H.E. NO. 97-20

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

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.
& AMALGAMATED TRANSIT UNION, DIVISION 822,

Respondents,

-and- Docket No. CI-H-96-36

TOMMIE LEE JOHNSON,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint issued on a charge alleging that New Jersey Transit and ATU violated the Act. The charge alleged that the union recommended that a unit employee be suspended for refusing to pay union "initiation fees", violating subsection 5.4(b)(1) of the Act. The employer allegedly followed the recommendation and the employee, a part-time bus operator, was "put out of service", violating subsection 5.4(a)(1) of the Act.

The Hearing Examiner recommended that the "statutory mission" scope of negotiations standard for New Jersey Transit employees, as interpreted by our Supreme Court, contemplates the enforcement of a "union shop" provision (which does not violate constitutional rights). Applying private sector precedent, the Hearing Examiner recommends that the actions taken by the Respondents are lawful. The Hearing Examiner recommends that the Complaint 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent NJ Transit
Peter Verneiro, Attorney General
(David F. Griffiths, Deputy Attorney General)

For the Respondent ATU Division 822
Weitzman & Weitzman, attorneys
(Richard P. Weitzman, of counsel)

For the Charging Party,
Tommie Lee Johnson, pro se
Joseph A. Ferreiro, attorney, on the brief

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On December 5, 1995, Tommie Lee Johnson filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. and Amalgamated Transit Union, Division 822. The charge alleges that on or about November 13, 1995, Johnson was notified by the ATU that he was required to pay a $300 initiation fee, having been hired as a part-time employee in August 1995. On or about November 21, 1995, Richard Keschl, a New Jersey Transit supervisor allegedly told Johnson that the local union president insisted

that the initiation fee must be paid or that he should be "removed from service until the $300 was paid." Johnson purportedly refused and on November 22, 1995, he was "put out of service." New Jersey Transit's actions allegedly violate subsections 5.4(a)(1), (2) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The ATU's actions allegedly violate subsections 5.4(b)(1) and (5)[2/] of the Act.

On April 29, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On May 10, 1996, New Jersey Transit filed an Answer, incorporating a previously filed letter. It denies any violation of the Act. On May 20, 1996, the ATU filed an Answer, admitting that Johnson was hired as a part-time driver; that its initiation fee is $300; and that on November 13, 1995, the ATU delivered to Johnson a letter advising that he owed the "initiation" fee within fifteen days. The ATU denies violating the Act.

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 interfering with the formation, existence or administration of any employee organization. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Violating any of the rules and regulations established by the commission."

On July 15, 1996, I conducted a hearing at which the parties examined witnesses and presented exhibits. Mr. Johnson was not represented by counsel. At the conclusion of the hearing, counsels for respondents argued orally and Mr. Johnson elected to review a copy of the transcript and file a post-hearing brief.

On August 8, 1996, I received a letter from counsel for charging party advising that he had been retained to file the post-hearing brief. On November 20, 1996, charging party filed a brief. Responses were filed on December 12 and 23, 1996, and on January 8, 1997.

Upon the record, I make the following:

FINDINGS OF FACT

1. Tommie Lee Johnson was a full-time bus driver for New Jersey Transit out of the Fairview garage for about thirteen years before he retired in December 1994 (T33, T39, T50).[3/] In those years, Johnson was a member of and represented by the Transit Workers Union, Local 225, for purposes of collective negotiations. Johnson was at different times a shop steward, a member of the executive board and in 1994, a vice president (T33-T34).

2. Around July 1995, Johnson applied to work as a part-time driver with New Jersey Transit at the Paterson (Market Street) garage. Employees there are represented for purposes of

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3/ "T" refers to the transcript of the hearing conducted on July 15, 1996.

collective negotiations by the Amalgamated Transit Union, Division 822 (T39, T40).

The ATU and New Jersey Transit have a collective agreement extending from July 1, 1993 through June 30, 1996 (C-4).[4/] Section 1C of the agreement, "union security", states: "all present employees and all new employees shall become and remain members in good standing of the Union as a condition of continuous employment with the Company. Employees entering the service of the Company shall become members of the Union after 30 days."

