

D.U.P. 87-14

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS,

Respondent,

-and-

Docket No. CO-87-23

AMALGAMATED TRANSIT UNION,  
DIVISION 824, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a Complaint with respect to certain unfair practice allegations charged by ATU Division 824. Specifically, allegations that New Jersey Transit failed to properly process grievances at intermediate steps of the grievance procedure were dismissed where the ATU may pursue the grievance to the next contractual level.

Further, allegations that New Jersey Transit failed to provide ATU with certain information were dismissed where ATU did not assert any nexus between the information sought and its duty to represent the employees in negotiations or contract administration.

Additionally, allegations which were mere alleged contract violations were dismissed under Human Services, 10 NJPER 419 (¶15191 1984), or deferred to the parties' arbitration process.

Allegations of employee harrassment were also dismissed where there was no assertion that such actions were in retaliation for protected activities.

Allegations that New Jersey Transit officials made disparaging remarks to the union business agent during grievance hearings were found not to be complaintable where the parties were not in an employer-employee context and such comments did not tend to interfere with, restrain or coerce employees.

Finally, the Director determines that the alleged violations of subsection 5.4(a)(3) involving discrimination based upon union activities will not be deferred to the parties' grievance arbitration procedure absent an agreement among th parties to do so. A complaint is issued on those allegations.

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Appearances:

For the Respondent,  
C. Cary Edwards, Attorney General  
(Jeffrey Burstein, Deputy Attorney General)

For the Charging Party,  
Oxford, Cohen & Blunda, Esqs.  
(Arnold Cohen, of Counsel)

REFUSAL TO ISSUE COMPLAINT

On July 21, 1986, the Amalgamated Transit Union Division 824, AFL-CIO ("ATU") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against New Jersey Transit Bus Operations ("N.J. Transit"). The Charge, as amended on August 6, November 6 and December 1, 1986, alleges violations of subsections 5.4(a)(1), (2), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act").<sup>1/</sup> In its Charge, the ATU asserts that in 16 separately enumerated allegations, N.J. Transit has engaged in "a pattern of discrimination, harassment, reprisal and intimidation of ATU members and leaders...and repudiated the agreement between ATU and N.J. Transit."

N.J.S.A. 34:13A-1 et seq. ("Act"), N.J.S.A. 34:13A-5.4(c) provides that the Commission shall have the power to prevent anyone from engaging in any unfair practice and that it has the authority to issue a complaint stating the unfair practice charge.<sup>2/</sup> The

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<sup>1/</sup> 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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

<sup>2/</sup> Paragraph 5.4(c) provides: The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the Commission or any designated agent thereof; provided that no

Commission has delegated its authority to issue Complaints to me and has established a standard upon which unfair practice Complaints shall be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute unfair practices within the meaning of the Act,<sup>3/</sup> and the Commission's rules provide that I may decline to issue a complaint where appropriate.<sup>4/</sup> For the reasons that follow, I find that the following allegations, do not meet the Commission's Complaint issuance standard, and I decline to issue a Complaint with respect to them:

Paragraphs 1, 4, 5, 12 and 15 of the Charge allege that N.J. Transit failed to seriously process grievances and has undermined the effectiveness of the grievance procedure.

Section 1, Article A of the parties' 1985-1987 agreement provides for a 4-step grievance procedure as follows:

Step 1: Such grievances are to be taken up between the employee and the union representative and the supervisor, foreman, or department head.

Step 2: Between the union president or business agent and the Division manager or department head.

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2/ Footnote Continued From Previous Page

complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the Charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

3/ N.J.A.C. 19:14-2.1.

4/ N.J.A.C. 19:14-2.3.

Either the Company or the union may delegate; 2nd step hearings shall be within 48 hours, and if a Company representative is not available within that period, the union may deem the second step waived....

Step 3: Between the President or Board Attorney of the involved and/or the State business agent of the Union, and general manager of the Company...The 3rd step hearing shall be held within 96 hours after the written request for such third step hearing, and if a company representative is not available within that period, the union may deem the third step waived.

Step 4: In the event, however, that such dispute or grievance is not settled...the grievance may be referred by written request by any division or the state union council, or the company to an arbitration board...provided the request is made within 96 days after the grievance arose...The decision of the board shall be finding and binding.

The Commission has repeatedly held that where the parties' contract provides for a self-executing grievance procedure ending in binding arbitration, it is not an unfair practice for the employer to fail to act at an intermediate step of the grievance procedure.

