P.E.R.C. NO. 86-129

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

N. J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket No. CO-85-158-70

LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on unfair practice charges filed by Local 824, Amalgamated Transit Union against N.J. Transit Bus Operations, Inc. The charges alleged that New Jersey Transit violated the New Jersey Employer-Employee Relations Act when it forced the Union into court and arbitration over the transfer of some Union members; when it forced the Union into arbitration to undermine the Union; when it sought to reduce the Union's membership; when it denied grievances or delayed their processing and when it sought to break or undermine the union. The Commission holds, however, in agreement with the Hearing Examiner, that it failed to prove its allegations by a preponderance of the evidence.

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Docket No. CO-85-158-70

LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

Appearances:

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

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

DECISION AND ORDER

On December 20, 1984 and January 8 and June 26, 1985, Local 824, Amalgamated Transit Union ("Union") filed an unfair practice charge and amended charges against N.J. Transit Bus Operations, Inc. ("NJT"). The charges allege that NJT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) through (5)[1/] and subsections

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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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the

Footnote Continued on Next Page

5.4(b)(1) through (7),[2/] when it forced the Union into court and arbitration over the transfer of some Union members; when it forced the Union into arbitration over nine cases in order to undermine the Union; when it sought to reduce the Union's membership in two instances; when it denied grievances or delayed their processing, and when it sought to break or undermine the Union.

On June 20, 1985, a Complaint and Notice of Hearing issued. NJT then filed an Answer responding to each of the 56 paragraphs in the Complaint. It also asserts the following affirmative defenses: (1) the majority of the allegations are

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1/ Footnote Continued From Previous Page

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."

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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the commission." There are no subsections 5.4(b)(6) or (7).

untimely; (2) the Complaint does not show a nexus between protected activity and NJT action; (3) the allegations concern matters which are being or can be resolved through the grievance and arbitration procedure; (4) the Complaint fails to state a cognizable cause of action because it lacks specific allegations of illegality; because NJT is not an employee representative and because NJT has a managerial prerogative to transfer employees, fill vacancies, contract out work and "sell" bus service to private companies; (5) the alleged excessive number of arbitrations is the result of frivolous grievances, and (6) the Complaint should be dismissed because the Union brought it in bad faith.

On October 1, 2 and 4, 1985, Hearing Examiner Alan R. Howe conducted hearings. After the Union's case, NJT moved to dismiss. Both parties argued orally.

On October 25, 1985, the Hearing Examiner issued his Decision and Order on the Motion, H.E. No. 86-18, 12 NJPER 37 (¶17015 1985)(copy attached). He concluded that 39 paragraphs of the Complaint alleged violations of the parties' collective agreement and that there was not even a scintilla of evidence that NJT repudiated an established term and condition of employment. He therefore dismissed those claims relying on State of N.J., Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (1984). In addition, the Hearing Examiner dismissed six paragraphs dealing with delays in the grievance procedure. He concluded that the allegations, even if true, would amount only to de minimis

violations of the Act. The Hearing Examiner denied the motion as to four paragraphs. Those paragraphs allege NJT sold two routes to reduce Union membership; a supervisor stated NJT would break the Union by forcing it to arbitration; and another supervisor stated that NJT would seek to undermine the Union by not ruling in its favor at the second step of the grievance procedure.

On November 18, 1985 and January 6, 1986, the Hearing Examiner conducted hearings on the remaining allegations. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by February 24, 1986.

On February 28, 1986, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-42, 12 NJPER ___ (¶_____ 1986)(copy attached). He recommended dismissal of the four remaining allegations. He concluded that NJT's decisions to discontinue service along two routes were based solely on legitimate business considerations. In addition, he found that NJT did not threaten to undermine the Union and that its grievance handling did not violate the Act.

On April 1, 1986, the Union filed exceptions. It contends that certain of the Complaint's paragraphs,although dismissed, are still important as background evidence. Also, it alleges that NJT has retaliated against the Union's president to subvert his authority. The Union excepts to the Hearing Examiner's crediting two NJT witnesses and not the Union's president. In addition, the Union asserts that NJT's decision to discontinue routes, while

normally a managerial prerogative, was illegally motivated by anti-union animus.

On April 10, 1986, NJT filed a reply. It argues that the Commission should not review, for background purposes, the dismissed paragraphs of the Complaint. Also, it asserts that the Union's exceptions violate N.J.A.C. 19:14-7.3(b) and (c)'s requirement of specific reference to the record. NJT also asserts that the two allegations regarding transfers of service are untimely, but agrees with the Hearing Examiner's findings of legitimate business motives. Finally, NJT agrees with the Hearing Examiner's recommendation of dismissal of the allegations of threats to undermine the Union and of illegal grievance handling.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. 86-18, 12 NJPER at 38-40 and H.E. 86-42 at 4-9) are accurate. We adopt and incorporate them here.

We first address the Hearing Examiner's dismissal of 45 paragraphs of the Complaint in H.E. No. 86-18. N.J.A.C. 19:14-4.6(a) provides, in part:

> All motions, rulings and orders of the hearing examiner shall become part of the record.... Unless expressly authorized by these rules, rulings by the hearing examiner on motions...shall not be appealed directly to the commission except by special permission of the commission, but shall be considered by the commission in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the commission....

No request for special permission or exceptions were filed. In their absence, we agree with the Hearing Examiner's decision to dismiss those portions of the Complaint.

We next address the allegations in the four remaining paragraphs. The union asserts that NJT discontinued two routes to reduce the Union's membership and thereby undermine its strength. The Hearing Examiner found that one route was discontinued pursuant to a lawsuit settlement, not involving the Union, and that the other was discontinued because of a loss of revenue due to low ridership. Each was found to be an exercise of a managerial prerogative without illegal motivation. See Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). In its exceptions, the Union asserts that the routes were discontinued because of anti-union animus. It failed, however, to prove its allegations by a preponderance of the evidence. We therefore agree with the Hearing Examiner's conclusions and dismiss these paragraphs.