Section 16.0, "part-time operators" permits their hiring, "notwithstanding any other provision of the collective bargaining agreement." The section permits part-time operators to work up to 30 hours per week. They are "entitled to and covered by, the contract provisions of union membership and checkoff on a non-discriminatory basis, and the grievance procedure after completion of the probationary period."

3. On August 21, 1995, Johnson started work as a part-time bus operator at the Paterson garage (T48, T41; UR-1). Operator Michele Vigh was assigned to show Johnson the Paterson-Hackensack routes (T60, T41).

Johnson could not recall what date or month he first spoke to Vigh, though he conceded that she was not an officer of

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4/ "C-" refers to Commission exhibits; "UR-" refers to Union Respondent exhibits.

the ATU then (T42, T44). He testified that he told her that he was not joining the union and would pay an agency fee (T24). She allegedly answered that he would probably [not] have to pay the initiation fee but "I want you to sign these papers....She gave me the papers" (T24).

A short time later in his direct narration, Johnson testified that he was riding with Vigh "not [on] the Hackensack line and she had just got appointed shop steward and she told me, she brought me the papers to sign for the local and I told her but I was not going to pay the $300. She said well, you probably won't have to..." (T26).

Johnson later admitted in his re-direct narration, "So I said from the very first beginning, that [as] long as I didn't have to pay the $300 initiation fee, I would pay union dues" (T58).

Vigh testified that she instructed Johnson on the Paterson-Hackensack route on a hot August day and that Johnson mentioned his previous position(s) with the TWU. She testified that he said nothing about membership in ATU (T61, T73).

Johnson's version of events is confused and inconsistent. According to Johnson, he and Vigh had the same conversation twice -- before <u>and</u> after Vigh became an ATU official and that she gave him "the papers" to sign <u>twice</u>. Nothing in the record corroborates the fact or logic of such a sequence of events. Assuming however, that Johnson received "the papers"

(i.e., membership and authorization cards) for signature once only, I am suspicious of his failure to repeat his testimony that he told Vigh he was not joining the union and would pay an agency fee. My suspicion was reiterated by the following cross-examination of Johnson:

> Q: ...Now when did the question about the agency fee come up?
> A: At the time that she told me, Michele.
> Q: When did that question come up?
> A: Well, before I signed the papers, I told her I wasn't going to pay the initiation. She said well, you probably won't have to, but I have to check with Vito first... [T48-T49].

An "agency fee" is not the same as an "initiation fee."

Vigh's testimony about the date of their first conversation is credible, in light of Johnson's inexperience on the Paterson-Hackensack route soon after being hired.

4. On or about October 10, 1995, Vigh became acting president and business agent of Division 822 (T60). Johnson was one of about thirty-eight part-time operators who had not joined the union (T62). She spoke with them separately about membership and asked each to sign two cards -- "one for the Company that they agree to pay union dues, and one goes to our records, and we send it to the International and give them the union card..." (T62).

5. Sometime later in October, Vigh spoke to Johnson about joining the union. She gave him the two cards for his signatures (T63-T64, T74; UR-1, UR-2). One card, bearing the ATU

logo is an "application for membership in division no 822[5/] of the Amalgamated Transit Union." A designated space for the "member's signature" appears at the bottom. On the reverse side are spaces for name, address, birth date, social security number, signature, etc. (UR-1).

The other card authorizes the employer "...to pay from my wages, from one payroll period in each month, union dues owed...to Division 822 of the Amalgamated Transit Union...." The card designates that the authorization is irrevocable for one year or at the expiration of the current agreement, whichever is sooner; and that afterwards, it may be revoked in writing (UR-2).

Upon receiving the cards, Johnson told Vigh that he was not paying the initiation fee (T49; T62). Vigh testified that Johnson said that he will be a union member but did not intend to pay the initiation fee (T62). Johnson essentially admitted this fact (see finding no. 3). Vigh denied that he said anything about "agency fee" (T67). I credit Vigh's testimony, which was forthright and consistent. It is more credible than Johnson's testimony, which I described in finding no. 3.

