existing contract. See State of New Jersey,

D.R. No. 87-25, Note 9 and see also, Union Co. Reg. H.S. District,
D.R. No. 83-22, 9 NJPER 228 (¶14106 2983).

RECOMMENDATION

I recommend that the appropriate unit is:

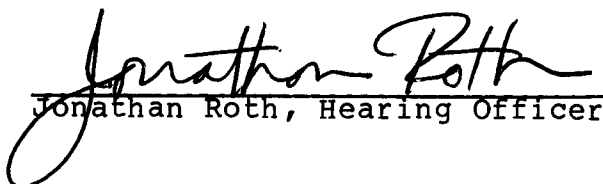
Included: All regularly employed substitute bus drivers employed by the Lakewood Board of Education to be added to the existing collective negotiations unit of regular bus drivers, bus aides, and custodial/maintenance employees.

Excluded: All casually employed substitute bus drivers, managerial executives, confidentials, police, craft, professional, white collar and supervisory employees within the meaning of the Act.

I also recommend that the Commission direct an election among all substitute bus drivers employed by the Lakewood Board of Education who worked at least 135 hours during school year 1985-86 and who were regularly employed as substitute bus drivers in school year 1986-87 to determine whether the majority of those employees wish to be represented in collective negotiations by TWU in the existing unit.

With respect to the matter of two or three bus aides who act as substitute drivers a high proportion of the time, I find that they are already members of the TWU unit. Therefore, it would be inappropriate for them to vote in an election of substitute drivers only. Therefore, these employees shall not be eligible to vote in this election.

DATED: May 15, 1987
Trenton, New Jersey


Jonathan Roth, Hearing Officer