The two remaining paragraphs allege misconduct in the administration of the grievance procedure. We dismiss both paragraphs.

The Hearing Examiner first found that denying or refusing to respond to a grievance is not, by itself, an unfair practice where the employee representative can unilaterally proceed to a higher level of the grievance procedure. See, Borough of Mountainside, 11 NJPER 6 (¶16003 1984). We agree: The Union here had a contractual right to proceed unilaterally.

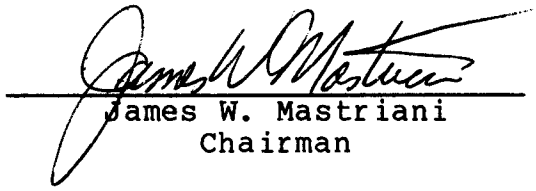
The Hearing Examiner then credited the testimony of two NJT supervisors denying that they refused to entertain or grant

grievances in order to break the Union.[3/] Absent compelling evidence, we will not substitute our reading of the transcript for the Hearing Examiner's credibility determinations. City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980). Such compelling evidence is not present. We therefore dismiss the remaining two paragraphs of the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Reid and Wenzler voted in favor of this decision. Commissioner Smith was opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986

3/ The Hearing Examiner based his credibility determinations on the witnesses' respective demeanors and abilities to recall events as well as the implausibility of the union president's testimony.

H.E. NO. 86-18

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket No. CO-85-158-170

LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of fifty-two (52) allegations out of fifty-six (56) total allegations in a Complaint by the Charging Party as a result of a Motion to Dismiss made by the Respondent at the conclusion of the Charging Party's case. The Hearing Examiner concluded that the overwhelming number of allegations subject to dismissal involved alleged breaches of contract, as to which no Complaint should have issued under State of New Jersey, Department of Human Services, 10 NJPER 419 (1984).

However, the Hearing Examiner refused to dismiss four allegations since there was at least a scintilla of evidence that the Respondent was illegally motivated in its conduct toward Charging Party, thus, implicating Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

In view of the partial granting of the Respondent's Motion to Dismiss a plenary hearing is to be scheduled on the four allegations which were not dismissed.

H.E. NO. 86-18

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket No. CO-85-158-170

LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

Appearances:

For the Respondent
Irwin I. Kimmelman, Attorney General
(Jeffrey Burstein, D.A.G.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 20, 1984, and amended on June 26, 1985, by Local 824, Amalgamated Transit Union (hereinafter the "Charging Party" or the "Union" or "824") alleging that N.J. Transit Bus Operations, Inc. (hereinafter the "Respondent" or "NJT") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter

the "Act"), in that NJT forced 824 into court and arbitration proceedings over the transfer of certain members of 824 from one facility to another (¶3); and that NJT forced 824 into arbitration in nine cases for the purpose of undermining 824 (¶'s 4-6, 8, 10, 13, 15, 22, 23); that NJT sought to reduce the membership of 824 in two instances (¶'s 7, 18); that NJT violated the contract with 824 either by denying grievances or delaying their processing (¶'s 9, 11, 12, 14, 17, 19-21, 24-29, 33-39, 41, 43-48, 56); and that NJT sought to break or undermine 824 (¶'s 30, 31, 50-55); all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1)-(5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued

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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; (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."

on June 20, 1985. Pursuant to the Complaint and Notice of Hearing, after initial adjournment, hearings were held on October 1, 2 and 4, 1985 in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine its sole witness, James B. Lynch, and present relevant evidence. At the conclusion of the Charging Party's case, the Respondent made a Motion to Dismiss on the record on October 4, 1985 and the Hearing Examiner, after hearing oral argument by both parties, reserved decision and stated that a written decision would issue on the motion.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. New Jersey Transit Bus Operations, Inc. is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Local 824, Amalgamated Transit Union is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. At the time of the instant hearing there were 305 members of the Charging Party. This membership may be broken down as follows: 200 bus operators in the Old Bridge and Lakewood garages; 15 bus operators in the Allentown, Pa., garage; 75 mechanical personnel in the Old Bridge and Lakewood garages; and the balance are field salaried personnel.

4. There are seven other locals of the Amalgamated Transit Union in New Jersey which, together with locals of the Transport Workers Union and the United Transportation Union constitute all of the representatives of the Respondent. The Charging Party's membership constitutes 10% of the represented employees of the Respondent.

5. The monthly union dues are presently $35, having been $20 in April 1983 when James B. Lynch, the President and Business Agent of the Union, assumed office.

6. The Hearing Examiner excluded testimony as to ¶'s 1 and 2 of the Complaint on the ground that, at the hearing, the Charging Party amended the dates in each paragraph to January 1982 and March 1982, which were deemed dates too remote in time and irrelevant to the gravamen of the Unfair Practice Charge, as amended.

7. Complaint ¶3: It is alleged that the Respondent transferred five drivers from the Fairview garage to the Old Bridge garage and sought to dovetail their seniority rather than endtail seniority as the Union contends should have happened. Lynch acknowledged that these five drivers, who had been members of the Transport Workers Union, became members of his union but nevertheless filed suit in court. An arbitration proceeding ultimately became moot when, as a result of the court proceedings, the Respondent agreed to endtail the seniority of the former Fairview drivers. The expense to the Union was approximately $7,000.

Allegations Involving Arbitration Awards[2/]

8. Complaint ¶4: In an arbitration award dated February 27, 1984, Arbitrator James A. Healy denied a grievance on the five-day suspension of Allen Thomas (J-3). Lynch insisted that before testimony was taken at the arbitration hearing, the arbitrator ordered the Respondent to pay sick pay to Thomas but there is no evidence of this in the arbitration award.