Johnson conceded that in his thirteen years as a full-time operator and in his experience as a union officer he never knew an employee who was an agency fee payer (T50). He

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5/ The number printed on the card, "819", was crossed out in ink and "822" in the same color ink was handwritten above it by Vigh. She did not have any "822" cards and "borrowed some from 819" (T63).

testified that he knows the term, "agency fee" from his reading a Reader's Digest compendium on 'knowing your rights' and from advice from the president of TWU, Local 225 (T52).

Johnson told Vigh that he paid an initiation fee when he worked at Fairview. Vigh answered that she believed that the TWU and ATU do not have a "reciprocal" agreement and that she would inquire further about the ATU initiation fee (T49, T65). He kept the cards (T64-T65).

6. Vigh spoke to Vito Forlenza, ATU chairman of state council and acting financial secretary, who confirmed that Johnson must pay the initiation fee (T66). A few days later, Johnson signed the cards and returned them to Vigh (T48, T64).[6/] Johnson admitted signing the "application" card and that he understood what he was signing (UR-1; T48). I find that this card, placed in evidence by the ATU and authenticated by Johnson at hearing, undermines and supercedes any contrary statement he may have made to Vigh about wanting to pay an agency fee.[7/]

6/ Vigh testified that Johnson signed both cards and that she conveyed the dues authorization card to New Jersey Transit (T65). A signed authorization card was not placed into evidence. Johnson agreed that Vigh "had me sign these cards..." and then he equivocated; "I can't say if I signed this card or not." I find that Johnson signed the authorization card (T47).

7/ The card bears a handwritten notation, "enrolled 10-1-95", written by Forlenza (T68). Enrollment dates are backdated to the first day of the month in which an employee enrolls. Accordingly, when Johnson signed the "application for membership" card in late October, it bore no enrollment date. Vigh has Johnson's membership card (T68).

Vigh informed Johnson that he must pay the $300 fee (T66). He said, "no, I'm not paying it" (T66).

7. On November 13, 1995, Johnson was given a letter at the garage from Forlenza on ATU letterhead. It advised Johnson that he owed $300 for "initiation - Section IC - union security" and that he should pay within fifteen days, "so you do not lose any of your rights or benefits, as a member of Local 822, ATU" (C-1; T26, T51).

8. On or about November 21, 1995, a New Jersey Transit supervisor, a Mr. Keschl, advised Johnson that Forlenza informed him that the initiation fee was unpaid. Keschl advised that if the $300 fee was not paid, he (Johnson) will be "put out of service." Johnson was not permitted to work that afternoon and no day afterwards (T28).

ANALYSIS

Our Supreme Court has affirmed the "statutory mission" standard, first announced by the Commission, to define the scope of the negotiations for employees, including bus operators, covered by the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et seq. NJ Transit Bus Operations, Inc. and NJ Transit Mercer and Transport Workers Union, United Transportation Union and Amalgamated Transit Union, P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd rem'd 233 N.J. Super. 173 (App. Div. 1989), sub nom. In the Matters of NJ Transit Bus Operations, Inc. New Jersey Corporation and Amalgamated Transit Union et al., rev'd

and rem'd 125 N.J. 41 (1991), dism'd (4/8/92). This standard "...confer[s] such rights on these employees as would place them in the same position that they had in the private sector, subject only to the overriding responsibility and power of government to accomplish the goals of the [Transportation] Act." Id. at 125 N.J. 45.

N.J.S.A. 27:25-14(d) mandates the employer and majority representative to negotiate collectively over mandatorily negotiable subjects, "including wages, hours of work, maintenance of union security and check-off arrangements...." The Court wrote that "provisions relating to union security and check-off rights, language traditionally associated with private sector collective bargaining,...compels the decision reached by PERC: the Legislature intended to treat New Jersey Transit employees differently than it treats all other public employees in New Jersey." New Jersey Transit at 125 N.J. 56-57.

