

P.E.R.C. NO. 96-11

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT  
BUS OPERATIONS, INC.,

Petitioner,

-and-

Docket Nos. SN-87-36  
SN-88-23

AMALGAMATED TRANSIT UNION,  
NEW JERSEY STATE COUNCIL,

Respondent,

-and-

NEW JERSEY TRANSIT CORPORATION,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of two grievances filed by the Amalgamated Transit Union, New Jersey State Council against New Jersey Transit Bus Operations, Inc. The Commission concludes that claims that two private bus companies that took over certain NJTBO bus lines must become parties to the NJTBO-ATU collective negotiations agreement cannot legally be arbitrated. An arbitration award requiring the private bus companies to become parties to the agreement would violate the private sector statutes and cases proscribing union-signatory agreements because the private companies would be required to recognize ATU as the majority representative of the private workforce.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner and Intervenor, Deborah T. Poritz,  
Attorney General (David S. Griffiths, Deputy Attorney  
General)

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

DECISION AND ORDER

New Jersey Transit Bus Operations, Inc. ("NJTBO") has petitioned for two scope of negotiations determinations. NJTBO seeks restraints of binding arbitration of two grievances filed by the Amalgamated Transit Union, New Jersey State Council ("ATU"). The grievances assert that NJTBO violated its collective negotiations agreement with ATU when its parent company, New Jersey Transit Corporation ("NJT"), contracted with the Orange-Newark-

Elizabeth Bus Company ("ONE") and with the Bergen-Passaic Bus Company to have those companies take over bus services on certain routes, but did not require those companies to become parties to the NJTBO-ATU collective negotiations agreement.<sup>1/</sup>

A hearing was scheduled, but the parties then stipulated the facts. The verbatim stipulations follow.<sup>2/</sup>

1. On April 19, 1985, the parties hereto entered into a Labor Agreement, effective March 24, 1984 through March 23, 1987, governing the employment relationship between NJ Transit Bus Operations, Inc. and certain employees of that Company. This Labor Agreement has been renegotiated (twice) and continues in full force and effect to date (as modified by negotiated changes). The current Labor Agreement covers the time period of July 1, 1990 through June 30, 1993.
2. The March 24, 1984 Labor Agreement contained a "PURPOSE" clause, the second paragraph of which reads:

"In the event that the Company shall dispose of its transit properties and business by sale or other transfer or shall lease the same, the Company shall make it a condition of such sale or transfer or lease that the

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<sup>1/</sup> NJT has intervened in this proceeding and relies on the petitioner's submissions.

<sup>2/</sup> The stipulations refer only to NJT's agreement with ONE. The parties declined an invitation to specify facts concerning NJT's agreement with the Bergen-Passaic Bus Company and apparently agree that no facts concerning that agreement would warrant a different result than with respect to the NJT-ONE agreement. The stipulations do not mention or permit reliance on any previously filed affidavits.

purchaser or transferee or lessee shall become a party to the Labor Agreement in force with the Union and its Division affected by such sale, transfer or lease."

There have been no changes negotiated in the above paragraph which remains in the present Labor Agreement.

3. The same paragraph of the "Purpose" clause referred to in paragraph 2 above has continuously appeared in earlier Labor Agreements between the Union and Management antedating the establishment of New Jersey Transit Corporation and going back to (at least) 1970.
4. New Jersey Transit Bus Operations, Inc., an operating division of New Jersey Transit Corporation, operates numerous bus lines out of many garages throughout the State of New Jersey.
5. Between September 1986 and January 1987, NJ Transit Corporation engaged in negotiations which led to an Agreement (attached hereto as Exhibit A) with the Orange-Newark-Elizabeth Bus Company, ("One Co."), dated September 22, 1986 and amended January 2, 1987 whereby One Co. would acquire and transfer to NJ Transit Corporation the operating certificates of a number of entities providing bus service in the Essex and Union County areas and also undertake to provide bus service on certain routes previously served by Petitioner, Route Nos. 24, 44, and a portion of Route 50.
- 5A. NJ Transit Corporation provided One Co. with bus equipment necessary to

operate the subject bus service, title to the buses not passing to the One Co.