9. Complaint ¶5: On October 22, 1984, Arbitrator Martin F. Scheinman rendered an award that the Respondent violated the agreement when it failed to pay worker's compensation to Harry Maskell for June 2 and 3, 1983 (J-4). This is alleged to have been an attempt to undermine the Union, notwithstanding that there is no reference to this fact in the arbitration award.

10. Complaint ¶6: On March 21, 1984, Arbitrator Irvine Kerrison rendered an arbitration award, in which he found that Aurelio J. Festa was not suspended for proper cause and that his suspension of 30 days should be reduced to a three-day suspension (J-5). Lynch conceded that there was nothing in the arbitration award indicating that the Respondent "fabricated a story regarding Mr. Festa" as alleged in the Complaint.

11. Complaint ¶8: On December 29, 1984, Arbitrator Paul J. Krebs rendered an award that the Respondent should refrain from transferring certain repairmen in violation of the agreement but

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2/ The Union contends, as part of its charge of unfair practices, that the Respondent has forced it to arbitration in nine instances between March 1984 and December 1984 for the purpose of undermining the Union by compelling it to expend monies from its treasury.

held that the Respondent did not violate other provisions of the agreement, including the management rights provision, when it determined the effective dates for the transfer of certain employees (J-6). The Union complained in the Complaint that it was required to deplete its treasury to bring this matter to arbitration.

12. Complaint ¶10: On November 8, 1984, Arbitrator Robert S. Weaver rendered an award that James Moran was not entitled to a full day's regular pay for December 9, 1983 (J-7). The Union had alleged only that Moran was not paid for a job-related accident in violation of the agreement.

13. Complaint ¶13: On August 22, 1984, Arbitrator James P. McCabe rendered an award wherein he held that the discharge of Anthony Cifelli was not for cause and that he should be reinstated without backpay (J-8). The Union alleged that the sole basis for the action of the Respondent was that Cifelli was a member of the Union, notwithstanding that there is no provision in the arbitration award so indicating.

14. Complaint ¶15: Three arbitration awards were rendered with respect to this allegation -- on January 17, 1985, Arbitrator Martin C. Seham rendered award, concurred in by all parties, that the six-day suspension of Pompolio Egidi be set aside and that the grievant be made whole (J-10), but there was nothing in the award indicating that Egidi had been suspended due to his Union membership; -- on February 21, 1985, Arbitrator Joel Douglas rendered an award denying the grievance of Peter Wagner, who had

been charged with missing an assignment (J-9), but there was no indication that this was due to his Union membership; -- on February 28, 1985, Arbitrator Homer C. LaRue sustained the grievance of Carmine DeStefano, who had been suspended for two days, and the grievant was ordered to be made whole (J-11), but the arbitration award did not indicate that DeStefano had been suspended due to his Union membership.

15. Complaint ¶22: On August 27, 1984, Arbitrator Anton J. Hollendonner rendered an arbitration award that Robert Carver had been improperly warned and that the warning should be removed from his peronnel records (J-12), there being no backpay involved as alleged in the Complaint.

16. Complaint ¶23: On December 3, 1984, Arbitrator Irvine Kerrison rendered an arbitration award in which he held, after noting that the Respondent abandoned the charge of insubordination, that Karen Tonks was improperly suspended for five days and that the suspension shall be reduced to a written warning (J-13). Thus, the allegation that Tonks was improperly suspended for insubordination is not factually correct.

Allegations Regarding Conduct Of The Respondent To
Break Or Undermine The Union Or Reduce Its Membership

17. Complaint ¶7: The Union alleged and Lynch testified that the Respondent sold its Route 9-Wall Street route to a private carrier in an attempt to reduce the membership of the Union, six members having been displaced and dispersed as a result of the

sale. This occurred in June 1983 at a time when the Union had 315 active members whereas on the date of the instant hearing the Union had 305 active members.

18. Complaint ¶18: It is alleged and Lynch testified that in May 1984 the Respondent sold two of its routes to Suburban Bus Co., as a result of which two members of the Union were displaced and that this was done in order to sap the strength of the Union.

19. Complaint ¶30: In July 1984 Charles Bresnahan, the garage supervisor at Old Bridge, said to Lynch that, "the Union can't afford to take all of these cases to arbitration, we'll break you." Bresnahan also stated that the Respondent would not "entertain" first-step grievances and on a later occasion said, "What do you guys want now?" Lynch conceded that any actions by Bresnahan did not cause the Union to incur any expense. Finally, Lynch conceded that any delay by Bresnahan in bringing three cases to arbitration was due to Bresnahan's unavailability on a vacation in Ireland in June 1984.

20. Complaint ¶31: It is alleged and Lynch testified that Everett Cunningham, the second-step hearing officer under the agreement, has stated that he would not rule in favor of the Union, which is part of a plan by the Respondent to undermine the Union. This, according to the Union, was illustrated by Cunningham taking the position at the second step that eleven suspensions of drivers would have to be taken to the third step or arbitration.

21. Complaint ¶50: It is alleged and Lynch testified that in the Spring of 1985 the Respondent delayed a second-step grievance hearing for Sherry Polo, a cleaner in the Old Bridge garage, who had been suspended for one day. When a convenient second-step hearing could not be scheduled for Polo she said to Lynch, "Fuck it."

22. Complaint ¶51: In April 1985 it is alleged and Lynch testified that there was a dispute as to the location where a third-step grievance hearing should be held for Larry Irving, the stated reason being that the ensuing delay was to undermine the effectiveness of the Union. The step-3 meeting was scheduled, as of course, in Maplewood and Irving, who was unable to appear, stated to Lynch, "You're a bunch of assholes."