The Commission had earlier found negotiable the union security provision at issue in this matter. While not deciding the constitutionality of the provision, the Commission "noted":

> ...union security arrangements entered into by NJ Transit are subject to the same constitutional limitations that apply to public sector agency shop. Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Robinson v. New Jersey, 741 F2d 598 (3rd Cir. 1984), cert den. 469 U.S. 1228 (1985). We do not believe that this provision is preempted by the representation

> fee statute[8/] in view of the plain language of the NJPTA which expressly declares "the maintenance of union security" to be mandatorily negotiable. But it is clear under federal law that such clauses are limited to 'financial core membership' and cannot be construed to require more than that. NLRB v. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963). [14 NJPER 180].[9/]

8/ N.J.S.A. 34:13A-5.5 was enacted in 1980 to allow for the payment of a "representation fee" in an amount "equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members...but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments." The Court in New Jersey Transit wrote that a comparison of "union security and check-off rights" with "representative fees and payroll deduction" (legislation enacted one year after N.J.S.A. 27:25-1 et seq.) revealed a "substantive difference", i.e., the Legislature granted negotiating rights to New Jersey Transit employees at a time "when public employees in New Jersey simply had no corresponding rights...." Id. at 126 N.J. 57.

9/ General Motors used the term "financial core membership" to skirt the prohibition against encouraging or discouraging union membership under Section 8(a)(3) of the NLRA while acknowledging the need for stability by eliminating "free riders." The Court wrote, "...the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights may in turn be conditioned only upon payment of fees and dues." 53 LRRM 2316. This "financial core" for non-members was further narrowed in 1988 to monies for collective bargaining, contract administration and grievance adjustment. See CWA v. Beck, 487 U.S. 735 (1988); California Saw and Knife Works, 321 NLRB No. 95, 152 LRRM 1241 (1996) supplementing 320 NLRB No. 11, 151 LRRM 1121 (1995) (unions must timely notify newly hired employees of Beck rights).

Johnson's words and actions show that he agreed to membership in the ATU. He told Vigh that he would be a member but would not pay the initiation fee. Johnson also signed the ATU application card and gave it to Vigh, whom he knew was the ATU representative. The record shows that Johnson's signature on the card was not secured through a misrepresentation of his obligations. The question of his having to pay the initiation fee was not definitively answered until after he signed the application card. He gave the card(s) to Vigh and she unhesitatingly told him that he must pay the initiation fee. Johnson immediately refused, but did not ask her to return the card(s) or otherwise attempt to rescind his membership. A membership card was issued in Johnson's name and kept by Vigh. I conclude that Johnson intended to be a member of the ATU and that his refusal to pay the initiation fee was merely a dispute between a union member and his union, over which the Commission has no jurisdiction. See Calabrese v. PBA Loc. 76, 157 N.J. Super. 147 (App. Div. 1978); Hoboken PSOA, D.U.P. No. 92-21, 18 NJPER 319 (¶23136 1992).

I find that the ATU did not violate 5.4(b)(1) of the Act by recommending that Johnson be "put out of service." In IBI Security, Inc., 292 NLRB No. 64, 130 LRRM 1185 (1989),[10/] a unit employee who had previously been a union shop steward elsewhere, was

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10/ In Lullo v. IAFF, 55 N.J. 409 (1970), the New Jersey Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

repeatedly asked to join the union, which had a "union shop" agreement with the employer. The employee dissembled, saying he needed to "check out" this union and would "get back" an answer. The employee was asked to "sign a dues check off provision or at least fill out the membership application and send that in to the union" but did nothing. These communications occurred over an eighteen-month period, at the end of which the union representative told the employee of "the need for him to join the union, his obligation to pay an initiation fee, the amount of that fee and the consequences of fail[ing] to do so." 130 LRRM 1185. The employee failed to act and within the next month the union proceeded to seek his discharge.

