

P.E.R.C. NO. 93-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NJ TRANSIT BUS OPERATIONS INC.,

Petitioner,

-and-

Docket No. SN-93-19.

AMALGAMATED TRANSIT UNION,
NEW JERSEY STATE COUNCIL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by Amalgamated Transit Union, New Jersey State Council. The grievance asserts that NJ Transit Bus Operations Inc. violated the parties' collective negotiations agreement when it denied an employee a thirty day trial period to determine if he should be promoted to repairperson C. The employer proposed a test as a criterion for entering a thirty day trial period that has accordingly disqualified certain senior employees considered for promotion to repairperson C. The Commission finds that this imposition settles an aspect of the relationship between the employer and its employees and has not been shown to be necessary to fulfill NJ Transit's statutory mission.

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Appearances:

For the Petitioner, Robert J. Del Tufo, Attorney General
David S. Griffiths, Deputy Attorney General

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

DECISION AND ORDER

On August 27, 1992, NJ Transit Bus Operations Inc. petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by an employee represented by Amalgamated Transit Union, New Jersey State Council ("ATU"). The grievance asserts that the employer violated the parties' collective negotiations agreement when it denied the employee a 30 day trial period to determine if he should be promoted to Repairperson C.^{1/}

^{1/} Although some documents refer to repairman, the parties use the word repairperson. We will too.

The parties have filed certifications, exhibits, and briefs. These facts appear.

ATU represents servicepersons and repairpersons among other titles. The parties entered into a collective negotiations agreement effective from July 1, 1990 through June 30, 1993. Section 14 is entitled Vacancies. It provides, in part:

G. All vacancies in any department shall be filled by promoting regular employees, provided they are qualified. Foremen and Union Representatives shall determine within thirty (30) days whether an employee is qualified or not. Employees failing to qualify within the thirty (30) day period shall be moved back to their former job. The thirty (30) day period may be extended by mutual consent. Employees bidding on a vacancy shall retain the rate of their former position until qualified in the new position. Upon qualification, an employee shall be paid the new rate retroactively for the thirty (30) day qualification period.

Employees who fail to prove their qualifications after thirty (30) days in a new position shall be moved back to their former position and must remain in that position for a minimum of six (6) months.

Ability and merit being sufficient, seniority shall govern promotions.

Employees promoted to [Repairperson] C shall pass an examination, ninety (90) days after such promotion, to determine their aptitude and ability to perform [Repairperson's] work. Employees failing such examination shall be moved back to their former position.

This section has been in the ATU's contracts for decades without any material change. The grievance procedure ends in binding arbitration of contractual disputes on issues submitted by the parties.

The employer's mechanical work force maintains and repairs its revenue vehicles. Its work force is organized into the titles of Cleaner, Serviceperson, Repairperson (A,B,C), Mechanic (A) and Mechanic (Shops). Repairperson C is the entry-level position into the skilled mechanical work force.

For many years before 1992, a vacancy in the position of Repairperson C would normally be filled by having the most senior Serviceperson serve in that position in a probationary capacity for up to 30 days. During that time, the employee would have a chance to demonstrate ability and gain knowledge and management would determine whether the candidate was qualified to work in the position permanently. If the candidate was deemed qualified, he or she would receive a retroactive adjustment in pay as a Repairperson C for time served in the probationary status. The new Repairperson C, however, would still lose that position if he or she did not pass an aptitude and ability test 90 days after being promoted.

In 1992, the employer instituted a program entitled Serviceperson Training for Advancement to Repairperson C ("STAR"). According to the employer's Vice-President and General Manager, the program was instituted to meet the employer's responsibility and mission to the public to provide safe and reliable equipment, to meet the demands of federal regulations, to meet the challenge of new technology, and to assure itself that its skilled maintenance employees would be able to fulfill their duties. The record does not indicate what regulations the employer was responding to or what

problems, if any, it had experienced under the system in effect for decades. The program includes this specific objective: (1) mandate courses and steps necessary to train, test, and qualify entry-level maintenance personnel in the skills/knowledge necessary to effectively perform [Repairperson] "C" duties...."

