P.E.R.C. NO. 88-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket Nos. CO-86-3-89 and CO-86-209-172

DIVISION 822, AMALGAMATED TRANSIT UNION, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that New Jersey Transit Bus Operations, Inc. violated the New Jersey Employer-Employee Relations Act when it refused to supply Division 822, Amalgamated Transit Union, AFL-CIO, with information needed to process grievances on behalf of unit employees. A Commission Hearing Examiner recommended this conclusion and the Chairman, in the absence of exceptions, adopts it.

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Charging Party.

Appearances:

For the Respondent, Hon. W. Cary Edwards, Attorney General (John Ward, of counsel)

For the Charging Party, Weitzman & Rich, Esqs. (Richard P. Weitzman, of counsel)

DECISION AND ORDER

On July 2, 1985 and February 6, 1986, Division 822, Amalgamated Transit Union, AFl-CIO ("Division 822") filed unfair practice charges against N. J. Transit Bus Operations, Inc. ("N.J. Transit"). The July 2, 1985 charge alleges that N. J. Transit violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (5) ("Act") when it refused to supply Division 822 with information needed to process grievances on behalf of Pauline Pearce and Jose Reyes, two unit employees. The February 6, 1986 charge alleges that N.J. Transit refused to supply Division 822 with information needed

to process a grievance on behalf of Nathaniel Jones, another unit employee.

On December 23, 1985 and April 16, 1986, Complaints issued and the cases were consolidated.

New Jersey Transit submitted its position statements as Answers. It denies violating the Act, contending that it has read certain requested documents to Division 822, but denies an obligation to furnish it with copies of documents.

On July 7 and 14 and October 20, 1986, Hearing Examiner Marc Stuart conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They also filed pot-hearing briefs.

On May 7, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-65, 12 NJPER 423 (¶18164 1987). He found that Division 822's requested information was relevant to its obligation to represent unit members and that N. J. Transit violated the Act when it refused to supply such information or did so untimely. As a remedy, he recommended a cease and desist order, reimburse the union for the fee it incurred in cancelling an arbitration because it did not have the needed information and posting a notice of the violation.

The Hearing Excaminer served his report on the parties and informed them that exceptions were due May 20, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's

findings of fact (3-12) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree with the Hearing Examiner's conclusions of law and recommended remedy.

ORDER

N. J. Transit Bus Operations, Inc. is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the 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, particularly by refusing to supply in a timely manner information requested by Amalgamated Transit Union, AFL-CIO, to process grievances.

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, particularly by refusing to supply in a timely manner information requested by Amalgamated Transit Union, AFL-CIO, to process grievances.

B. Take the following affirmative actions:

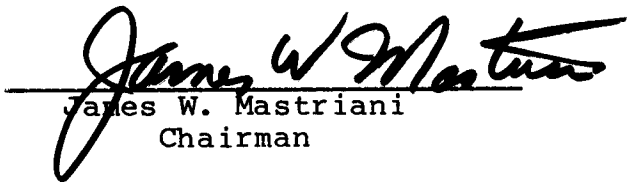
1. Upon request and the showing of a proper nexus, and in the absence of a compelling rationale for withholding information which would outweigh Amalgamated Transit Union, AFL-CIO's need for such information to defend a unit member under the grievance procedure, to furnish to Amalgamated Transit Union, AFL-CIO any relevant information and documentation to the charges against the affected employee.

2. Reimburse Amalgamated Transit Union, AFL-CIO in the amount of $300 for the fee it incurred for late cancellation (February 10, 1986) of the February 13, 1986 arbitration hearing, due to the Company's failure to provide relevant information to Amalgamated Transit Union, AFL-CIO in a timely manner.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and shall be maintained for at least sixty (60) consecutive days. Reasonable steps shall be taken by the respondent to insure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
July 24, 1987
MODIFIED: September 23, 1987

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refuse to process grievances presented by the majority representative, particularly by refusing to supply in a timely manner information requested by Amalgamated Transit Union, AFL-CIO, to process grievances.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by this Act, particularly by refusing to supply in a timely manner information requested by Amalgamated Transit Union, AFL-CIO, to process grievances.

WE WILL upon request and the showing of a proper nexus, and in the absence of a compelling rationale for withholding information which would outweigh Amalgamated Transit Union, AFL-CIO's need for such information to defend a unit member under the grievance procedure, furnish to Amalgamated Transit Union, AFL-CIO any information and documentation relevant to the charges against the affected employee(s).