- 5B. As of the time of the Agreement (Exhibit A) provision of bus service by NJ Transit Bus Operations, Inc. on the subject bus routes had produced net revenues of approximately \$534,000 annually calculated on an avoidable cost basis. (Respondent may submit portions of testimony of Albert R. Hasbrouck, III related to this issue as given on oral deposition on January 13, 1987 in the Superior Court of New Jersey Civil Action bearing Docket No. C-6775-86E referred to hereinafter)<sup>3/</sup>
6. The Agreement referred to in paragraph 5 above contained no provision whereby One Co. agreed to become a party to the Labor Agreement referred to in Paragraph 1, above.
7. Respondent filed a civil action in the Superior Court of New Jersey, Chancery Division, Essex County bearing Docket No. C-6775-86E against New Jersey Transit Corporation and NJ Transit Bus Operations, Inc. seeking to enjoin the defendants from concluding the Agreement with One Co. absent a condition that One Co. become a party to the Labor Agreement in force.
8. The above civil action was voluntarily dismissed pursuant to a

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<sup>3/</sup> ATU submitted portions of Hasbrouck's deposition addressing the meaning of "avoidable cost basis" -- that is, excluding overhead costs -- and confirming that NJTBO would lose over \$500,000 in annual revenue once ONE took over routes 24 and 44 and part of route 50. [Footnote added]

Stipulation of Dismissal signed and filed by the parties dated February 2, 1987. A copy is attached hereto as Exhibit B.

9. Prior to the filing of the above Stipulation of Dismissal the present Scope of Negotiation Petition bearing Docket No. SN-H-87-36 had been filed by the Petitioner with the PERC.
10. There was also pending before the PERC the "major" Scope of Negotiation Petitions bearing Docket Nos. SN-87-88, SN-87-90, SN-87-91, SN-87-92, and SN-87-93. By mutual Agreement the parties did not press for a resolution of the subject Petition bearing Docket No. SN-H-87-36 pending a final determination by the Commission in the "major" indicated Scope of Negotiations Petitions.
11. Pursuant to the Stipulations of Dismissal entered in the case bearing Docket No. C-6775-86E Respondent agreed to take no further action by way of submission of its dispute with the Company concerning the Agreement with One Co. to final and binding arbitration under the terms of the Labor Agreement between the parties, until the present PERC proceeding was concluded.
12. On February 22, 1988 the PERC issued its Decision in the "major" Scope of Negotiations matters above, P.E.R.C. No. 88-74. That Decision specifically rules on the negotiability of the "Purpose" clause, pages 21-24 of said Decision.
13. New Jersey Transit Bus Operations appealed to the Appellate Division of the Superior Court from the

Commission's ruling in P.E.R.C. No. 88-74. The matter(s) was ultimately resolved by decision of the Supreme Court of New Jersey, Matter of NJ Transit Bus Operations, Inc., 125 N.J. 41 (1991).

14. Pursuant to the above decision of the New Jersey Supreme Court the case was remanded to the Appellate Division of the Superior Court to review PERC's specific rulings as rendered in P.E.R.C. No. 88-74 in order to determine whether they conformed to the "statutory mission" test as initially formulated by PERC and now affirmed by the Supreme Court of New Jersey.
15. Subsequently, NJ Transit Bus Operations, Inc. determined to withdraw its appeal pending before the Appellate Division on remand from the Supreme Court, Docket No. A-4136-87T3, and a Stipulation of Dismissal was filed, dismissing the appeal and further stipulating and agreeing that the Decision rendered by the PERC in No. 88-74 be reinstated. A copy of the Stipulation of Dismissal and Order of Dismissal entered by the Appellate Division on April 8, 1992 so dismissing the appeal with prejudice is attached hereto as Exhibit C.
16. The Respondent Union has now sought to proceed to arbitration with its grievance with the Petitioner concerning the Agreement with One Co. The issue to be resolved in said arbitration proceeding will be whether NJ Transit Bus Operations, Inc. violated the "Purpose" clause of the Labor Agreement referred to in Paragraph 2 above.
17. Respondent will not dispute Petitioner's contention that NJ

Transit Corporation's Agreement with One Co. (Exhibit A) resulted from an attempt to reorganize and make more efficient a number of bus routes operated by a number of private entities and others operated by NJ Transit Bus Operations, Inc.

18. One Co. does not operate bus services under the Agreement (Exhibit A) pursuant to authority derived from any certificate of public convenience and necessity issued by the New Jersey Department of Transportation. The authority for One Co. to operate the subject service arises directly from the said Agreement (and related service contract).
19. One Co. is legally entitled to apply to the New Jersey Department of Transportation for certificates of public convenience and necessity granting it authority to operate the same service it now provides pursuant to the One Agreement.