Under the STAR program, employees wishing to be promoted to repairperson must pass a pre-test of mechanical aptitude (PMA). Employees who do not pass that test may not participate further in the STAR program and will not be promoted. Employees who pass the PMA then bid by seniority to undergo the STAR training. That training consists of classes and hands-on training and lasts 34 days. If the training is successfully completed, the trainee receives a permanent promotion and a retroactive pay adjustment.^{2/}

Jonathan Cotton, an employee at the Union City garage, filed a grievance asserting that the employer had violated Section 14G. He filed the grievance on behalf of himself and all other employees in his situation. He claimed that he had been denied the 30 day trial period to show that he was qualified to become a Repairperson C.

On March 25, 1992, his garage superintendent denied the grievance. He stated that Cotton has been disqualified from being promoted to a Repairperson C because he had failed the PMA. He

^{2/} According to NJT's Deputy General Manager, he and ATU's Chairman agreed on the design and implementation of the STAR program, including the pre-test; but their agreement was not approved by respondent's State Council.

advised Cotton to get some more technical training and to take the test again. He noted that the company's equipment is very sophisticated, requiring the company to "modify our techniques of qualifying new employees to provide safe and reliable buses to the riding public."

On April 9, 1992, a grievance hearing was held. The hearing officer denied the grievance and advised the union representative that "the company position is that Section 14G allows the company to promote 'qualified' people and the testing procedure is used to identify those individuals." The Director of Labor Relations upheld the denial. ATU then demanded binding arbitration and this petition ensued.^{3/}

NJT asserts that it has a non-negotiable prerogative to determine promotion qualifications under New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd 125 N.J. 41 (1991). ATU responds that New Jersey Transit held only that a proposal that management and union representatives determine jointly whether an employee was qualified for promotion was not mandatorily negotiable and expressly held that challenges to the employer's determinations about an employee's qualifications could proceed to arbitration. ATU does not challenge the employer's ability to offer the STAR program to employees seeking promotions and to consider the

^{3/} NJT has requested oral argument. We deny this request. The arguments have been fully briefed.

completion of that program in determining qualifications; but it does object to employees with the most seniority being precluded from even trying to qualify for the position of Repairperson C because they failed the PMA pre-test.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

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

Thus, we cannot consider the contractual merits of this grievance or any contractual defenses the employer may have. NJT may or may not have a contractual right to condition trial periods on passing a PMA test, but that is for an arbitrator, not us, to decide.

The scope of negotiations is broader for these employees than for any other employees in the New Jersey public sector because they are covered by the Public Transportation Act, N.J.S.A. 27:25-1 et seq., instead of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The labor relations subchapter of the Public Transportation Act requires this employer and this majority representative "to negotiate collectively with respect to mandatorily negotiable subjects which intimately and directly affect the work and welfare of employees." N.J.S.A. 27:25-14(d).

Interpreting the labor relations subchapter as a whole and subsection 14(d) in particular, we held in New Jersey Transit that, as in private sector employment relationships generally, "issues that settle an aspect of the relationship between the employer and the employee" are mandatorily negotiable unless, unique to this particular employment situation, NJT would be prevented from fulfilling its statutory mission.

In New Jersey Transit, we considered the negotiability of a contractual clause similar to Section 14G.^{4/} We stated:

^{4/} The underlined portions of the following clause were in dispute:

Vacancies

All vacancies in any department shall be filled by promoting regular employees, provided they are qualified. Foremen and Union representatives shall determine within thirty (30) days whether an employee is qualified or not. Employees failing to qualify within the thirty (30) day period shall be moved back to their former job. The thirty (30) day period may be extended by mutual consent. Any employee bidding on a vacancy shall retain the rate of his former position until qualified in the new position. Upon qualification, an employee shall be paid the new rate retroactively for the thirty (30) day qualification period.