WE WILL reimburse Amalgamated Transit Union, AFL-CIO in the amount of $300, for the fee it incurred for late (February 10, 1986), cancellation of the February 13, 1986 arbitration hearing, due to the Company's failure to provide relevant information to Amalgamated Transit Union, AFL-CIO in a timely manner.

Docket No. CO-86-3-89
CO-86-209-172

N.J. Transit Bus Operations, Inc.
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-65

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Docket No. CO-86-3-89
and CO-86-209-172

DIVISION 822, AMALGAMATED TRANSIT UNION, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that N.J. Transit Bus Operations, Inc. violated §§5.4(a)(5 and (1) of the New Jersey Employer-Employee Relations Act when, upon request and a proper showing of nexus, it failed to provide relevant information and documentation to the Union at the time the Union was charged with the representation of three (3) of its unit members under the parties' collectively negotiated grievance procedure.

The Hearing Examiner further recommends that the Union's §5.4(a)(2) allegation be dismissed.

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.

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Appearances:

For the Respondent, Hon. W. Cary Edwards, Attorney General
(John Ward, D.A.G.)

For the Charging Party, Weitzman & Rich, Esqs.
(Richard P. Weitzman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On July 2, 1985, and February 6, 1986, Division 822, Amalgamated Transit Union, AFL-CIO, filed Unfair Practice Charges with the Public Employment Relations Commission. In the first charge the Union alleged that N. J. Transit Bus Operations, Inc. (the "Company") violated N.J.S.A. 34:13A-5.4(a)(1), (2) and (5)[1/]

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

Footnote Continued on Next Page

of the Act when the Company declined to furnish the Union with information relied upon by the Company in its personnel action taken against Pauline Pearce, a bus operator, for her alleged use of intoxicants, narcotics or other harmful drugs; and, further, when the Company took disciplinary actions against Jose Reyes, a bus operator, it failed to provide to the Union the information upon which it relied. In the second charge, the Union similarly alleged that the Company violated 5.4(a)(1), (2) and (5),[2/] when it (the Company) failed to provide, to the Union, information relied upon in its personnel action against Nathaniel Jones, a bus operator, who was discharged on November 5, 1985, for alleged fare irregularities.

At the hearing on this matter the Company introduced its August 13, 1985, position statement as its answer in the Pearce/Reyes case, and its March 17, 1986, position statement as its answer in the Jones case.[3/] Substantively, the Company denied

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1/ Footnote Continued From Previous Page

interfering with the formation, existence or administration of any employee organization; (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."

2/ See footnote #1 above.

3/ The Charging Party did not object to the introduction of the position statements as the Company's answer to the Complaint (TA 6).

having committed any unfair practices and asserted instead that Pauline Pearce was discharged for violation of rule B-4.15 of the Operating Employees Service Guide, and Jose M. Reyes was suspended for conduct unbecoming an employee. The Company further stated that Nathaniel Jones was discharged for "fare irregularities."

Since the allegations of the charge, if true, might constitute an unfair practice, a Complaint and Notice of Hearing was issued in the Pearce/Reyes matter on April 16, 1986, and in the Jones matter on May 2, 1986. On July 10, 1986, a Notice of Severance severed the Jones matter from another case with which it had previously been consolidated, and an Order of Consolidation was issued consolidating the Jones matter with that of Pearce/Reyes. An evidentiary hearing, at which the parties examined witnesses, presented evidence, and argued orally was conducted on July 7th, July 14th and October 20, 1986. A letter brief and proposed factual findings were filed by the Union and the Company on December 16 and December 22, 1986, respectively.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. N.J. Transit Bus Operations, Inc. (the Company), is a public employer within the meaning of the Act (TA 8).[4/]

4/ Transcript designations are as follows: TA refers to the transcript dated July 7, 1986; TB refers to the transcript dated July 14, 1986; TC refers to the transcript dated October 20, 1986.

2. Division 822, Amalgamated Transit Union, AFL-CIO is a public employee representative within the meaning of the Act (TA 9).

Pauline Pearce

3. On or about June 14, 1985, Pauline Pearce, an employee of N.J. Transit (employee #23876), who was a bus operator employed at N.J. Transit's Market Street Garage for approximately four (4) years, was issued a notice (violation slip) to report on June 20, 1985, to the office of her garage supervisor, Stanley Sobczak, at the Market Street Garage, for a "first step" hearing. The charge was that Ms. Pearce had appeared on Company property on June 12, 1985, in violation of Company Rule B-4.15 (prohibiting the use of intoxicants, narcotics or other harmful drugs by operators).5/ (TA 12-13).

