

I.R. NO. 2019-20

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,  
BUS OPERATIONS, INC.,

Petitioner,

-and-

Docket No. SN-2019-050

AMALGAMATED TRANSIT UNION,  
NEW JERSEY STATE COUNCIL,  
ATU LOCALS 540, 819, 820,  
822, 823, 824, 825, AND 880,

Respondent.

SYNOPSIS

A Commission Designee denies the application of New Jersey Transit Bus Operations, Inc., for an order that would bar various locals of the Amalgamated Transit Union (ATU) from introducing certain evidence in five pending grievance arbitrations. Each of the grievances challenges NJTBO's discharge of bus operators represented by the ATU. NJTBO contends that evidence submitted (or soon to be submitted) in the arbitrations, asserting that the design and features of NJTBO buses obstructs the vision of bus operators and contributed to the accidents for which they were discharged, amounts to an attempt to negotiate over what vehicles should be in NJTBO's fleet of buses. The Designee concludes that NJTBO has not sustained its burden of showing it is likely to prevail on the merits of its claim as arbitration of disciplinary grievances, expressly authorized by N.J.S.A. 34:13A-5.3, settles an aspect of the employment relationship between NJTBO and employees represented by ATU, and does not prevent NJTBO from fulfilling its statutory mission.

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Appearances:

For the Petitioner, Gubrir S. Grewal, Attorney General  
of New Jersey, (Michael S. Rubin, Deputy Attorney  
General of counsel and on the brief)

For Respondent ATU Local 819, Kroll, Heineman, and  
Carton, attorneys, (Curtiss T. Jameson, of counsel  
and on the brief)

For the other ATU Respondents, Cohen, Leder, Montalbano  
and Connaughton, attorneys, (Paul A. Montalbano, of  
counsel and on the brief; Brady M. Connaughton, of  
counsel and on the brief)

INTERLOCUTORY DECISION

On February 22, 2019, New Jersey Transit Bus Operations,  
Inc. ("NJTB" or "NJT") petitioned for a scope of negotiations  
determination and filed an application for interim relief  
seeking, pending a final determination by the Commission, an  
interim order that would restrain the Amalgamated Transit Union  
(ATU) State Council and ATU locals from raising to the assigned

arbitrators through the presentation of testimonial and documentary evidence, certain defenses in the course of pursuing five discharge grievances.<sup>1/</sup>

On March 1, 2019, an Order to Show Cause was issued specifying April 3 as the return date for oral argument. The argument was conducted via telephone conference call.

NJTBO filed briefs, certifications and exhibits in support of its application. ATU filed briefs, a certification and exhibits opposing the interim relief request. After the parties' finished their arguments I issued a written 3-page order denying the NJTBO application for interim relief. This decision and order more fully recites my reasoning.

The background facts pertaining to the incidents that led NJTBO to discharge the bus operators in the five grievance arbitrations do not affect the scope of negotiations determination, given both the boundaries of the Commission's jurisdiction and the limited relief sought by NJTBO which does not challenge the ability of the ATU to seek arbitral review of

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<sup>1/</sup> The grievances, all challenging bus driver discharges are:

- a. NJTBO & ATU Local 823, NJSBM Case No. 16-0338;
- b. NJBTO & ATU Local 819, NJSBM Case No. 17-0013;
- c. NJTBO & ATU Local 823, NJSBM Case No. 18-0076;
- d. NJTBO & ATU Local 823, NJSMB Case No. 18-0208;
- e. NTBO & ATU Local 880, NJSBM Case No. 18-0343.

the terminations.

Instead, NJTBO argues that evidence that the ATU locals presented, or plan to present, asserting that the structure and/or design of NJTBO buses caused or contributed to the accidents that were the basis for the bus operator's discharges, should be excluded from the record.<sup>2/</sup> NJTBO reasons that because it has the managerial prerogative to determine which buses to purchase for its fleet, including how the buses should be designed and equipped, an argument that the vehicles are inherently unsafe, prevents NJTBO from fulfilling its statutory mission.<sup>3/</sup> It asserts that its vehicles comply with federal regulations addressing design and safety standards. And, it posits that an arbitrator's ruling that the characteristics of the bus caused the accidents (thereby relieving a discharged operator of fault) amounts to a directive to NJTBO to buy different buses.

ATU responds that it does not and has never sought negotiations over what buses NJTBO should purchase.<sup>4/</sup>

ATU notes that the parties agreed to a written "Accident

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2/ In the five cases some hearings are complete, some are in progress and some have not begun.

3/ NJTBO concedes that the discharged employees are entitled to have their firings reviewed through binding arbitration.

4/ ATU's brief recites that only the State Council, and not the Locals, can engage in collective negotiations with NJTBO.