City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986),  
Township of Rockaway, D.U.P. No. 83-5, 8 NJPER 644 (¶13309 1982);  
Rutgers University, D.U.P. No. 82-28, 8 NJPER 237 (¶13101 1982);  
Essex County Vocational School Board of Education, D.U.P. No. 77-2,  
2 NJPER 372 (1976); Englewood Board of Education, E.D. No. 76-34, 2  
NJPER 175 (1975).

In paragraph 1, the ATU asserts that N.J. Transit failed to accord serious treatment to a seniority grievance of unit member McGough. However, N.J. Transit has demonstrated through documentation that this grievance was subsequently submitted to

arbitration. In paragraph 4, the ATU alleges that N.J. Transit representatives withheld information or gave false information in a grievance hearing.<sup>5/</sup> Similarly, in paragraph 12 of the charge, the ATU alleges that a N.J. Transit representative refused to hear six first-step grievances.

Paragraph 5 of the Charge asserts that the ATU business agent complained to a N.J. Transit representative about selection of drivers. The employer's representative suggested that the ATU "grieve it". This allegation fails to state a violation of the Act, since the ATU was then free to seek remedy for its complaint through the parties' contractual grievance procedure.

In paragraph 15, the ATU alleges that N.J. Transit has had a continually antagonistic attitude at grievance hearings. This allegation also fails to state a violation of the Act, since the ATU is free to invoke arbitration to remedy such problems.

Section 1, Article B of the parties' contract provides for a self-executing grievance procedure culminating in final and binding arbitration and either party may invoke arbitration. These allegations, even if true, do not constitute violations of the Act, since the contract permits the union, if not satisfied with the results of any step of the grievance procedure, to simply proceed to the next step. Therefore, I decline to issue a complaint with

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<sup>5/</sup> See discussion infra, concerning withholding of information from the majority representative.

regard to the allegations contained in paragraphs 1, 4, 5, 12 and 15 of the Charge.

In paragraph 2, the ATU asserts that N.J. Transit failed to provide the ATU with certain information in an effort to undermine its effectiveness. While it is "a fundamental principal [in labor relations] that the employer must furnish the union, upon request, sufficient information to enable it to represent employees in negotiations for future contracts and the administration of existing agreements,"<sup>6/</sup> and thus, in certain contexts, a refusal to supply information constitutes a violation of the Act,<sup>7/</sup> the employee organization must show some nexus between its duty to represent unit employees, either in the negotiation or the administration of the collective negotiations agreement, and the information being requested. Here, the allegation does not contain any basis for the ATU's need for the requested information. Therefore, the ATU has failed to assert facts which would rise to the level of any unfair practice. Therefore, I decline to issue a Complaint with regard to the allegation in paragraph 2 of the Charge.

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<sup>6/</sup> The Developing Labor Law, Cumulative Supplement, p. 177, BNA, Washington, (1976)

<sup>7/</sup> See New Jersey State Dept. of Higher Ed., I.R. No. \*87-3, 12 NJPER 664 (¶17251 1986) (refusal to supply information necessary for negotiations); Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981) (refusal to supply information necessary for grievance processing).

Paragraphs 3 and 7 of the Charge allege that N.J. Transit violated the contract and Section 13(c) of the Urban Mass Transit Act of 1964. Paragraph 3 states that N.J. Transit failed to pay moving expenses to employees at the Allentown garage. Paragraph 7 alleges an improper discharge.

At best, these allegations concern a violation of the collective negotiations agreement in effect between the parties.<sup>8/</sup>

The Commission will refuse to issue a complaint where the charges merely allege a violation of the parties' collective negotiations agreement. New Jersey Department of Human Services and CWA, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Thus, these allegations then are also not appropriate for Complaint issuance.

In paragraph 10 of its Charge, ATU alleges a repudiation of the contract concerning part-time and extra work. However, the bare assertion of contract repudiation is not sufficient by itself to force this allegation into a hearing.

"An employer will not be found to have refused to negotiate in good faith simply because its interpretation of the contract clause may ultimately be proven mistaken, so long as the collective negotiations agreement provides specific grievance procedures for the resolution of contract disputes and the employer is willing to abide by those procedures." See City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986) aff'd P.E.R.C. No. 86-121, 12 NJPER 376 (¶17146 1986).

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<sup>8/</sup> N.J. Transit also notes that the question of arbitrability of the issues presented in paragraphs 3 and 7 is pending in Essex County Superior Court, Law Division.



Here, N.J. Transit has provided documentation which demonstrates that this very issue was submitted to binding arbitration, and an arbitrator was appointed on October 1, 1986 to hear this dispute. Therefore, I hereby defer this allegation to the parties' contractual grievance procedure. See, Bd. of Ed. of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975); City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58, and State of N.J. (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1972).