4. The "first step" hearing was held on June 20, 1985. In attendance were Pearce, Union President and Business Agent Anthony Coiro; Union Delegate Amos Dickerson, Garage Supervisor Sobczak and Assistant Garage Supervisor Joe Sanchez. Sobczak conducted the hearing. He advised the Union representatives that Pearce had been at the Company medical dispensary in Maplewood, New Jersey, on June 12, 1985 (at the request of N.J. Transit), at which time she was asked to submit a urine specimen. The Company submitted this specimen to a laboratory for analysis, and the

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5/ This rule is currently being challenged in a separate pending arbitration proceedings between the Union and the Company.

analysis, which was returned on June 14th, was positive for some form of drug which Sobczak claimed to be marijuana. There was also some reference by Sobczak to a similar test made in May. Pearce denied having used marijuana before reporting to the Company dispensary, but did indicate she had been taking medication. Sobczak discharged Pearce. (TA 14-15).

5. At Pearce's first-step hearing on June 20, 1985, Coiro requested of the Company anything that it was relying on in the way of medical proofs or documents in its action against Pearce (TA 36; TB 63). The Company declined to furnish this information, but indicated that it would do so at the second-step hearing (TA 36). At the second step Coiro again requested this information, and was advised that it would not be made available to him (TA 38; TB 63).[6/] Once again at the third-step hearing, Coiro requested the same information, but the request apparently was again not honored (TA 38, 69; TB 63).[7/]

6. It is the Union's established procedure that following a third-step hearing a recommendation be made to the executive board

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6/ At the hearing in this matter, the Company attempted to demonstrate that it did not refuse to permit the Union to copy information from CP-1; however, the Union requested an actual copy due to Coiro's doubt as to whether he could accurately understand and copy the technical, medical information (TA69), and this they were refused (TB 28).

7/ At one point in the record Coiro contradicted prior testimony by testifying that he might have seen the Pearce medical records prior to the third step (TA 69).

determining whether or not to go to arbitration; however, since the Company refused to furnish the Union with the information it requested, the Union was unable to make a recommendation to its executive board (TA 39). In order to preserve its rights, the Union filed for arbitration, hoping to receive the requested documentation prior to the appointment of an arbitrator (TA 39-40). Therefore, at the time the Union requested arbitration, it apparently had no information from the Company showing what type of test Pearce had been given, nor any information showing the test results (TA 41).

7. Thereafter, on February 6, 1986, the Company agreed to provide to the Union the documentation it relied upon in its case against Pearce (TA 42-43). However, prior to providing this information and documentation, the Company required that Pearce sign an authorization releasing certain information to the Union (TA 42-43; TB 29). The authorization stated as follows, "I, Pauline Pearce, give permission to Anthony Coiro, Business Agent for my Union, to view the lab reports from Roche Lab, urine, drug and alcohol screening."[8/] This was the first time the Company had ever followed such a procedure (TA 43). Ultimately, the Union received the documentation on or around February 9 or 10, 1986 (CP-1, 2, 3; TA 46; TB 23).

8/ The authorization also contained the date 7/12/85; however, it does appear to reflect the date on which the authorization was signed, and its meaning was not apparent to the Union at the time of signing (TA 46-47).

8. As a result of the Union's nonreceipt of the documentation in the Pearce matter prior to the first arbitration hearing scheduled for February 13, 1986, the Union was forced to cancel the arbitration and incurred a penalty of $300. (CP-5)[9/] Pearce's records contained a reference to a prior accident of some type that she had had on May 13th and the notation, "Patient acting without normal behavior, with slurred speech, atoxic, with staggering gait." (TA 48). Ultimately, the Pearce matter went to arbitration in June, 1986. At the arbitration hearing the Company produced a physician who testified that at the initial examination

