P.E.R.C. NO. 2006-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC,

Petitioner,

-and- Docket No. SN-2006-010

AMALGAMATED TRANSIT UNION,
DIVISION NOS. 819, 820, 821,
822, 823, 824, 825 AND 880,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of successor contract proposals made by the Amalgamated Transit Union, Division Nos. 819, 820, 821, 822, 823, 824, 825 and 880 for inclusion in a successor collective negotiations agreement with New Jersey Transit Bus Operations Inc. The Commission concludes that a proposal concerning pension benefits for current as well as future retirees is not mandatorily negotiable. The Commission concludes that a subcontracting proposal is not mandatorily negotiable absent language that specifically exempts situations that would preclude New Jersey Transit from fulfilling its statutory mission. The Commission determines that a proposal concerning filling vacancies presents the mandatorily negotiable issue of the grievance procedures for appealing denials. The Commission concludes that a proposal to limit the hiring of part-time operators to 10% of the full-time workforce at each location is mandatorily negotiable, but that NJTBO can challenge the enforcement of such a provision if it can demonstrate under a particular set of facts that compliance would prevent it from delivering its services.

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, Genova, Burns & Vernoia, attorneys, (Doug E. Solomon and Joseph M. Hannon, on the brief)

For the Respondent, Kroll, Heineman & Giblin, attorneys (Raymond G. Heineman, on the brief)

DECISION

On August 2, 2005, New Jersey Transit Bus Operations, Inc. ("NJTBO"), petitioned for a scope of negotiations determination. NJTBO seeks a determination that successor contract proposals made by the Amalgamated Transit Union, Division Nos. 819, 820, 821, 822, 823, 824, 825 and 880 ("ATU") are not mandatorily negotiable.

The parties have filed briefs and exhibits as well as submissions concerning subsequent modifications to ATU's proposals. These facts appear.

ATU represents all full-time and part-time bus operators, general office workers, field salary employees, and mechanics. The parties' collective negotiations agreement expired on June 30, 2005. The parties are negotiating for a successor agreement and ATU has petitioned for interest arbitration. NJTBO asserts that ATU proposals concerning pensions, subcontracting, vacancies and part-time operators are not mandatorily negotiable and thus may not be submitted to interest arbitration absent NJTBO's consent. The details of each proposal are described later in this opinion.

This case is governed by the scope of negotiations standard set forth in 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). In that case, 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"), the legislation that established NJT and authorized the conversion of New Jersey's mass transit system from one of private ownership to one owned and operated by the State. 125 N.J. at 43. In deciding what scope of negotiations the NJPTA authorized, 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." P.E.R.C. No. 88-74, 14 NJPER at 174. The Supreme Court approved this test and added:

> [A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between government and its employees in mass transit. There must be more than some abstract principle involved; the negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. All of the various rulings of PERC . . . have that theme. They look to the actual consequences of allowing negotiations on the ability of NJT to operate and manage mass transit efficiently and effectively in New Jersey. If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test, rather than someone's notion of what government generally should be allowed to unilaterally determine and what it should not. [125 N.J. at 61]

In P.E.R.C. No. 88-74, we applied the "employment relationship" and "statutory mission" tests to several contract proposals. In general, we first addressed whether a given

proposal was mandatorily negotiable under the federal Labor-Management Relations Act, 29 U.S.C. §141 et seq. ("LMRA"), and if so, next discussed whether the statutory mission test required a different result for NJTBO. We follow that model here.

Pension Benefits

ATU has proposed the following:

> For those retirees with a retirement date effective between July 1, 2002 and December 31, 2002, an increase of five percent (5%) to their monthly pension benefits.
>
> Except as provided below, for all employees retiring on or after July 1, 2005, 3.00% will be used to calculate pension.
>
> Effective July 1, 2005, the plan shall provide for a C.O.L.A. for all retirees.
>
> Effective July 1, 2005, all retirees will receive a twenty percent (20%) increase to their monthly pension benefits.