The NJT-ONE Agreement, attached to the stipulations, had two parts. The first part -- signed on September 22, 1986 -- provided for NJT's "transfer to ONE of all NJ Transit's operating rights including the buses utilized therewith, in and to its routes nos. 24, 44 and [a certain] portion of Route No. 50." The second part -- signed on January 2, 1987 -- removed the quoted provision and substituted a provision requiring the execution of an NJT-ONE service agreement after ONE acquired the operating certificates from the private bus companies.

Based on their briefs, the parties also appear not to dispute that ONE was formed in 1986 when two owners of private bus



carriers in Essex and Union counties merged their operations and that the NJT-ONE agreement caused the loss of 32 "pickable pieces of work" for NJTBO bus operators working out of NJTBO's Orange and Elizabeth garages. It appears this loss may have diminished their overtime earning opportunities. It also appears that no NJTBO bus operators have been laid off as a result of ONE taking over the bus lines.

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 do not consider the contractual merits of the grievances or any contractual defenses the employer may have. We specifically do not consider the employer's cited reason for denying these grievances -- that the "purpose" clause "only pertains to the liquidation of [NJTBO] properties and business inclusive, and this paragraph is not intended to cover the loss of individual line work." Nor do we consider the employer's argument that the "purpose" clause does not apply since there was no transfer of any property or assets and hence no succession of owners.

In N.J. Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), we established the tests for determining whether a contract proposal is mandatorily negotiable under the New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq. ("NJPTA"). We rejected both the employer's argument that public sector negotiability tests exclusively applied and the unions' argument that private sector negotiability tests exclusively applied. Instead, we adopted this approach: an issue that settles an aspect of the employment relationship is mandatorily negotiable unless negotiations over that issue would prevent NJT from fulfilling its statutory mission to provide a "coherent public transportation system in the most efficient and effective manner." N.J.S.A. 27:25-2. Id. at 174. An Appellate Division panel reversed our decision, 233 N.J. Super. 173 (App. Div. 1989), but our Supreme Court then reversed the Appellate Division panel and reinstated our tests. 125 N.J. 41, 45 (1991).

In our initial decision, we applied our "employment relationship" and "statutory mission" tests to several contract proposals. One ATU proposal was to retain in a successor contract the paragraph of the "purpose" clause quoted in stipulation no. 2. Another ATU proposal was to amend the first sentence of that paragraph to include "or parts thereof." We held that both proposals were mandatorily negotiable and we rejected the employer's arguments that those proposals conflicted with its statutory right to sell its property and that they improperly attempted to impose contract terms on third parties. We stated:

The first paragraph is commonly known as a successorship clause. It is a mandatory subject of negotiations under federal law. Lone Star Steel Co., 231 NLRB No. 88, 96 LRRM 1083, aff'd in pertinent part 639 F.2d 545, 104 LRRM 3144 (10th Cir. 1980). See also Morris, The Developing Labor Law, at 841 (2d ed. 1983). In Lone Star, the Board said:

We are persuaded that a successor's assumption of any collective bargaining agreement negotiated between the Union and Lone Star would be vital to the protection of Starlight employees' previously negotiated wages and working conditions, as it is clear that the general rules governing successorship guarantee neither employees' wages nor their jobs. In view of the foregoing, we agree that the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of the Act, as an agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership. [231 NLRB at 575]

We find this clause mandatorily negotiable under the NJPTA as well. NJ Transit would retain the right to sell its properties, subject to only one restriction -- the buyer must assume its labor agreement. That restriction protects the fundamental interest of employees in maintaining their terms and conditions of employment, an interest the Legislature thought so vital it required NJ Transit to assume and observe labor agreements for their remaining term. N.J.S.A. 27:25-14(f). It would be anomalous for the Legislature to guarantee labor contracts when NJ Transit acquires assets, but to prohibit NJ Transit from negotiating such protections when it sells. Of course, not all conditions upon a sale of assets would be mandatorily negotiable (i.e., requiring the union's approval of the prospective purchaser), but this one is. The employer's freedom to manage its business, including its right to sell parts of it should be "balanced

here by some protection to the employees from a sudden change in the employment relationship." Lone Star, 693 LRRM at 555.<sup>4/</sup> 14 NJPER at 175.

