

D.U.P. NO. 2015-2

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-2013-302

AMALGAMATED TRANSIT UNION,
LOCAL 822,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by the Amalgamated Transit Union, Local 822. The Union alleged that New Jersey Transit Bus Operations violated subsection N.J.S.A. 34:13A-5.4a(5) when it unilaterally ordered that the window shades installed in buses at the Market Street garage be shortened by six inches, thereby reducing protection against sun glare to the operator and creating an unsafe working condition. The Director found that under the "statutory mission" test, the test used to determine whether an issue is mandatorily negotiable for New Jersey Transit employees, New Jersey Transit did not have an obligation to negotiate the shortening of the window shades. The Director found that prior to the shortening of the window shades, bus operators were using the shade to obstruct the on board camera system, which created multiple safety hazards. The New Jersey Transit's statutory mission is to provide "safe" public transit, and that mission would have been frustrated while negotiating the shortening of the shades. The Director found no evidence to suggest that shortening the curb side window shades created an unsafe working condition.

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Appearances:

For the Respondent
John Hoffman, Acting Attorney General
(Michael S. Rubin, Deputy Attorney General)

For the Charging Party
Cohen, Leder, Montalbano & Grossman, LLC, attorneys
(Paul Montalbano, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 19 and 23, 2013, the Amalgamated Transit Union, Local 822 (ATU) filed an unfair practice charge and amended charge against New Jersey Transit Bus Operations (NJTBO).^{1/} The charge, as amended, alleges that on or about April 1, 2013, NJTBO unilaterally ordered that the window shades installed in buses at

^{1/} The parties dispute whether Local 822 is the majority representative with standing to file the instant charge.

the Market Street Garage^{2/} be shortened by six inches, thereby reducing protection against sun glare to the operator and creating an unsafe working condition. The charge alleges that NJTBO has refused to negotiate over this change. NJTBO's conduct allegedly violates 5.4a(5)^{3/} of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). As a remedy, ATU seeks an order requiring NJTBO to restore the window shades to their original length and negotiate with ATU until an agreement has been reached.

On May 16, 2014, I sent a letter to the parties indicating my intention to dismiss the charge. On May 28, 2014, I received a response from ATU requesting a complaint issue in this matter because NJTBO eliminated the benefit of safety and comfort drivers received prior to the shortening of the window shades. On June 2, 2014, NJTBO responded to ATU's letter maintaining that ATU failed to provide any additional facts or legal arguments worthy of persuading me to issue a complaint. By letter dated

^{2/} The Market Street Garage is located in Paterson, New Jersey.

^{3/} The charging party alleges a violation of 5.4 b(5) on the charge. However, an employer cannot violate this section of the Act and a review of the facts makes clear that this was a typographical error, and that the charging party alleges a violation of 5.4 a(5). This provision prohibits public employers, their representatives or agents from:
“(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.

July 7, 2014, I requested that each party supplement its submission with citations to case law and statutes to answer the narrow question of whether shortening the window shades implicates a mandatorily negotiable issue under the New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq. On July 21, 2014, NJTBO responded that shortening the curb side window shades was not mandatorily negotiable because such action did not change a term or condition of employment, and it was necessary to eliminate safety hazards caused by drivers covering the on-board camera system (Drivecam) with the shades. I did not receive a response from ATU.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. The following facts appear.

ATU represents non-supervisory bus drivers who work for NJTBO. The parties are currently operating under a collective negotiations agreement (Agreement) that expired on June 30, 2010.

NJTBO operates a fleet of over twenty five hundred (2500) buses. Almost all of the buses in NJTBO's fleet are equipped with Drivecam installed on the windshield. Drivecam is intended to enhance the safety and security of both passengers and bus operators. Drivecam records data when triggered by a significant sudden change in "g-force," such as a collision or high-speed maneuver, capturing occurrences both inside and outside the bus. If Drivecam video/audio footage provides evidence that an operator violated a rule or policy, such evidence may be used to support the issuance of discipline.

In 2009, NJTBO first discovered that multiple bus operators were pulling their curb-side window shade down far enough to cover the camera mounted on the windshield. That conduct not only blocked the recording of images on the camera, it also obstructed the operators' view of the passenger side-view mirror, in violation of NJTBO's safety standards.

Employees Safety Rule Book provides at §3106, "mirror use:"

Operators shall check the adjustment of mirrors in such a way as to minimize blind spots. Operators shall be aware that to maximize visibility a variety of sight angles are needed. Seat adjustments from side to side or backward to forward shall enhance mirror visibility and minimize blind spots. Operators shall scan mirrors regularly in order to maintain a cushion of safety around his/her vehicle at all times. Interior mirrors shall be adjusted and scanned to minimize on board incidents.

