

I.R. No. 2010-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS-MERCER,

Petitioner,

- and -

Docket No. SN-2010-075

AMALGAMATED TRANSIT UNION,
DIVISION 540,

Respondent.

SYNOPSIS

A Commission Designee denies the request of New Jersey Transit Bus Operations-Mercer to temporarily restrain arbitration of a grievance filed by the Amalgamated Transit Union, Division 540. The grievance challenges the denial of a promotion of a part-time bus driver to full-time. Applying the broader scope of negotiations that applies to non-police employees of New Jersey Transit and Commission and judicial decisions holding that promotions of New Jersey Transit employees are mandatorily negotiable and arbitrable, the Designee concludes that the arbitration hearing should not be stayed.

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Appearances:

For the Petitioner, Paula T. Dow, Attorney General
(Richard W. Schleifer, Deputy Attorney General, of
counsel)

For the Respondent, Oxfeld Cohen, P.C. (Arnold Shep
Cohen, of counsel)

INTERLOCUTORY DECISION

On March 23 and 25, 2010, respectively, New Jersey Transit Bus Operations-Mercer filed and amended, a petition for a scope of negotiations determination seeking to restrain binding arbitration of a grievance filed by the Amalgamated Transit Union, Division 540. The grievance involves the denial of a promotion of a part-time driver to full-time. The employer is also seeking interim relief to restrain an April 14, 2010 arbitration hearing pending the final decision of the Commission.

On April 5, 2010, acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d), I executed an Order to Show Cause

returnable on April 9, 2010. Both parties have filed briefs and exhibits pertaining to the interim relief application.^{1/} The employer filed a certification.

On the return date, both parties argued orally by means of a telephone conference call. At the end of the Order to Show Cause hearing I denied the request for an interim restraint of arbitration, stating my findings and conclusions to the parties. This written decision contains my reasoning.

On February 6, 2008, Raheem Henderson, a part-time bus driver, applied for a promotion to full-time driver on a form containing sections to be completed by the candidate, the Garage Supervisor and the Manager/Supervisor of Employee Resources. The completed form, showing that Henderson achieved a specific point total based on the factors considered, is attached to the certification of Director of Labor Relations Richard Shuster.^{2/} On February 14, Henderson filed a grievance listing a contract violation. The grievance quotes language in Article XI, §1(k) concerning the use of seniority among part-time operators.^{3/}

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- 1/ The employer's request to file a reply brief was denied. Interim relief rules do not refer to reply briefs.
 - 2/ Neither Shuster's certification, nor the form itself, indicates why the application was denied or lists how many points are needed for promotion to full-time status.
 - 3/ Neither the arbitration demand nor any correspondence relating to the scheduling of the arbitration hearing is part of the record of the interim relief proceeding.

After a grievance arbitration hearing was scheduled for April 14, 2010, the employer filed its petition and sought interim relief.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The employer argues that, since 1994, it has had a past practice of using the point system described by its Director of Labor Relations in determining whether to promote operators to full-time from part-time and that seniority is not a factor in

those determinations. It asserts that the selection of drivers to be promoted affects its statutory mission to provide a "safe and efficient" public transit system and therefore the grievance involves a subject that is not negotiable or arbitrable.

The ATU responds that the issue of whether seniority is used in promotions or whether the past practice cited by NJT is the basis for promotions goes to merits of grievance and is not relevant in a scope proceeding.

The ATU notes that the scope of negotiations for non-police employees of NJT is broader than that applicable to other public employees. It asserts that the Commission, with the concurrence of the New Jersey Supreme Court, has held that promotions of NJT employees and other related issues such as job classifications are mandatorily negotiable. It cites N.J. Transit Bus Operations, Inc. and N.J. Transit Mercer, P.E.R.C. No. 88-74, 14 NJPER 169, 177-178 (¶19070 1988), rev'd and rem'd 233 N.J. Super. 173 (App. Div. 1989), sub nom. In the Matters of N.J. Transit Bus Operations Inc., New Jersey Transit Corporation and Amalgamated Transit Union, et al., rev'd and rem'd 125 N.J. 41 (1991) and New Jersey Transit Bus Operations, P.E.R.C. No. 2005-82, 31 NJPER 184 (¶74 2005).

As set forth in the cases cited and discussed by the ATU, the scope of negotiations for non-police employees of NJT is broader than that applicable to public employees generally. New

Jersey Transit Bus Operations, 125 N.J. 41, 63-64 (1991) recites the obligation of state transit authorities, like NJT, to maintain, as a condition of receiving federal funds, the collective bargaining rights that transit workers had before a state's acquisition of a transit system. Our Supreme Court, citing Amalgamated Transit Union v. Donovan, 767 F.2d 939 (D.C. Cir. 1985) noted:

The [federal appellate] court found specifically that a transit authority must be able to bargain over, among other things, aspects of scheduling, part-time employment, work assignments, and promotions in order to comply with section 13(c)(2) of the [Urban Mass Transportation Act].

[125 N.J. at 64, emphasis supplied].

In addition to the Supreme Court, the Commission has also held that promotions of NJT employees are mandatorily negotiable. As a Commission designee I am not free to disregard its rulings. Similarly, the Commission is obligated to follow and apply pertinent rulings of appellate courts. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 22 (App. Div. 1977).

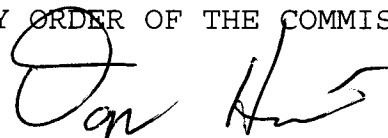
Given the broader scope of negotiations for its employees, NJT's citations to decisions involving promotions of other public employees are not pertinent. Other than to assert that promotion decisions are tied to its mission to provide a safe transit system, the employer has not shown how promotion of this driver from part-time to full-time status, if ordered by the arbitrator, would compromise that mission.

Applying the pertinent negotiability standard and precedents, I conclude that the Commission is substantially likely to decline to restrain arbitration.^{4/} The issue raised in the grievance relates to "an aspect of the relationship between the employer and the employees." 14 NJPER at 174. Arbitration would not compromise the employer's statutory mission.

ORDER

The request of New Jersey Transit Bus Operations-Mercer for an interim restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



DON HOROWITZ
Commission Designee

ISSUED: April 12, 2010
Trenton, New Jersey

^{4/} NJT urges that the arbitration must be stayed because if it wins the arbitration, the scope of negotiations issue it raises will become moot and an important issue will not be decided. As noted supra. at pp 4-5, the negotiability and arbitrability of promotions of NJT employees has already been decided. In any event, NJT's argument is not a factor in granting or denying a stay of arbitration. Moreover, given the size of NJT's workforce the issue is likely to reoccur. See City of Newark and FOP, Newark Lodge No. 12, P.E.R.C. No. 98-82, 24 NJPER 56 (¶29035 1998), app. disp. 25 NJPER 310 (¶30131 App. Div. 1999) (withdrawal of grievances after Commission decision mooted appeal of negotiability ruling) and City of Newark and Police Superior Officers Ass'n, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003), aff'd 31 NJPER 9 (¶6 App. Div. 2005) (later case involving same employer where negotiability issue, that had become moot in first case, was decided in context of new grievances).