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9/ It's the general practice of the parties that when one party is forced to cancel an arbitration hearing at a late date, that party bears the cost of the arbitrator's fee if any (TA 53-54); and as a result, the Union was forced to bear said expense. The Company attempted to demonstrate that the Union had sufficient notice to cancel the February 13, 1986 arbitration with Barbara Tener without incurring the penalty for late cancellation. However, I do not believe the record adequately demonstrates this to have been the case and, thus, I make no specific finding other than to find that the Union did cancel the arbitration on February 10, 1986, and that due to the lateness of the cancellation, the Union incurred a penalty. The record is inexact as to when the Pearce documentation was actually given to the Union, in relationship to the date the Union chose to cancel the arbitration hearing; however, it does indicate that the documentation was given to the Union on or around February 9 or 10, 1986 (TA 45-46), and that the Union cancelled the arbitration hearing on February 10, 1986. Since I have found that this information was specifically requested by the Union on more than one occasion, but not provided by the Company until on or around February 9 or 10, 1986, I can only assume that it was not received prior to the Union's cancellation and that its nonreceipt formed the basis for the Union's reluctant cancellation since the Union must have assumed it would be financially responsible for the arbitrator's late cancellation fee.

of Pearce, she was "in some type of impaired condition" (TA 48-49). The Union had no prior knowledge of this (TA 49).

Jose Reyes

9. On or about June 21, 1985, N.J. Transit employee Jose Reyes (employee #2317), a bus operator employed at N.J Transit's Market Street Garage for approximately five (5) years, was given a notice (violation slip) to report to the office of the garage supervisor on June 25, 1985, with union representation, to answer to a charge of "conduct unbecoming a N.J. Transit employee" (TA 55-56; C-1). Substantively, the Company alleged that on June 19, 1985, Reyes engaged a young woman passenger in conversation and then refused to permit her to get off of the bus after she declined a personal invitation from Reyes (TA 56-57; C1). These charges were brought against Reyes as a result of a telephone complaint to the Company from the sister of the passenger involved in the incident (TA 57). Thereafter, the Company compiled notes and a statement from the complainant as to the events which ultimately formed the basis of the charge against Reyes. Subsequently the Company personally interviewed the passenger involved and another statement was taken (TA 59-60). As a result of this incident, a five-day suspension was imposed upon Reyes (TA 60).

10. Coiro was shown the Company's statements and notes which form the basis for the Reyes suspension, and noted several inconsistencies between the various documents (TA 60; TB 18). As a result, he asked to have copies of the documents, or to copy them

out in longhand; however, he was prevented from doing either (TA 60-63; TB 17-18, 35). The Union requested, of the Company, to be furnished with documentation on the Reyes case at both the second and third steps in the grievance procedure, but was denied the documentation (TA 70).[10/] The record does not appear to definitively reflect that the Company ever offered to proffer, to the Union, the documentation requested. In fact, at TB 35, the Union's Business Agent testified credibly that he was refused the opportunity to copy the documentation by hand.[11/] As a result of

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10/ At the hearing the Company suggested that its refusal to share the name of the complaining witness with the Union was based on its concern for the complaintant's anonymity.

11/ Throughout the course of these proceedings one or another of the parties attempted to differentiate and distinguish between the Company's offering copies of the requested information, or offering to permit the Union to "copy," in longhand, the information requested. To a limited extent, the Company has attempted to show that at certain times it was in a position to permit the Union to either see and/or "copy" in longhand the requested information. I de-emphasize this distinction because it is not critical to my findings and recommended conclusions. I intend my findings to be as to whether or not the Company was under an obligation to provide information, and, if so, whether or not it complied. Thus, if I determine that the only effective way of providing information would be to provide copies, that such would represent no burdensome financial hardship to the Company, and that such was not done in response to a valid request therefor, it will be my finding that the information was not provided. (See ex., TB 8, where the Company questioned the Union's witness as to whether the Company offered to permit the Union to view the information (Jones day card)(see Jones findings, generaly, infra, and also specific explanation of the terms "day card" and "register tape," contained in footnote #12, infra) and/or copy it out in longhand, without being given actual Xerox copies; and, the Union witnesses response that the Union requested copies and did not request to either view and/or copy out in longhand the

Footnote Continued on Next Page

the Company's refusal to provide the information upon which it relied, the Union's grievance process has been stopped prior to the arbitration level and the arbitration, having been postponed twice already, is still pending because the Union has been unable to review the Company's documentation and, possibly, interview the complainants to ascertain whether or not to pursue its case further (TA 61-63).