In P.E.R.C. No. 88-74, we held that a proposal increasing the pensions of already retired employees as well as future retirees was not mandatorily negotiable. We stated:

> Pensions are, in general, mandatorily negotiable under the NJPTA. N.J.S.A. 27:25-14. N.J.S.A. 34:13A-8.1 is not applicable to these employees. However, the instant clause is not a mandatory subject of negotiations, even in the private sector, because it would require negotiations concerning employees already retired. [Allied Chemical Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)]. [14 NJPER at 177]

That analysis controls this case. ATU's proposal would increase the benefits of current retirees and is thus not mandatorily negotiable. We recognize that the proposal also affects the benefits of future retirees as well as current part-time operators who had retired but were rehired pursuant to Article 16 of the parties' contract. Under P.E.R.C. No. 88-74, provisions governing pensions for those two groups of active employees would be mandatorily negotiable. This proposal is not mandatorily negotiable because it covers current retirees as well as future retirees.

Subcontracting

Section 15-I of the predecessor contract is entitled Subcontracting. In P.E.R.C. No. 88-74, we found Section 15-I to be not mandatorily negotiable because it limited NJTBO's ability to subcontract for reasons pertaining to its statutory mission to provide "a coherent public transportation system in the most efficient and effective manner." When ATU sought to include Section 15-I in the successor contract now at issue, NJTBO filed this petition reiterating that Section 15-I was not mandatorily negotiable. ATU responded by proposing that the language in bold below be added to this section:

> Except as provided below, the Company will not undertake the contracting out of the kind or nature of work presently and normally performed by bargaining unit employees **for the purpose of taking advantage of lower labor costs or where not related to the scope**

> **and direction of the Company and its capital expenditures.**
>
> The Company reserves the right to continue its present practices of contracting out certain work of the nature and kind of such work as was contracted out in the past, **provided such subcontracting is to a subcontractor which pays its employees not less than the economic equivalent of the wages and benefits provided under this Agreement, unless such limitation would interfere with the statutory mission of the Company.**
>
> If and when a new technology makes the performance of certain types of work economically unfeasible, such work may be contracted out, provided that no bargaining unit employee shall be laid off as a result of such contracting out **and provided such subcontracting is to a subcontractor which pays its employees not less than the economic equivalent of the wages and benefits provided under this Agreement, unless such limitation would interfere with the statutory mission of the Company.** The company agrees to notify the Union in advance of any contracting out work by reason of this paragraph.
>
> It is specifically understood that no maintenance work will be subcontracted to a subsidiary company.

ATU has proposed modifying the first paragraph of Section 15-I to prohibit two categories of subcontracting: (1) where it is done to take advantage of lower labor costs, and (2) where it is not related to the scope and direction of the company and its capital expenditures.

The prohibition against labor cost subcontracting is mandatorily negotiable because it protects employees against having their wages and benefits undercut by a subcontracting decision based on a desire to reduce labor costs. In P.E.R.C. No. 88-74, we held that subcontracting decisions based on reducing labor costs are mandatorily negotiable. See also Naperville Ready Mix, Inc. v. NLRB, 242 F.3d 744 (7th Cir. 2001), cert. den. 534 U.S. 1040 (2001). See generally Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). The prohibition against subcontracting that does not relate to a company's scope and direction and capital expenditures is not mandatorily negotiable as written because it uses a private sector formulation to exempt certain subcontracting decisions. See Fibreboard. Because NJTBO's statutory mission might involve other considerations, a mandatorily negotiable provision must include language that specifically exempts situations that would preclude NJTBO from fulfilling its statutory mission.

NJTBO asserts that ATU's proposed paragraphs 2 and 3 are mandatorily negotiable "in a vacuum," given the proviso that the limitations in these paragraphs will not be effective if they would interfere with NJTBO's statutory mission. Accordingly, we need not consider the negotiability of those proposals any further.

NJTBO does, however, challenge the negotiability of Paragraph 4. That provision prohibits subcontracting of maintenance work to a subsidiary company under all circumstances and is therefore not mandatorily negotiable as written. As we stated above, a mandatorily negotiable provision must include language that specifically exempts situations that would preclude NJTBO from fulfilling its statutory mission. If ATU is correct in assuming that a ban on subcontracting maintenance work to a subsidiary would not impact on NJTBO's statutory mission, the required statutory mission language will not compromise its interests.