In response to the problems presented by window shades which obstructed the cameras, NJTBO first cut a hole in the shades so that the camera would not be obstructed when the shades were pulled down completely. However, operators assertedly pulled the shades down partially, continuing to obstruct the cameras' lens. NJTBO then secured the bottom of the shade so it could not be pulled over the camera, but operators continued to block the lens by billowing the shade over the secured bottom. That action also blocked the operator's unobstructed view of the passenger side-view mirror.

Beginning in 2009, NJTBO shortened curb-side window shades by ten inches in one hundred forty one (141) of its buses. This prevented operators of these buses from obstructing Drivecam and their view of the side-view mirror. In or about April 2013, NJTBO reduced the length of the shades on approximately fifty (50) buses at the Market Street Garage.^{4/}

ATU claims that by shortening the length of the shades, NJTBO has changed a working condition and is therefore required to bargain over the change. NJTBO contends that shortening the shades does not adversely effect operator safety, but rather

^{4/} It is undisputed that there is no regulation requiring curb-side front window shades on passenger buses. Only forty five percent (45%) of NJT's bus fleet have curb-side window shades.

enhances it, and that it has a managerial right to modify its own equipment. It urges our dismissal of the charge. I agree with NJTBO and dismiss the charge.

An alleged change in terms and conditions of employment can implicate the duty to negotiate in good faith, protected by section 5.4a(5) of the Act. Section 5.4a(5) of the Act prohibits public employers from "refusing to negotiate over terms and conditions of employment with the majority representative." Section 5.3 provides that the obligation is on the public employer to negotiate, prior to implementation, a proposed change in a term and condition of employment. An employer violates these sections when it unilaterally changes or implements negotiable terms and conditions of employment. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 25 (1978); Hunterdon Cty. and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), on review of remand P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd NJPER Supp.2d 189 (¶16888 1988), 116 N.J. 322 (1989).

Terms or conditions of employment may exist either as contractual benefits or through the parties' past practice. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016), aff'd 334 N.J. Super. 512 (App. Div. 1999), 25 NJPER 357 (¶30151 App. Div. 1999), aff'd 166 N.J. 112, 26 NJPER 453 (2000).

The duty to negotiate is not limited to only the period of negotiations for a new agreement. It applies at all times, including prior to the implementation of a proposed change in an established practice governing working conditions which is not explicitly or implicitly included under the terms of the parties' agreement. Galloway at 49, n.9. However, an employer will not be found to have violated a(5) where the term or condition of employment is not mandatorily negotiable.

The standard used to determine whether an issue is mandatorily negotiable for New Jersey Transit (NJT) employees is broader than the standard used for other public employees. In N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), we established the "employment relationship" and "statutory mission" tests. These tests require negotiations over any aspect of the employment relationship, unless negotiations over that issue would prevent NJT from fulfilling its statutory mission to provide a "coherent public transportation system in the most efficient and effective manner." N.J.S.A. 27:25-2; Id. at 174. An Appellate Division panel reversed our decision, 233 N.J. Super. 173 (App. Div. 1989), but our Supreme Court then reversed the Appellate Division panel and reinstated our tests. 125 N.J. 41, 45 (1991).^{5/}

^{5/} The scope of negotiations for other New Jersey public sector employees is governed by Local 195, IFPTE v. State, 88 N.J. (continued...)

The New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq., sets forth, among other things, NJT's statutory mission.

N.J.S.A. 27:2-2a mandates that:

The provision of efficient, coordinated, safe and responsive public transportation is an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.

I find that obstruction of or interference with Drivecam and/or the side-view mirror implicates "safe public transportation" for both the public and bus operators, as set forth in the Transportation Act.

ATU has not alleged that driver-side window shades have been disturbed. No apparent state or federal regulations require the installation of curb-side window shades. Only forty-five (45%) of NJTBO's fleet have curb-side window shades. ATU has provided no facts indicating that shortening curb-side window shades to their current length creates an unsafe working condition. That the shades were shortened and not removed indicates that operators may continue to use them for their intended purpose.

5/ (...continued)
393, 404-405 (1982).

Under all the circumstances, I find that the Commission's standard for issuing a Complaint has not been met and that the charge should be dismissed. N.J.A.C. 19:14-2.3.



Gayl R. Mazuco

Director of Unfair Practices

DATED: September 4, 2014
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 15, 2014.