23. Complaint ¶52: It is alleged and Lynch testified that in May 1985 the Respondent delayed proceeding to a third-step hearing on the grievance of Percy Hunter for the purpose of undermining the effectiveness of the Union. Lynch on April 18, 1985 requested a third-step hearing for Hunter (R-7) and on May 1, 1985 a third-step hearing was held, a delay of only eight days from Lynch's request (R-8).

24. Complaint ¶53: It is alleged and Lynch testified that early in 1985 the Respondent, for the purpose of undermining the Union, delayed in reimbursing Earl Orcult, who had privately engaged an attorney in a work-related accident. The Respondent ultimately paid the contractual $100 following a delay of six weeks.

25. Complaint ¶54: It is alleged and Lynch testified that Richard Smith, in August 1984, was not paid sick pay for the purpose

of undermining the Union. The Respondent's position was that no payment was made because no doctor's certificate had been provided by Smith. No grievance was ever filed nor was the matter submitted to arbitration.

26. Complaint ¶55: It is alleged and Lynch testified that Lee Phillips, a bus operator from the Old Bridge garage, was told by Ben Larson, the regional supervisor of the Port Authority, that "Every dog has its day, I'll get your ass." And that this statement was made because Phillips was a member of the Union.

The Conduct Of The Respondent With Respect To
Contract Violations, Denials Of Benefits And Delay

27. Complaint ¶'s 9, 11 & 12: These allegations, as to events having occurred in January and September 1984, involve the denial of sick pay to Gary Baulmin and Louis Ardise, who were not paid until the Union intervened on their behalf and the failure to pay holiday pay to three employees who were only paid after the Union intervened -- payment was delayed by three weeks.

28. Complaint ¶'s 17, 20 & 25: These allegations and Lynch's testimony involve Larry Irving's loss of six months' seniority, which was restored after a grievance was filed; the improper suspension of Joseph Telazaro for five days in June 1984, which was rescinded with backpay after six to eight weeks; and the requiring of certain drivers from Lakewood and Old Bridge to work out of Lakewood on weekends in the Spring and Summer of 1984, which resulted in the filing of a grievance for harassment that was not processed through arbitration.

29. Complaint ¶'s 26 & 27: These allegations and Lynch's testimony involve Major Finklin, who in June 1984, was improperly taken off of the Union work roster, as a result of which he was denied work, and a grievance was filed and processed through the third step; and in June 1984, certain drivers were not paid overtime for charter runs and, after the filing of a grievance on behalf of four of the drivers, one was paid on November 19, 1984 by an agreed upon arbitration award (R-4).

30. Complaint ¶'s 28, 33, 37 & 38: In June 1984, Nick Altomoro worked 16 hours but was not paid an additional eight hours pay and a grievance was dropped at the first step; in October 1984, John Callaghan was not excused for a third step hearing to be held some 40 miles away but it was acknowledged that there was nothing in the agreement dictating a contrary result; in November 1984 Donald Marks was sick on the day before Thanksgiving and never received holiday pay and a grievance is pending at step four; and in December 1984 John Weymeyer had a problem with a dental claim which was resolved after a first-step hearing.

31. Complaint ¶'s 41, 43, 45-48 & 56: In February or March 1985, David Packard was denied an attorney for a work-related accident but he received no reprimand, contrary to the allegation in the Complaint; in March 1985, the Respondent warned Armunt Rungturapanich for wearing his uniform back and forth to work and the warning has remained in his file; sometime between April and June 1985, Patrick Malloy was suspended for six days for falsification of delay time and the matter is going to arbitration;

in June or July 1985, Major Finklin was disciplined for leaving his garage without a "defect card" (R-6) but on cross-examination the Union acknowledged that there had been no discipline involved; in the Spring of 1985, Kenneth Monroe, an Allentown driver, was accused of leaving late and being insubordinate -- this case is going to arbitration in December 1985; in June or July 1984, Robert Buggelli was out sick two days and it took until November 1984 to obtain payment of a doctor's bill; and in May 1985, William Schwartzman, a driver from Old Bridge, worked one day during his vacation and should have been paid an extra 40 hours pay, which was eventually paid.

32. Complaint ¶'s 14, 21 & 29: These paragraphs of the Complaint pertain to subcontracting or transfers, the grievances for which have been the subject of scope petitions by the Respondent and the issuance by the Commission of restraints of arbitration. The grievances arise between March and July of 1984.

33. Complaint ¶19: It is alleged and Lynch testified that in May 1984, there was an agreement between the Union and Bresnahan on behalf of the Respondent to honor the Union's by-laws regarding the picking of runs and seniority but the Respondent reneged in July 1984 on the "pick" of John Callaghan, following which a grievance was filed but no arbitration was sought.

34. Complaint ¶24: It is alleged that in July 1984 a long-term "sick person" (never identified by name) was given a "pick" in violation of the Union's by-laws and the agreement,

another person having thereby been denied his proper pay and the dispute has not been resolved.

35. Complaint ¶44: In April or May 1985, Karen Carragher, a field salaried garage clerk, was out sick and a foreman, William Giese, performed her work for two weeks, which Lynch testified is a violation of the agreement, notwithstanding that there is no provision in the agreement preventing supervision from performing bargaining unit work.

36. Complaint ¶'s 34-36 & 39: These allegations cover the period from June 1984 through December 1984 and involve four instances where Lynch acknowledged that the grievance procedure worked to the Union's satisfaction in matters such as a violation of seniority, improper checkoff, failure to pay proper vacation pay and failure to provide the Union with certain seniority records.

37. During the course of the hearing the Union withdrew five paragraphs of the Complaint, which were not litigated, namely, ¶'s 16, 32, 40, 42 & 49.