After approving our negotiability tests, the Supreme Court remanded the case to the Appellate Division to determine whether we had correctly applied those standards to the individual contract proposals. 125 N.J. at 65-66. The parties, however, entered a stipulation of dismissal and the appeal was dismissed with prejudice.

Given our previous decision and its subsequent appellate history, the negotiability of the "purpose" clause and ATU's proposed amendment may not be relitigated. Watkins v. Resorts Int. Hotel & Casino, 124 N.J. 398, 412-413 (1991). However, that ruling does not compel dismissal of these petitions. These petitions were not consolidated with the petitions producing the initial New Jersey Transit decision, and they pose a distinctive and different question than the questions involved in that case -- the legal arbitrability of grievances arising in a specific factual context rather than the mandatory negotiability of contract proposals considered in the abstract. Although a contract clause may be mandatorily negotiable on its face, an application of that clause in a particular factual setting may raise a non-negotiable claim. Cf. Franklin Lakes Bd. of Ed., P.E.R.C. No. 95-24, 20 NJPER 395 (¶25198 1994), app. pending App. Div. Dkt. No. A-1285-94T3 (personal leave clause is mandatorily negotiable, but its application in a particular setting could be

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<sup>4/</sup> We add that this successorship clause can only apply to employees working at the operations purchased and cannot require the purchaser to extend the contract to other operations and employees. [Footnote in original]

unconstitutional). We will therefore review NJTBO's claim that the "purpose" clause cannot be legally applied to require that ONE become a party to the NJTBO-ATU contract since (NJTBO asserts) such a requirement would substantially interfere with its statutory mission and would contravene private sector statutes and policies prohibiting a contractual commitment between a primary employer (NJTBO) and a majority representative (ATU) that compels a secondary employer (ONE) to recognize a particular union as the unelected representative of its existing workforce.

As already discussed, this case involves the legal arbitrability of grievances rather than the initial negotiability of contract proposals. The question is not whether the employer was required to negotiate over the "purpose" clause in the first instance, but whether the "purpose" clause can be legally applied in a certain manner. The issues of the existence and breadth of a permissive category of negotiations under the NJPTA were not litigated in the first case, 14 NJPER at 174; 125 N.J. at 46, but are relevant here. Nevertheless, we will not definitely resolve those issues since the parties did not brief them. We will instead base our analysis on two assumptions: first, NJTBO may enter enforceable agreements on subjects beyond those that settle an aspect of the employment relationship with its employees; but second, an agreement cannot be interpreted or applied so as to prevent NJTBO from fulfilling its statutory mission. While a

private sector employer may enter an agreement preventing it from accomplishing its commercial mission of making money, NJTBO cannot abdicate its statutory mission of providing a coherent public transportation system.

We first consider whether this case involves NJT's statutory mission. We conclude that it does.

N.J.S.A. 27:25-2 sets forth the mission entrusted by the Legislature to the New Jersey Transit Corporation at its inception:

- a. The provision of efficient, coordinated, safe and responsive public transportation is an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.
- b. As a matter of public policy, it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner.
- c. In the development of public transportation policy and planning, participation by county and municipal governments, transit riders and concerned citizens should be encouraged.
- d. In the provision of public transportation services, it is desirable to encourage to the maximum extent feasible the participation of private enterprise and to avoid destructive competition.
- e. In furtherance of these findings and declarations, a public corporation shall be created with the necessary powers to accomplish the purposes and goals set forth in this section, including the power to acquire and operate public transportation assets.

To meet its statutory mission, NJT is also authorized to enter contracts by which private or public entities operate bus lines.

N.J.S.A. 27:25-6(b).

In this case, NJT contracted with ONE, a private bus company, to have ONE deliver bus services on three routes. ATU does not dispute that NJT entered into this contract "to reorganize and make more efficient a number of bus routes operated by a number of private entities and others operated by [NJTBO]." NJT thus sought to rationalize bus service and eliminate unnecessary and unhelpful competition.<sup>5/</sup> The NJT-ONE agreement implicates several statutory policies identified by the Legislature as constituting NJT's mission -- in particular, subsections (a), (b), and (d) of N.J.S.A. 27:25-2.

We next consider whether requiring ONE to assume the NJTBO-ATU collective negotiations agreement would prevent NJT from accomplishing its statutory mission. Under the particular circumstances of this case, we conclude that it would.

A tenet of private and public sector labor relations is that employees have a right to choose their own negotiations representative. See, e.g., 29 U.S.C. §157; N.J.S.A.