Nathaniel Jones

11. On or about November of 1985, Nathaniel Jones, a bus operator, was discharged for alleged fare irregularities (TA 71). At the first-step hearing, the Company produced reports, from certain undercover agents who had been assigned rides on Jones' routes, making reference to bus register tapes and day cards which had been completed by Jones (TA 71-72; J-1).[12/]

11/ Footnote Continued From Previous Page

relevant information. I specifically find, in this regard, that, whether or not the Company offered to permit the Union to view and/or copy "out in the longhand," any requested information, both day cards and register tapes would be difficult to remember and/or copy, and, further, that register tapes would be practically impossible to copy and virtually impossible to remember (see J-1)).

12/ The "day card" is a printed form that the operator starts his day out with listing his name, the run number that he's working, the bus number that he has, his employee number, and any other relevant personal information. On the back, the operator fills in his trips plus the run that he is working, the times of departure and arrival of each scheduled trip, the amount of passengers handled on each trip and how many tickets he has collected on that particular trip. (TA 72). The "register tape" is the tape that is kept inside the register

Footnote Continued on Next Page

12. Pursuant to the Company's action against Jones, the Union sought to represent him through the parties' negotiated grievance procedure (TA 75). In order to properly represent Jones and to assess his case for arbitration, the Union requested copies of Jones' day card(s) and register tape(s) (TA 75). The Union made several requests for these items through the various steps of the grievance procedure; however, the Company refused to provide the information to the Union (TA 75-76).[13/] Currently, the Jones matter is pending, prior to the arbitration phase of the grievance procedure (TA 84).[14/] The record shows that the Union has had

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12/ Footnote Continued From Previous Page

that records transactions that the operator makes during the course of the day. At the start of the day the operator inserts his key into the register, recording his number and all the fares that are collected until he closes his register out (TA 73-74).

13/ There is some dispute in the record as to whether the Company ever shared or offered to share its documentation on Jones with the Union; however, at TB 99, the Garage Supervisor testified that he permitted the Union to review the relevant documentation at the first step hearing; and at TB 87, the Company's District Manager testified that he allowed the Union to review the documentation at the second-step hearing. This is specifically disputed by the Union (see TA 75-76). I credit the Union's witness based on the witnesses' comparative demeanor and the other evidence in the record supporting the finding that the Company did not make relevant documentation and information available to the Union in a timely manner.

14/ The Union filed for arbitration in the Jones case in order to preserve its procedural remedies; however, it has not moved for the selection of an arbitrator due to the Company's refusal to provide applicable day cards and register tapes; and, also in light of the pendency of the instant proceedings before the Public Employment Relations Commission.

some experience in defending fare irregularity cases, and that in order to carry out its responsibilities in a professional manner, it would need to analyze applicable day cards and register tapes in an attempt to verify the accuracy of the Company's allegations (TA 74).[15/]

LEGAL ANALYSIS

The Union asserts that, on three separate occasions in an attempt to exercise its statutory obligation of defending its unit members, the Company declined to furnish the Union with information and documentation relevant to the Union's defense and its evaluation thereof, and that such was done at critical stages of the grievance procedure. The Union asserts that these activities were violative of sections 5.4(a)(5), (1) and (2) of the Act. There is ample precedent for a "moving" party's obligation to share relevant information with a defending party, or for a party in whose exclusive possession information exists, to share it when it is likely to have a direct bearing on another party(s).

In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶ 12105 1981), the Education Association "requested all correspondence and Board of Education minutes relating to [a] grievance" involving one of its members.

15/ To the extent that these findings demonstrate a continuing pattern of activity, the record appears to indicate that prior to the Pearce/Reyes and Jones matters, there had never been a problem between the Union and the Company involving the Company's providing information to the Union at critical stages during the pendency of grievances and arbitration hearings.

> This request was denied by the Board due to the fact that the grievant was not a member of the NJEA. Additionally, in the Board's brief great weight [had] been given to the fact that the individual had not consented to the disclosure. The Board [asserted] that it [was] under no obligation to provide the Association with information concerning the adjustment of the grievance and when the Board failed to disclose the requested information, the Association filed an unfair practice charge. [7 NJPER at 236]

In reliance upon NLRB v. Acme, 385 U.S. 432, 87 S.Ct. 565 (1967), the Commission reasoned as follows:

> [T]he Supreme Court declared that the majority representative has a right to relevant information in the possession of the employer. Quoting from NLRB v. Truitt Mfg. Co., 351 U.S. 149, the Court stated that, "There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." Acme, pgs. 435-436. The Court in affirming the Board's original decision requiring the employer to supply the requested information found that the Board was "only acting upon the probability that the desired information was relevant, and that it would be of use to the Union in carrying out its statutory duties and responsibilities." Acme at 437. The Court was more concerned with the potential relevance of the information to the Union in this matter, as is the Commission presently. [7 NJPER at 236]

The Commission went on to qualify this principle by noting that "an employer's obligation to release information requested by a majority representative is not absolute"; however, the Commission suggested that given an alleged nexus, the employer would be obligated to furnish the requested information to the majority representative. Finally, the Commission concluded that the Board's withholding of the requested information based on the individual's

right to file a grievance on his own, and the individual's failure to give his consent to such a disclosure, did not constitute an adequate rationale for its position, and the Board was found to have violated subsections 5.4(a)(5) and (1), as alleged.