38. The by-laws of the Union (CP-1), which were revised in September 1983, provide only with respect to seniority that: "Members of the Union who incur the loss of their license and who assume an alternative position within the company shall not suffer any loss of bidding seniority until after one year at which time loss of seniority accrues day for day" and that: "Members of the Union who are granted or extended a leave of absence shall not suffer the loss of any seniority." (Art. 3, Sec. 2 & 3).

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the charging party's case, namely, the same standard used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the charging party, the motion to dismiss must be denied.

The Allegations In ¶'s 3-6, 8-15, 17, 19-29, 33-39, 41, 43-48 & 56 Are Dismissed Under "Human Services."

The Hearing Examiner assumes that the allegations in the paragraphs of the Complaint previously cited allege apparent violations of §(a)(1) and (5) of the Act, namely, an alleged refusal of the Respondent to negotiate in good faith with 824 concerning terms and conditions of employment or the refusal of the Respondent to process grievances presented by 824.

The Commission in State of N.J., Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (1984) sought to limit the scope

of alleged violations of the Act which arise, basically, from breaches of contract. The Commission concluded that, "...a mere breach of contract claim does not state a cause of action under §5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures..." (10 NJPER at 421). The Commission based its conclusion on its interpretation of the Act and the legislative policy expressed therein favoring the use of negotiated grievance procedures for handling contractual disputes. Thus, the Commission proceeded to observe that negotiated grievance procedures for the resolution of disputes should be utilized and the parties should not be entitled "...to substitute this Commission for a grievance procedure..." which the parties had agreed upon (10 NJPER at 422).

However, the Commission set out certain examples in Human Services, supra, wherein a §5.4(a)(5) violation might be litigated. Thus, a specific claim that an employer has repudiated an established term and condition of employment might be litigated in an unfair practice proceeding (10 NJPER at 422). Such repudiation might be found in an employer's decision to abrogate a contractual clause based on its belief that the clause is outside of the scope of negotiations or by abrogating a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it. Also, if a charging party alleges facts indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause a complaint may issue. (10 NJPER at

422, 423). Finally the Commission noted that it would entertain an unfair practice charge in which specific indicia of bad faith over and above a mere breach of contract are alleged or in cases where the policies of the Act may be at stake. (10 NJPER at 423).

It is clear to the Hearing Examiner that the allegations by the Union in ¶'s 3-6, 8-15, 17, 19-29, 33-39, 41, 43-48 and 56, as a group, fall within the category of allegations proscribed from resolution as unfair practices under the Commission's decision in Human Services, supra. These allegations are plainly alleged violations of the agreement between the parties whether they involve denials of contractual benefits or the delay in remedying them under the grievance procedure. Further, nine of the paragraphs (¶'s 4-6, 8, 10, 13, 15, 22 & 23) pertain to arbitration awards, which were rendered by impartial arbitrators in accordance with the grievance procedure in the agreement. The remaining paragraphs in the Complaint, referred to above, all pertain to contract violations, denials and delays. These, in the aggregate, involve breaches of contract, which the Commission has stated in Human Services do not state a cause of action under §5.4(a)(5) of the Act.

There is not even a scintilla of evidence, as required by New Jersey Turnpike Authority, supra, that the Respondent herein has repudiated an established term and condition of employment, which might be litigated in an unfair practice proceeding, nor is there a scintilla of evidence indicating bad faith on the part of Respondent over and above a mere breach of contract as alleged. Finally, the

conduct of the Respondent herein does not indicate that the policies of the Act might be at stake.

Thus, the Hearing Examiner finds and concludes that as to the allegations of the Complaint, referred to several times above, there is not a scintilla of evidence that §(a)(1) and (5) of the Act have been violated and, therefore, these enumerated allegations are recommended for dismissal.

The Alleged Violations Of ¶'s 50-55 In The Complaint Are Dismissed.

The Hearing Examiner finds and concludes that the allegations in ¶'s 50-55 of the Complaint lack even a scintilla of evidence of a violation of any of the provisions of §§5.4(a)(1)-(5) of the Act. These six paragraphs of the Complaint deal, inter alia, with the problems of the Union in arranging for its grieving members to attend second and third step hearings under the grievance procedure or, who were allegedly prejudiced by delay in the resolution of a grievance. As a group, these allegations allege that the Respondent was seeking to undermine the effectiveness of the Union by its conduct. Even if the allegations were credited on their face, any alleged violations of the Act would, in the opinion of the Hearing Examiner, be de minimis and would not arise to a substantive violation of the Act, as to which a remedy would be warranted. Thus, the Hearing Examiner recommends dismissal of these allegations.

The Allegations In ¶'s 7, 18, 30 & 31 Are Not Dismissed And Will Be The Subject Of A Plenary Hearing.

Basically, ¶'s 7, 18, 30 & 31 of the Complaint allege that the Respondent sought by the sale of certain routes to reduce the membership of the Union, that a supervisor stated that the Respondent would break the Union by forcing it to arbitration and that another supervisor stated that the Respondent would seek to undermine the Union by not ruling in its favor at the second step of the grievance procedure. These allegations are sufficient to require a plenary hearing on the issues raised, in that there at least a scintilla of evidence, viewed most favorably to the Union, that a violation of §(a)(1), (2) and (3) of the Act may have occurred. See Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

For the foregoing reasons, the allegations of ¶'s 7, 18, 30 & 31 are not dismissed and a plenary hearing will be held.

* * * *

Upon the testimony of James B. Lynch, and the documentary evidence adduced in this proceeding to date, the Hearing Examiner makes the following:

ORDER

1. The Respondent's Motion to Dismiss paragraphs 3-6, 8-15, 17, 19-29, 33-39, 41, 43-48, 50-56 of the Complaint is granted.

2. The Respondent's Motion to Dismiss paragraphs 7, 18, 30 and 31 of the Complaint is denied and a plenary hearing will be scheduled forthwith to resolve these allegations in the Complaint.