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<sup>5/</sup> NJT was not seeking to reduce labor costs or evade labor relations commitments. It appears that the only effect of the NJT-ONE agreement on current NJTBO bus operators has been to reduce overtime opportunities.

34:13A-5.3.<sup>6/</sup> That fundamental right is enshrined in Article I, paragraph 19 of the New Jersey Constitution. See George Harms Constr. Co., Inc. v. New Jersey Turnpike Auth., 137 N.J. 8, 28-30 (1994). It is also codified in the NJPTA. N.J.S.A. 27:25-14.

In the private sector, an agreement between a primary employer and a union that imposes a representative upon existing employees of a secondary employer violates 29 U.S.C. §158(e). For example, a contractual clause forcing a subcontractor to comply with all the terms of the contractor's collective negotiations agreement, including a union recognition clause, is unenforceable because it denies the subcontractor's employees the right to choose their own representative. See, e.g., IBEW Local 437 (Dimeo Constr. Co.) 180 NLRB 420, 73 LRRM 1310 (1979).

By contrast, a contractual clause that preserves jobs or negotiated standards and benefits for the primary employer's employees is negotiable and enforceable. The successorship clause in Lone Star and the "purpose" clause in this case are examples because they protect negotiations unit employees against having their negotiated benefits reduced simply because a new owner now

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<sup>6/</sup> A private sector exception exists for pre-hire agreements in the construction industry. 29 U.S.C. §158(f). That exception is irrelevant to this case.



employs them. See also Teamsters, Local 814 (Bader Bros. Warehouses), 225 NLRB 609, 93 LRRM 1344 (1976).<sup>7/</sup> Another example is a clause requiring a new owner or subcontractor to retain negotiations unit employees or afford them a hiring preference (not a claimed right here)-- such a clause protects jobs of already represented employees and does not extend the union's power to claim representation of new employees. Bader Bros. Warehouses.<sup>8/</sup>

An arbitration award requiring ONE to become a party to the NJT-ONE agreement would violate the private sector statutes and cases proscribing union-signatory agreements because ONE would be required to recognize ATU as the majority representative of the ONE workforce. By recognizing ATU without demonstrated majority support among its employees, ONE would violate its employees' statutory right to choose their own representative. As a private sector employer, ONE would violate the law applicable to it unless it immediately ceased contracting with NJT once an award issued.

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<sup>7/</sup> Our ruling upholding the negotiability of the "purpose" clause assumed that a new owner would retain the same employees to work at the operations purchased and stated that the successorship clause could not be construed to extend the NJTBO-ATU agreement to other operations and employees. Id. at 175 n.11. Our implicit concern was that the clause would be interpreted to deny other employees, besides those who had worked for NJTBO and were already represented by ATU, the right to choose their own representative.

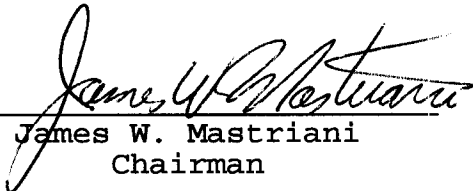
<sup>8/</sup> For a discussion of the distinction between unenforceable "union-signatory" clauses and enforceable "union-standards" clauses, see Hardin, The Developing Labor Law at 1327-1345 (3d ed. 1992); see also Gorman, Basic Text on Labor Law, 262-270 (1976).

Federal precedents guide rather than govern our interpretation of the scope of negotiations under the NJTPA. N.J.S.A. 27:25-14(c). These precedents, however, are critically important in this case because they would preclude ONE (and other private sector bus companies) from contracting with NJT even though NJT had determined that it needed such contracts to reorganize and rationalize bus service, to curtail destructive competition, and to provide a "coherent public transportation system." NJT would thus be prevented from accomplishing its statutory mission. We therefore hold that the claims that the Orange-Newark-Elizabeth Bus Company and the Bergen-Passaic Bus Company must become parties to the NJTBO-ATU collective negotiations agreement cannot legally be arbitrated.

ORDER

The requests of NJ Transit Bus Operations, Inc. for restraints of binding arbitration of the claims that the Orange-Newark-Elizabeth Bus Company and the Bergen-Passaic Bus Company must become parties to the NJTBO-ATU collective negotiations agreement are granted.

BY ORDER OF THE COMMISSION

  
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 James W. Mastriani  
 Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: July 28, 1995  
 Trenton, New Jersey  
 ISSUED: July 28, 1995