In paragraph 9, the ATU asserts that N.J. Transit terminated an employee who had been reinstated by an arbitrator. Enforcement of arbitrator's awards should be sought in the courts, not from the Commission. Belleville Bd. of Ed., N.J. Super, App. Div. Dkt. No. 506A2d (3/20/86), 12 NJPER 368 (¶17140 1986). I therefore, decline to issue a Complaint with regard to this allegation.

Paragraphs 8 and 16(d) assert that employees were badgered or harassed by N.J. Transit representatives. This factual allegation does not implicate a violation of the Act, since there is no claim that employees so treated were engaged in protected activities.

In paragraph 14, the ATU asserts that in August 1986, ATU official Lynch was disciplined in retaliation for exercise of his protected rights. This allegation was also presented in CO-87-99-52. On November 18, Hearing Examiner Howe, in accordance with the agreement of the parties, deferred Lynch's discipline to the parties' arbitration process. Howe indicated to the parties that the arbitrator's award will be reviewed by him in light of the

Commission's deferral standards as set forth in Spielberg.<sup>9/</sup> Therefore, any attempt to reopen the allegations of (a)(3) or (a)(4) in that matter must be directed to H.E. Howe, and not in the context of a new charge. Therefore, I decline to issue a Complaint with regard to that allegation.

In paragraph 13, the ATU contends that disparaging remarks were made to ATU business agent Lynch during the course of a grievance hearing. During the course of negotiations and administration of the contract, such as grievance hearings, the parties are not operating in their employer-employee roles, but rather, are considered to be equals across the table. . See, Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (1984); Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (1981), Middletown Twp., P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984). In Black Horse Pike, supra, the Commission explained the distinction between the employer's treatment of employee representatives in their representative capacity and their capacity as employees:

A public employer is within its right to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations ...just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However,...the employer must be careful to differentiate between the employee's status as the employee

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<sup>9/</sup> See Spielberg Mfg. Co. 112 NLRB No. 1080, 36 LRRM 1152 (1952); standard for review as adopted by the Commission in State of N.J. (Stockton State College), supra.

representative and the individual's coincidental status as an employee of that employer.(citations omitted)

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions; one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate....However, the employer ...cannot express its dissatisfaction by exercising its power over the individual's employment.

Therefore, outbursts made by the parties during the processing of grievances must be given wide latitude. Where the employer's conduct does not tend to interfere with, restrain or coerce employees, the expression of views, arguments or opinions is not an unfair practice if such expression contains no threat of reprisals or force or promise of benefit. See, Hillsborough Bd. of Ed., P.E.R.C. 84-54, 9 NJPER 680 (¶14298 1983).

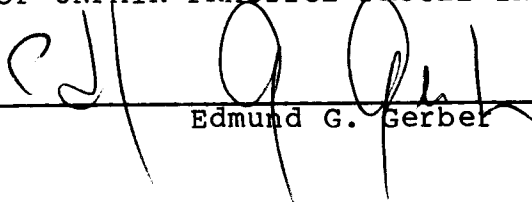
Paragraph 16, the ATU asserts that the N.J. Transit engaged in reprisals against certain ATU officers and members. The allegations in section 16(a) assert retaliation against an ATU officer on April 25, 1986. This allegation was raised for the 1st time in an amendment to the charge filed on December 1. Therefore, this allegation is beyond the 6-month statute of limitations as set forth in N.J.S.A. 34:13A-5.4(c). Therefore, no Complaint may issue on this allegation.

The remaining allegations, paragraphs 6, 16(b) and 16(c), concern claims of discharge, discipline or discrimination with regard to terms and conditions of employment, in retaliation of employees' protected activities. N.J. Transit asserts that each of

these allegations are either presently in the grievance/arbitration procedure, or should have been, and therefore, N.J. Transit suggests that no Complaint should issue on these allegations, but rather, they should be deferred to the contractual grievance/arbitration process.

In the absence of an agreement of both parties to do so, this Commission will not defer charges asserting violations of subsection 5.4(a)(3) to the grievance/arbitration process. See City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982); Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). Therefore, a Complaint and Notice of Hearing is being issued on this date concerning the alleged violations of N.J.S.A. 34:13A-5.4(a)(1) and (3) as set forth in paragraphs 6, 16(b) and 16(c) of this charge.<sup>10/</sup> All other allegations do not meet the Commission's Complaint issuance standard, and are hereby dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICE PROCEEDINGS

  
Edmund G. Gerber

DATED: April 23, 1987  
Trenton, New Jersey

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<sup>10/</sup> There are no facts alleged which support any violation of subsection 5.4(2), (4), (5) or (7); therefore allegation of those subsections of the Act are dismissed.