Alan R. Howe
Hearing Examiner

Dated: October 25, 1985
Trenton, New Jersey

H.E NO. 86-42

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

In the Matter of

N. J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket No. CO-85-158-170

LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent NJT did not violate §5.4(a)(1) through (5) of the New Jersey Employer-Employee Relations Act when (1) it discontinued its Wall Street bus service as a result of the settlement of a lawsuit on October 14, 1983; (2) it discontinued bus service between Milltown and New York City in favor of Suburban Transit Corp., the dominant carrier in the area, on April 28, 1984; and (3) two of its garage supervisors conducted themselves at the first and second steps of the grievance procedure in a manner objected to by the Charging Party. The Hearing Examiner found that the discontinuance of the Wall Street and Milltown service was a legitimate exercise of a managerial prerogative, which was in no way tainted by illegal motivation toward the Charging Party. Finally, the conduct of two of the Respondent's supervisors in connection with the grievance procedure was perfectly legal and proper under the collective negotiations agreement and decisions of the Commission such as Boro of Mountainside, D.U.P. No. 85-17, 11 NJPER 6 (1984).

The Hearing Examiner had previously dismissed all other allegations in the Complaint in a decision dated October 25, 1985: H.E. NO. 86-18, 12 NJPER 37.

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.

H.E. NO. 86-42

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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N. J. TRANSIT BUS OPERATIONS, INC.,

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LOCAL 824, AMALGAMATED TRANSIT UNION,

Charging Party.

Appearances:

For the Respondent
W. Cary Edwards, Attorney General
(Jeffrey Burstein, D.A.G.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 20, 1984, and amended on June 26, 1985, by Local 824, Amalgamated Transit Union (hereinafter the Charging Party" or the "Union" or "824") alleging that N.J. Transit Bus Operations, Inc. (hereinafter the "Respondent" or "NJT") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter

the "Act"), namely, that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1) through (5).[1/]

On October 25, 1985, the instant Hearing Examiner granted the Respondent's Motion to Dismiss as to ¶'s 3-6, 8-15, 17, 19-29, 33-39, 41, 43-48 and 50-56 of the Complaint: H.E. No. 86-18, 12 NJPER 37. However, a plenary hearing was ordered as to ¶'s 7, 18, 30 and 31 of the Complaint and a hearing on these allegations was held on November 18, 1985 and January 6, 1986.

The allegations as to which plenary hearings were conducted pertained to claims that the Respondent sought to break or undermine 824 or reduce its membership. These allegations may be summarized as follows:

¶7: The Union alleges that the Respondent sold its Rte. 9-Wall Street route to a private carrier in an attempt to reduce the membership of the Union, six members having been displaced and

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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; (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."

dispersed as a result of the sale. This occurred in June, 1983, at a time when the Union had 315 active members whereas on the date of the initial hearing the Union had 305 active members.

¶18: The Union alleges that in May, 1984, the Respondent sold two of its routes to Suburban Bus Co., as a result of which two members of the Union were displaced and that this was done in order to sap the strength of the Union.

¶30: In July, 1984, Charles Bresnahan, the garage supervisor at Old Bridge, said to James B. Lynch, the President and Business Agent of the Union, "...The Union can't afford to take all of these cases to arbitration, we'll break you." Bresnahan also stated that the Respondent would not "entertain" first-step grievances and on a later occasion said, "What do you guys want now?"

¶31: It is alleged that on a number of occasions during the last six months Ed Cunningham, the second-step hearing officer under the agreement, has stated that he would not rule in favor of the Union as he wants it to take grievances to the third step or to arbitration, all of which is alleged to be part of a plan by the Respondent to undermine the Union.

As noted above, the plenary hearing on the issues raised by paragraphs 7, 18, 30 and 31 of the Complaint were held on November 18, 1985 and January 6, 1986, in Newark, New Jersey, at which time the parties were given an oppportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by February 24, 1986.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after a plenary hearing on ¶'s 7, 18, 30 and 21 of the Complaint, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. N. J. Transit Bus Operations, Inc. is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Local 824, Amalgamated Transit Union is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Paragraphs 3-5 of the initial Findings of Fact in H.E. No. 86-18 are incorporated herein by reference thereto (12 NJPER at 38).

Findings With Respect To ¶ 7 Of The Complaint.

4. Albert R. Hasbrouck, the Assistant Executive Director of N.J. Transit Corp. Headquarters, testified credibly as follows regarding the extension of Rte. 9 corridor service to Wall Street in the Fall of 1983: Approximately 100 buses per day operate in the Rte. 9 corridor, which is a major operation of N.J. Transit Bus

Operations, Inc. NJT operated to Wall Street for approximately one year before this service was discontinued as a result of the settlement of a Federal District Court lawsuit instituted by New York-Keansburg Bus Company on June 9, 1983 (R-10), the settlement having been reached on October 14, 1983, (R-11). In this settlement NJT agreed to discontinue its Wall Street service and New York-Keansburg agreed not to operate in the Rte. 9 corridor. The foregoing settlement between NJT and New York-Keansburg had nothing whatsoever to do with 824.

5. James J. Vergari, the Assistant Manager of Labor Relations for NJT, testified credibly regarding the effect on 824 members as a result of the discontinuance of the Wall Street service, supra. Local 824 lost six operators who were reassigned to two other locations, two operators going to Local 821 of ATU and four operators going to Local 823 of ATU. Eventually all six operators returned to Local 824 after a lapse of approximately 2-1/2 months. The Hearing Examiner does not credit the testimony of Lynch that the Respondent discontinued the Wall Street service in order to reduce the membership of 824, primarily because 824 regained the six operators who were initially displaced and, further, because the Respondent clearly demonstrated a legitimate business justification in having discontinued its Wall Street service in the face of a lawsuit by New York-Keansburg Bus, which was settled for objective reasons, namely, NJT having agreed to discontinue its Wall Street service and New York-Keansburg having agreed to refrain from providing service in the Rte. 9 corridor.