Grading and Discipline System" that uses a point system in imposing discipline that rates accidents as preventable, partially preventable or non-preventable. The policy specifies operating adjustments to aid drivers in neutralizing routine and unusual conditions that might impede safe bus operation in a variety of situations (e.g. left turns, limited visibility).<sup>5/</sup>

The Commission's jurisdiction is narrow. Ridgefield Park at 154, states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses the Township may have. In addition, it is the province of the arbitrator to determine the admissibility, relevance and weight to give evidence the

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<sup>5/</sup> ATU submitted an arbitration award that upheld NJTBO's discharge of an operator who struck a pedestrian while making a left turn. The arbitrator applied the "Accident Grading and Discipline System in making his award.

parties seek to be considered in the hearing.<sup>6/</sup>

The scope of negotiations is broader for New Jersey Transit bus employees than for any other employees in the New Jersey public sector because they are covered by the Public Transportation Act, N.J.S.A. 27:25-1 et seq. ("PTA"), not just the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The labor relations subchapter of the PTA requires this employer and this majority representative "to negotiate collectively with respect to mandatorily negotiable subjects which intimately and directly affect the work and welfare of employees." N.J.S.A. 27:25-14(d). Interpreting the labor relations subchapter as a whole and subsection 14(d) in particular, the Commission held in New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd 125 N.J. 41 (1991) that, as in private sector employment relationships generally, "issues that settle an aspect of the relationship between the employer and the employee" are mandatorily negotiable unless, unique to this particular employment situation, NJT would be prevented from fulfilling its

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<sup>6/</sup> See Elkouri and Elkouri, How Arbitration Works (7<sup>th</sup> Edition 2012) Chapter 8.1.A citing Instrument Workers Local 116 v. Minneapolis-Honeywell Regulator Co., 54 LRRM 2660, 2661 (E.D. PA 1963).

statutory mission.<sup>7/</sup> The New Jersey Supreme Court approved this test and elaborated:

[A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between government and its employees in mass transit. . . . [T]he negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. . . . [T]he various rulings of PERC . . . have that theme. They look to the actual consequences of allowing negotiations on the ability of NJT to operate and manage mass transit efficiently and effectively . . . . If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test . . . .

[125 N.J. at 61]

Also relevant is the following portion of N.J.S.A. 34:13A-5.3, applicable to all public employees:

[T]he majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. . . . Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their

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<sup>7/</sup> For a case holding that a non-disciplinary grievance arbitration would interfere with NJT's statutory mission, see N.J. Transit Bus Operations Inc. and Amalgamated Transit Union, N.J. State Council, P.E.R.C. No. 96-11, 21 NJPER 286 (¶26183 1995), aff'd 22 NJPER 256 (¶27133 App. Div. 1996).

employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.

ATU has cited no law or precedent to support its theory that allowing evidence in a grievance arbitration on bus design as an attempt to mitigate a bus operator's culpability, would in the event an arbitrator so found, interfere with its statutory mission,

Somewhat analogous is the situation in N.J. Tpk. Auth. and N.J. Tpk. Supervisors Ass'n, P.E.R.C. No. 93-121, 19 NJPER 360 (¶24162 1993), aff'd 276 N.J. Super. 329 (1994), aff'd 143 N.J. 185 (1996). There, a supervisory employee was charged with sexually harassing a subordinate female co-worker. After the imposition of discipline, the supervisor filed a grievance, claiming that the Authority failed to follow disciplinary procedures required by the agreement. The Authority refused to hear the grievance or submit it to arbitration. As noted by the Supreme Court (143 N.J. at 194):

The Turnpike Authority contends, further, that the otherwise clear provisions of the New Jersey Employer-Employee Relations Act and its collectively negotiated contract

authorizing binding arbitration of disciplinary grievances cannot be applied in a case in which discipline is imposed for sexual harassment because that subject has been preempted by the LAD. Therefore, it concludes that the contractual disciplinary procedures, as applied to disciplinary disputes involving sexual harassment, are prohibited and non-negotiable.

The Court, quoting N.J.S.A. 34:13A-5.3 [Id. at 197-198] responded:

We agree with the Appellate Division that an employer's obligation to adopt and implement policies against sexual harassment "is distinct from the employees' ability to seek review of disciplinary actions based on allegations of sexual harassment." 276 N.J. Super. at 335. The [Law Against Discrimination], Executive Order No. 88, and [Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993)] impose a duty on public employers to enact and enforce policies and procedures to eliminate sexual-harassment discrimination in the workplace. That duty is not undermined by a collectively negotiated agreement requiring fair disciplinary procedures and permitting neutral review when an employee is accused of sexual harassment.

The Court [Id. at 193] quoted the legislative statement to the disciplinary amendments to N.J.S.A. 34:13A-5.3:

Disciplinary actions have an unquestionably intimate and direct effect on the work and welfare of public employees and should be viewed as only indirectly related to the right of public officials to determine substantive governmental or educational policy.

Similarly, applying the negotiability test applicable to NJTBO employees, binding arbitration of discharge grievances is

mandatorily negotiable as an issue that settles an aspect of the relationship between the employer and the employee and would not prevent NJTBO from fulfilling its statutory mission.

ORDER

NJTBO's application for an interim order limiting the introduction of testimony regarding the design of the buses driven by the drivers in the five pending discharge grievance arbitrations is hereby denied.

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/s/  
Don Horowitz  
Commission Designee

DATED: April 22, 2019

Trenton, New Jersey