In Willingboro Bd. of Ed., D.U.P. No. 83-2, 8 NJPER 512 (¶ 13237 1982), the Director of Representation declined to issue a complaint in a case where the Board of Education alleged that the Association had engaged in a course of unfair practice conduct whereby it introduced, at the Arbitration step, factual evidence which it failed to produce during the early stages of the grievance procedure; and, that the Association had consciously chosen to refuse to disclose such information until the Arbitration hearing. The Board alleged that this conduct violated the contract and the parties' past practice, and resulted in surprise, putting it at a disadvantage during an Arbitration hearing. The Board alleged that these practices were violative of subsection 5.4(b)(2), (3) and (5). The Director concluded that this conduct was not violative of the Act.

Thereafter, the Commission reversed and remanded, relying on the Board's assertions that

> (a) grievance procedures are mandatory matters for collective negotiations;
>
> (b) the parties here did, in fact, establish such grievance procedures both by formal negotiations and by past practice;
>
> (c) the [Association], by unilateral action without prior negotiations, altered those previously set grievance procedures;

> (d) said unilateral alteration was over the continuous objection of the Board of Education; and
>
> (e) under these specific factual circumstances, such activity amounts to a violation of [the Association's] obligation to engage in good faith negotiations and hence is a violation of our Act. [P.E.R.C. No. 83-91, 9 NJPER at 76-77 (¶14041 1982)]

In its reversal the Commission stated "a complaint should issue...if it appears that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent [Emphasis added]." "...[A]assuming the truth of the allegations in this case, we cannot conclude that a party's deliberate and continuing refusal to honor a grievance procedure it contractually accepted could not constitute a refusal to negotiate in good faith." Granted, the Commission's reversal of the Director's Refusal to Issue a Complaint is not tantamount to the finding of a violation; however, the general principles expressed by the Commission are consistent with the case law expressed in Shrewsbury, Supra and NLRV v. Acme, Supra.[16/][17/]

16/ This matter was never heard, but instead, was "constructively withdrawn" on June 12, 1984, by the Director of Unfair Practices, following the parties failure to pursue the matter to hearing.

17/ Compare, New Jersey Transit Bus Operations, D.U.P., No. 87-14, ___ NJPER ___ (¶_____ April 23, 1987), in which the Director of Unfair Practices declined to issue a complaint where no nexus was demonstrated between the information sought by the Union and its duty to represent employees in negotiations or contract administration.

In a somewhat farther removed but still comparable vein, this same principle of the right to information and/or documentation at critical stages is established in the context of the Union's right to information necessary for the exercise of its statutory and contractual right and obligation to negotiate collectively with the employer.[18/] New Jersey Department of Higher Education, I.R. No. 87-3, 12 NJPER 664 (¶ 17251 1986); Downe Twp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, (¶ 17002 1985); Monroe Twp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶ 15265 1984); City of Union City, P.E.R.C. No. 83-162, 9 NJPER 394 (¶ 14179 1983).

Finally, a recent variation on a party's right to information, at critical stages, in a labor relations context, has been expressed in the context of Agency Shop. Specifically, the Commission has held that a Union's refusal to provide information to an individual, which the individual deems necessary to his challenge of the organization's demanded and return system, constitutes a violation of the Act. PBA Local 277 (Wilson), P.E.R.C. No. 86-25, 11 NJPER 559 (¶ 16194 1985).