Findings With Respect To
¶ 18 Of The Complaint.

6. Hasbrouck testified credibly as follows regarding the decision of NJT to discontinue service from Milltown, New Jersey, to New York City: NJT had been providing service twice a day from Milltown to New York City and decided to discontinue service on April 28, 1984, because NJT was losing money, having been carrying only 30 passengers per trip. Suburban Transit Corp. agreed to step in and pick up the service, it being the dominant carrier in the area. Suburban Transit is now providing service three times per day whereas as NJT provided service only two times per day between Milltown and New York City. The Hearing Examiner finds as a fact that the decision of NJT to discontinue service between Milltown and New York City is totally unrelated to any impact upon the membership of 824 and was based solely upon legitimate business considerations, namely, the loss of revenue from having carried only 30 passengers per trip. Hasbrouck testified credibly that no one was laid off as a result of the decision of NJT on April 28, 1984, supra, but he acknowledged that transfers were made to other garages. The testimony of Lynch that two 824 members were displaced is credited but the Hearing Examiner finds that the above decision of NJT was not made in order to sap the strength of 824 as contended by Lynch.

Findings With Respect to
¶30 of the Complaint.

7. Charles Bresnahan, the Supervisor of Howell Garage, which has locations at Old Bridge and Lakewood, testified credibly

that he holds first-step hearings but has two assistants, one in Old Bridge and one in Lakewood, who also hold first-step hearings. Bresnahan stated that he holds well under 50% of these first-step hearings.

8. Bresnahan testifed credibly that he did not make a statement to Lynch that, "...the Union can't afford to take all of these cases to arbitration, we'll break you" (Tr 1/6:33, 34). The crediting of Bresnahan in this regard is based upon the respective demeanors of Bresnahan and Lynch, their respective abilities to recall events[2/] and the total unlikelihood that Bresnahan, in his position, would make such a statement. Further, the Hearing Examiner does not credit Lynch's testimony that Bresnahan stated that he would not entertain first-step grievances in view of the fact that Bresnahan testified credibly that he had never refused to hold a first-step hearing brought by Lynch if it was "properly brought." By that Bresnahan testified that he meant that if no grievant was present he did not consider that a first-step hearing was properly brought, pointing to the contract grievance procedure, the first step of which refers to a grievance being taken up between the "employee" and the Union and supervision (J-1, p. 2).

9. Lynch conceded that any actions by Bresnahan did not cause the Union to incur any expense and that any delay by Bresnahan

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2/ The Hearing Examiner observed during the testimony of Lynch that he was frequently vague and imprecise and, additionally, his testimony was often implausible.

in bringing three cases to arbitration was due to Bresnahan's unavailability on a vacation in Ireland in June, 1984.

Findings With Regard to
¶31 Of The Complaint.

10. Ed William Cunningham, a District Manager of NJT, supervises eight garages and handles second-step grievances for four locals of ATU, including 824. Lynch testified that Cunningham has stated that he would not rule in favor of 824 and that this is part of a plan by NJT to undermine the Union. Lynch illustrated this in the case of eight bus operators who were written up for falsifying a delay report on May 15, 1984. Shortly thereafter the eight operators were given a one-day suspension, subsequent to which Lynch requested a second-step hearing (see generally R-9). Lynch had wanted one operator to represent all eight at the second-step hearing which was denied by Cunningham. Cunningham appeared in Lakewood on May 21, 1984, for a second-step hearing where only two operators appeared and the grievances were denied. On June 15, 1984, Cunningham again returned to Lakewood where only one operator appeared. Cunningham testified credibly that he had told Lynch that all operators had to be present in order for a second-step hearing to be conducted. Lynch gave no reason to Cunningham why the other five operators were not present and Cunningham took the position that the grievances ceased to exist, citing the second-step of the grievance procedure in the contract, which requires the attendance of the grievant where necessary for disposition of the grievance (J-1, p. 3). Cunningham testified credibly that he never stated to

Lynch that he denied second-step grievances so that they would have to go to the third step or to arbitration. Lynch's testimony to the contrary is discredited, based on the demeanor of the respective witnesses and the total implausibility that Cunningham would make such a statement.

11. During the years since April 1983 that Lynch has been President and Business Agent of 824, the Union's record in arbitration has been as follows: prevailed in 6 cases; lost 17 cases; and obtained mixed results in 4 cases.

DISCUSSION AND ANALYSIS

The Evidence Adduced With Respect To ¶'s 7 And 18 Of The Complaint Establishes That The Respondent Did Not Violate Any Of The Subsections Of The Act Alleged By 824.

Although the Respondent argues persuasively that ¶'s 7 and 18 of the Complaint should be dismissed as untimely under §5.4(c) of the Act, the Hearing Examiner prefers to consider the evidence adduced by the parties on the merits in disposing of these allegations.

First, with respect to ¶7, the Hearing Examiner refers to his Findings of Fact Nos. 4 & 5, supra, which established conclusively that the Respondent exercised a managerial prerogative, totally unconnected with 824, when it discontinued its Wall Street operation after one year of service. First, the decision to discontinue resulted from the settlement of a Federal District Court lawsuit instituted by New York-Keansburg Bus Company in June 1983.

The settlement, which was consummated in October 1983, had nothing whatsoever to do with the Union. All of the foregoing was credibly testified to by Hasbrouck.

Any suggestion that the Respondent was illegally motivated toward 824 in the discontinuance of the Wall Street service is totally negated by the testimony of Vergari who testified credibly that 824 initially lost six operators who were reassigned to two other locations and two other locals of ATU, but eventually all six operators returned to 824 after a lapse of approximately 2-1/2 months. It is clearly untenable for 824 to contend in this proceeding that the Respondent was illegally seeking to reduce the membership of 824 since the six operators initially displaced returned to 824 after several months.