All vacancies in the General Shops shall be filled by promoting employees in the department, provided they are qualified, before hiring new men. Foremen and Union representatives shall determine within thirty (30) days whether an employee is qualified or not. Employees promoted to Repairman C shall pass an examination, ninety (90) days after such promotion, to determine their aptitude and ability to perform Repairman's work. Employees failing such examination shall be moved back to their former job. Any employee bidding on a vacancy shall retain the rate of his former position until qualified in the new position. Upon qualification, an employee shall be paid the new rate retroactively for the thirty (30) day qualification period.

The underlined portions would be non-negotiable under the EERA, e.g., Paterson Police PBA v. Paterson, 87 N.J. 78 (1981). But, these proposals concern an aspect of employer-employee relationship specifically mentioned by N.J.S.A. 27:25-14(g). In fact, in the private sector, seniority provisions are rarely litigated in NLRB proceedings because, as Morris states, it is "so obviously a condition of employment" (at 803). We further note that the clause limits promotional opportunities to those qualified to do the work. [Footnote 13/ In an affidavit, NJ Transit's director of labor relations has asserted that arbitrators interpreting this clause have required the promotion of unqualified employees. However, the clause only requires the promotion of qualified employees. An arbitration award going beyond these limits would be subject to vacation. N.J.S.A. 2A:24-1 et seq.] An employee who can do the job has a legitimate interest in being considered for promotion.

We do not believe, however, that unions may insist on negotiating a right to determine jointly with management whether an employee is qualified for a promotion. While the parties are obligated to negotiate seniority considerations and review procedures, management, at the outset, decides the promotion. This decision would, however, be subject to challenge by the union and that issue could proceed to arbitration. [Id. at 178]

Our order stated that portions of this section were mandatorily negotiable to the extent consistent with this opinion and other portions were not mandatorily negotiable to the extent consistent with this opinion. Id. at 183-184. We meant that the section was mandatorily negotiable except to the extent two underlined phrases stated that union representatives as well as foremen would determine in the first instance whether each employee completing the 30 day trial period was qualified for promotion.

New Jersey Transit does not make this grievance non-arbitrable. ATU is not challenging NJT's initial power to determine whether a particular employee is qualified for promotion at the end of the 30 day trial period. It is instead contesting NJT's asserted power to adopt a promotional criterion disqualifying an employee from having a trial period at all. Seniority and other promotional criteria are mandatorily negotiable and a determination that a particular employee does not meet those criteria is legally arbitrable. See generally Hardin, The Developing Labor Law, 887 (3d ed. 1992); Hill and Sinicropi, Management Rights, 350-369 (1990). The scope of mandatory negotiations includes probationary and trial periods and aptitude and ability testing. See American Gilsonite Co., 122 NLRB No. 127, 43 LRRM 1242 (1959); see also Developing Labor Law at 887; Management Rights at 321. In sum, the parties must negotiate over promotional criteria, including seniority, trial periods and aptitude testing; management need not negotiate over a proposal requiring it to share with the union its power to apply those criteria in the first instance; and management's initial application of those criteria to grant or deny a promotion may then be challenged in arbitration.

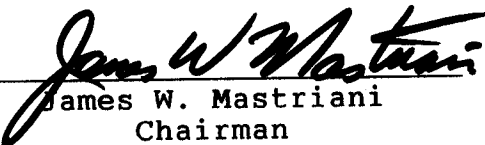
Here, the employer has imposed a PMA test as a criterion for entering a 30 day trial period and has accordingly disqualified certain senior employees from being considered for promotion to Repairperson C. This imposition settles an aspect of the relationship between the employer and its employees and has not been

shown to be necessary to fulfill NJT's statutory mission. Provisions like Section 14G have been in force for decades yet the record does not demonstrate any problems caused by allowing senior Servicepersons to be considered for promotion during a 30 day trial period. It is undisputed that the employer has the power to determine after the trial period that an employee is not qualified, subject to arbitral review, and to require employees to pass an aptitude and ability test 90 days after the promotion. We hold that this grievance involves a mandatorily negotiable issue and is legally arbitrable.

ORDER

The request of NJ Transit Bus Operations Inc. for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Grandrimo and Regan were not present.

DATED: November 25, 1992
Trenton, New Jersey
ISSUED: November 25, 1992