Here, the Company refused and/or made it practically impossible for the Union to obtain information and documentation it deemed necessary to defend Pauline Pearce, Jose Reyes and Nathanial Jones. The Union alleged a valid nexus between the material

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18/ Such would obviously apply only to information in the employer's exclusive control which is not otherwise available to a majority representative.

requested and its representation of its unit members. Accordingly, the Union was prevented from making informed decisions as to whether to pursue these grievances through the grievance procedure, and to arbitration. It prolonged the grievance procedure, dragging it out to its maximum scenario, which is inconsistent with the parties' negotiated grievance resolution mechanism. It necessitated the Union's having to file for arbitration in each case in order to preserve its available remedies without being able to make an informed decision as to whether it actually wanted to take the case to arbitration, and in one case, at least in part, to forfeit a fee for the late cancellation of an arbitration hearing due to the Union's inability to secure requested information from the Company. All of this is violative of the Act under sections 5.4(a)(5) and (1) Shrewsbury Bd. of Ed., 7 NJPER 235; NLRB v. Acme, 385 U.S. 432.[19/] Furthermore, in reliance upon Red Bank Reg. Ed. Assn. v. Red Bank Reg. High School, 78 N.J. 122, 4 NJPER 364 (¶ 4167 1978), the Commission in Shrewsbury, Supra, stated that "an employer cannot condition its acceptance of an organizational grievance on the employee's consent...," and it would then seem to follow that the Company cannot rely, in the Pearce matter, on the employee's initial lack of written consent in support of its refusal to consent to the request of the Association to have the Pearce medical test results

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19/ Additionally, such a pattern of activity is not consistent with constructive labor management relations.

and evaluations released. [7 NJPER 236]. Thus, the Company was without authority to refuse the Pearce medical reports to the Union, even in the initial absence of Pearce's signed authorization.

The Company asserts that it offered to furnish the Pearce laboratory reports to the Union during the course of the instant proceedings; however, I previously found that it delayed this offer until such time as the grievance procedure had nearly reached an end. With reference to the Reyes and Jones matters, the Company asserts it has offered and continues to offer to provide copies of certain documents to the Union; however, I have previously determined that such offers were not made in a timely fashion and that generally, and particularly in the case of the Jones' day cards and register tapes, the Company's offer(s) to permit the Union to make "long hand copies" of the documentation was not feasible and appear somewhat obstructive. In the absence of some showing of burdensome cost to the Company in providing the information as requested or some overwhelming need for confidentiality which would preclude the Union's right to information, I am not sympathetic to the Company's refusal to provide the information as requested (i.e., photocopies). Thus, it is my recommended conclusion that the Company's offers have been too little and too late, and I recommend that the Commission find that N.J. Transit Bus Operations, Inc. violated 5.4(a)(5) and (1) by its aforementioned actions and inactions.

Commission cases dealing with (a)(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union County Regional Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Middlesex County (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden County Board of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). While motive is not an element of an (a)(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. Cf., Charles J. Morris (editor), The Developing Labor Law; The Board, The Courts and the National Labor Relations Act (B.N.A. 2nd ed. 1983), p. 279, citing Garment Workers (Bernard Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961). Apart from findings of interference with individuals' protected rights, I find no evidence of actual interference with or domination of the employee organization as a whole, and I do not recommend finding an (a)(2) violation.

Therefore, it is recommended that the Commission issue the following:

ORDER

The Respondent, N.J. Transit Bus Operations, Inc. is hereby ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the 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.

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

B. Take the following affirmative actions:

1. Upon request and the showing of a proper nexus, and in the absence of a compelling rationale for withholding information which would outweigh the Union's need for such information to defend a unit member under the grievance procedure, to furnish to the Union, any relevant information and documentation to the charges against the affected employee.

2. Reimburse the Union in the amount of $300 for the fee it incurred for late cancellation (February 10, 1986) of the February 13, 1986 arbitration hearing, due to the Company's failure to provide relevant information to the Union in a timely manner.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and shall be maintained for at least sixty (60) consecutive days. Reasonable steps shall be taken by the respondent to insure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Marc Stuart
Hearing Examiner

Dated: May 7, 1987
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refuse to process grievances presented by the majority representative.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by this Act.

WE WILL upon request and the showing of a proper nexus, and in the absence of a compelling rationale for withholding information which would outweigh the Union's need for such information to defend a unit member under the grievance procedure, furnish to the Union, any information and documentation relevant to the charges against the affected employee(s).

WE WILL reimburse the Union, in the amount of $300, for the fee it incurred for late (February 10, 1986), cancellation of the February 13, 1986 arbitration hearing, due to the Company's failure to provide relevant information to the Union in a timely manner.

Docket No. CO-86-3-89
CO-86-209-172

N.J. TRANSIT BUS OPERATIONS, INC.
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.