With respect to ¶18, the Hearing Examiner has credited the testimony of Hasbrouck that the decision to discontinue service between Milltown and New York City was totally unrelated to any impact on the membership of 824. Rather, the decision to permit Suburban Transit Corp. to pick up the service from Milltown as the dominant carrier in the area was based solely upon legitimate business considerations, namely, the loss of revenue to NJT from having carried only 30 passengers per trip. Although no one was laid off as a result of the decision, which occurred on April 28, 1984, there were transfers made to other garages. Although the testimony of Lynch that two 824 members were displaced is credited, the Hearing Examiner finds that the conduct of NJT with respect to Suburban Transit was not made in order to sap the strength of 824.

In connection with both ¶'s 7 & 18, the Hearing Examiner notes his agreement with the Respondent's citation of Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. Ed., 78 N.J. 144 (1978) and Local 195 v. State of New Jersey, 88 N.J. 393 (1982) as supporting its contention that an employer has a managerial prerogative to transfer employees or to subcontract work in the absence of illegal motivation, i.e., anti-union animus as the basis for its actions (Respondent's brief, pp. 3-5).

The Evidence Adduced With Respect To ¶'s 30 And 31 Of The Complaint Establishes That The Respondent Did Not Violate Any Of The Subsections Of The Act Alleged By 824.

Paragraphs 30 & 31 of the Complaint basically allege misconduct on the part of Bresnahan and Cunningham in connection with the administration of the grievance procedure at steps one and two of a four-step contractual grievance procedure. The Respondent correctly argues that employer comments directed to the public employee representative regarding grievances are given considerable latitude: Ridgefield Park Bd.Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (1984) and, also, Black Horse Pike Reg. Bd.Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (1981).[3/]

Further, since a portion of the allegations in ¶'s 30 & 31 of the Complaint involves the proper response of Bresnahan and

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3/ Cf., Middletown Twp., P.E.R.C. No. 84-100, 10 NJPER 173 (1984) and Ridgefield Public Library, P.E.R.C. No. 84-112, 10 NJPER 255 (1984).

Cunningham at steps one and two of the grievance procedure, the Hearing Examiner notes that the Commission's Director of Unfair Practices has consistently held that the refusal of an employer to respond to a grievance, or to deny the grievance at any step of the grievance procedure, is not in and of itself an unfair practice where the employee representative can automatically proceed to a higher level of the grievance procedure, including binding arbitration, such as is provided in J-1 herein: Boro of Mountainside, D.U.P. No. 85-17, 11 NJPER 6 (1984); Twp. of Rockaway, D.U.P. No. 83-5, 8 NJPER 644 (1982); and City of Pleasantville, D.U.P. No. 77-2, 2 NJPER 372 (1976).

Turning now to the evidence with respect to ¶30 of the Complaint, which involves alleged illegal conduct on the part of Bresnahan, the Hearing Examiner refers to his Findings of Fact Nos. 7-9, supra, wherein he has credited Bresnahan's testimony that he never made a statement to Lynch to the effect that the Union cannot afford to take all of these cases to arbitration, concluding with the statement, "we'll break you."[4/] Additionally, the Hearing

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4/ The transcript of October 1, 1985, at p. 111, lines 2-5, quotes Lynch as having testified that the concluding portion of Bresnahan's statement was "It will break you." The notes taken by the Hearing Examiner disclose that Lynch's testimony was consistent with the allegation in ¶30 of the Complaint that Bresnahan said, "we'll break you." In concluding that the court reporter must have erred, the Hearing Examiner refers to the transcript of January 6, 1986, where Bresnahan, on direct examination, denied making the statement to Lynch, "we'll break you." (Tr 1/6: 33, 34). This testimony is also consistent with the Hearing Examiner's notes. Accordingly, the transcript of October 1, 1985, p. 111, supra, is deemed corrected.

Examiner has refused to credit the testimony of Lynch that Bresnahan said he would not entertain first-step grievances in view of the credible testimony of Bresnahan that he never refused to hold a first-step hearing if it was "properly brought." Here Bresnahan referred to the first step of the grievance procedure, which refers to a grievance being taken up between the "employee" and the Union and supervision. The position of Bresnahan, expressed to Lynch, that first-step grievance must be "properly brought" appears perfectly logical and consistent with the first step of the contractual grievance procedure (J-1, p. 2). Lynch even conceded that any actions by Bresnanhan did not cause 824 to incur any expense and that the delay in bringing three cases to arbitration was due to Bresnahan's legitimate unavailability.

Moving next to ¶31 of the Complaint, and the conduct of Cunningham in the handling of second-step grievances, the contractual grievance procedure clearly supports Cunningham in the manner in which he handled the second-step hearings on May 21 and June 15, 1984. Lynch had wanted <u>one</u> of the eight suspended operators to represent <u>all</u> eight operators at the hearing. Cunningham denied this request, testifying credibly that he had told Lynch that <u>all</u> operators had to be present in order for the hearing to be conducted. Lynch provided no reason why all operators were not present and Cunningham properly took the position that the grievances had ceased to exist, referring to the second step of the grievance procedure (J-1, p. 3). Finally, the Hearing Examiner has

credited Cunningham's denial that he ever stated to Lynch that he denied second-step grievances so that they would have to go to the third step or arbitration. Even if this were true, the fact is that 824 had an automatic removal of the grievance to the next step, as to which no violation of the Act could be found based on Mountainside, supra.

* * * *

Based on all the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) through (5) by its conduct herein with respect to ¶'s 7, 18, 30 & 31 of the Complaint.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: February 28, 1986
Trenton, New Jersey