The National Labor Relations Board first wrote that before a union seeks to discharge an employee for failing to pay dues or fees it must inform the employee of the amount owed, the method used to compute the amount, when such payments are to be made and the fact that discharge will result from failure to pay. Philadelphia Sheraton Corp., 136 NLRB 888, 49 LRRM 7874 (1962), enf'd sub nom. NLRB v. Hotel Employees Local 568, 320 F2d 254, 53 LRRM 2765 (3rd Cir. 1963). Despite the union's failure to inform the employee of the specific time within which the fee had to be paid, the NLRB found that the union "fulfilled its fiduciary obligation." It did so, the NLRB wrote, because the "requirements were established to ensure that a reasonable employee will not fail to meet his obligation through ignorance or inadvertance, but will do so only as

a matter of conscious choice." 130 LRRM 1186. The NLRB concluded that the employee "consciously chose not to fulfill his union security obligations until it was too late" and found no violations of Section 8(b) 1(A) and (2) of the Labor Management Relations Act.

Parallel to the facts of IBI Security, Johnson too had been a union member and representative before he was told of the necessity to pay the initiation fee. But unlike the employee in IBI Security, Johnson had previously been employed by the same employer, signed new membership and authorization cards, and repeatedly refused to pay the initiation fee. His conduct, a willful and deliberate evasion of union security obligations, obviated the union's duty to more closely follow notice requirements. I find that the ATU legitimately requested that Johnson be "put out of service" and recommend that it did not violate 5.4(b)(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967).

Johnson alleges that New Jersey Transit violated 5.4(a)(1) of the Act by placing him "out of service." I disagree.

An employer violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. N.J. Sports and Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); UMDNJ, Rutgers Med. Schl., P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). The tendency of the employer's conduct, and not its result

or motivation, is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983).

In all other public sector contexts in New Jersey, an employer's refusal to employ someone because he or she declined to directly pay an "initiation fee" (compared to a "representation fee" from a non-member, deductible from paycheck(s) pursuant to an agreement with the majority representative) may very well "tend" to interfere with the right to "...refrain from...joining or assisting an employee organization" under section 5.3 of the New Jersey Employer-Employee Relations Act.

The "union security" provision of Transportation Act (N.J.S.A. 27:25-14(d)) is "substantively different" than the representation fee provision of the Employer-Employee Relations Act (N.J.S.A. 34:13A-5.5, 5.6). See New Jersey Transit at 125 N.J. 57. Accordingly, I recommend that the Commission may simultaneously enforce a traditional "union shop" provision without violating constitutional rights so long as a New Jersey Transit employee pays only "financial core membership." See New Jersey Transit at 14 NJPER 180. Initiation fees are part of the "core." See IBI Security, Inc. at 130 LRRM 1186 and The Developing Labor Law (3rd ed. at 1495-1504).

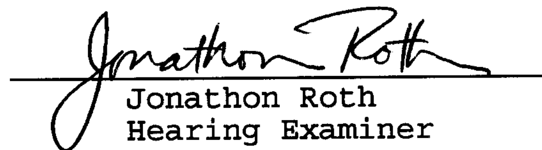
Finally, no evidence suggests that New Jersey Transit believed that the action sought by the ATU was for reasons other than Johnson's refusal to pay the initiation fee. Having already

received the signed authorization card, the employer reasonably believed that the ATU was entitled to the fee.

Johnson's charge alleges and the record confirms that his employment is contingent upon payment of the initiation fee. Nothing suggests that Johnson will need to apply again at New Jersey Transit for a part-time operator position. Unlike a discharge in which the employment relation is severed, Johnson's payment of the initiation fee is the condition, once met, that restores the status quo.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.[11/]



Jonathon Roth
Hearing Examiner

DATED: February 6, 1997
Trenton, New Jersey

11/ No facts suggest that the public employer violated subsections 5.4(a)(2) and (7) of the Act. No facts suggest that the majority representative violated subsection 5.4(b)(5) of the Act. I also recommend that these charges be dismissed.