Vacancies

Section 15-F provides:

> All vacancies in the General Shops shall be filled by promoting employees within their group, provided they are qualified, before hiring new employees.
>
> For the purposes of filling vacancies, the shop employees are divided into two (2) groups, as follows:
>
> Group 1 - Shop employees classified as Repairman, Class C; Repairmen, Class B; Repairmen, Class A; Mechanics; Mechanics, Class A; and Special Mechanics shall be eligible to fill vacancies in the classifications within this group.
>
> Group 2 - Shop employees classified as Watchmen; Utilitymen, Class B; and Utilitymen, Class A, shall be eligible to fill vacancies in the classifications within this group.

> Although Group 2 employees may not bid for vacancies in Group 1, they may submit applications to be considered for promotion to Group 1. All applications received from employees in Group 2 shall be reviewed by the Company to determine whether the applicant has the necessary background to qualify. The decision of the Company regarding applications received from Group 2 shall be final and not subject to appeal.

ATU has proposed that the underlined sentence be deleted.

In P.E.R.C. No. 88-74, we held that a clause concerning the filling of vacancies was not mandatorily negotiable to the extent it called for management and the majority representative to jointly determine in the first instance whether an employee was qualified for promotion. Id. at 178. Such an initial determination is for management alone. We recognized, however, that promotion issues were generally negotiable under the labor relations statutes governing private sector employees and NJTBO employees and that the parties could specifically negotiate for arbitral review of management's promotional decisions. ATU's proposal in this case does not present the problem of joint determination that we found not mandatorily negotiable in P.E.R.C. No. 88-74. Instead it presents the mandatorily negotiable issue of grievance procedures for appealing promotional denials.

Part-Time Employees

Section 16-P(a) provides:

> Notwithstanding any other provision of the collective bargaining agreement, the Company may employ part-time operators. The use of such part-time operators is subject to the restrictions and limitations imposed by this section. Part-time operators will only receive pay and benefits specifically provided for in this section.

ATU proposes deleting the underlined sentence and adding this sentence:

> The hiring of part-time operators is subject to a 10% limitation of the full time work force of operators at each location.[1/]

In P.E.R.C. 88-74, we considered the negotiability of certain aspects of the contract clause then governing part-time and seasonal operators. Among the aspects considered was a provision limiting the use of part-time operators to 10% of the scheduled platform hours in each garage. We held that the disputed aspects were mandatorily negotiable. We stated:

> We start with the federal model. The clause is mandatorily negotiable because it pertains to hours and days of work, work assignments and labor costs. To the extent it limits non-unit employment, it would be mandatorily negotiable as preserving unit work. NJT's argument that the clauses interfere with its statutory mission is too broad. The right to employ part-time and seasonal employees without any restrictions to reduce labor

1/ In P.E.R.C. No. 88-74, the employer did not challenge the negotiablity of identical language found elsewhere in the clause.

> costs could totally undermine the work and welfare of full-time unit personnel.
>
> We do however, make one exception to this general rule. NJT must have the right to assign part-time and seasonal employees where it can demonstrate that it cannot otherwise deliver its service. With this limitation, however, we hold the clause to be mandatorily negotiable. [Id. at 178]

In this case, the proposed deletion of the first sentence would not eliminate NJTBO's ability to hire and use part-time operators; the rest of the clause both recognizes and restricts that ability. Consistent with P.E.R.C. No. 88-74, the concept of a 10% limitation on hiring is in general a mandatorily negotiable subject protecting the work and welfare of full-time personnel against the unrestricted use of part-time personnel at lower wage rates. NJTBO has not submitted any evidence showing how a 10% limitation would prevent it from accomplishing its statutory mission. However, again consistent with P.E.R.C. No. 88-74, NJTBO can challenge the enforcement of any mandatorily negotiable provision if it can demonstrate, under a particular set of facts, that compliance would prevent it from delivering its services.

ORDER

The following proposals are mandatorily negotiable and may be submitted to interest arbitration:

> ATU's proposal to modify Section 15-F.
>
> ATU's proposal to modify the first paragraph of Section 15-I to the extent it would protect employees against having their work

subcontracted for the purpose of taking advantage of lower labor costs.

ATU's proposal to modify Section 16-P(a).

The following proposals are not mandatorily negotiable as written:

ATU's proposal to increase pension benefits.

ATU's proposal to modify the first paragraph of Section 15-I to the extent it would prohibit subcontracting that was unrelated to the scope and direction of the company and its capital expenditures.

The fourth paragraph of Section 15-I.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

ISSUED: December 15, 2005

Trenton, New Jersey