

P.E.R.C. NO. 2013-61

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-2012-048

NEW JERSEY STATE COUNCIL
OF AMALGAMATED TRANSIT UNION,
LOCAL 822,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Bus Operations, Inc., for a restraint of binding arbitration of a grievance filed by New Jersey State Council of Amalgamated Transit Union, Local 822. The grievance asserts that employees were entitled to retroactive workers' compensation benefits based on negotiated retroactive salary increases in the parties' most recent contract. The Commission holds that the grievance is not preempted by the workers' compensation statutes because the dispute is about wages and proper calculation of benefit amounts based on wages. The Commission further holds that an agreement by the parties to increase employees' workers' compensation benefits based on the negotiated salary increase does not substantially impair the ability of NJTBO to operate and manage mass transit efficiently and effectively in New Jersey.

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, Jeffrey S. Chiesa, Attorney General
(Michael S. Rubin, on the brief)

For the Respondent, Cohen, Leder, Montalbano &
Grossman, attorneys (Paul A. Montalbano, of counsel)

DECISION

On March 9, 2012, New Jersey Transit Bus Operations, Inc. (NJTBO) filed a Scope of Negotiations Petition. NJTBO seeks a restraint of binding arbitration of a grievance filed by the New Jersey State Council of Amalgamated Transit Union, Local 822 (ATU). The grievance asserts that the grievant and all similarly situated employees are entitled to a retroactive increase in their workers' compensation benefits based upon the negotiated retroactive salary increase in the parties' most recent collective negotiations agreement (CNA). We deny NJTBO's request

for a restraint of binding arbitration.^{1/}

The parties have filed briefs and exhibits. NJTBO filed certifications of counsel and Mary Ann Redmond, Manager of New Jersey Transit Workers Compensation and Disability Claims Department. The following facts appear.

NJTBO and ATU are parties to a collective negotiations agreement with a duration from July 1, 2008 through June 30, 2010. The grievance procedure ends in binding arbitration. The Memorandum of Agreement (MOA) for the most-recent CNA was ratified in April 2009. The grievant is an employee of NJTBO who was injured on the job in October 2008 and received workers' compensation benefits. After the new CNA was executed, grievant sought the difference in his workers' compensation calculation to reflect the retroactive 3.5% wage increase for 2008 that was included in the MOA. NJTBO denied grievant's request.

In October 2009, ATU filed a grievance contesting NJTBO's refusal to provide the grievant, and all similarly situated employees, with a retroactively increased workers' compensation benefit based on the 2008 3.5% wage increase included in the MOA. The grievance proceeded through the four steps of the parties' grievance procedure and was denied at each step. On May 3, 2011,

^{1/} On March 26, 2012, NJTBO filed an application for interim relief seeking a temporary restraint of arbitration. That application was denied by the Commission designee on June 12, 2012. I.R. No. 2012-17, NJPER (¶ 2012).

ATU requested binding arbitration. This petition ensued.

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 merits of the grievance or any contractual defenses the employer may have.

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), 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 Legislature authorized in the 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. N.J. Transit, 14 NJPER at 174. The Supreme Court approved this test and elaborated on it as follows:

[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]

The sole issue in this case is preemption: does N.J.S.A. 34:15-49 bar NJTBO from agreeing to pay an employee who was receiving workers' compensation benefits a modified benefit based

on the negotiated retroactive salary increase? We determine it does not.

In order to preempt negotiations, a statute or regulation must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233. [Id. at 44].

NJTBO argues that the grievance is preempted by the workers' compensation statutes, N.J.S.A. 34:15-1 et seq., as only the workers' compensation court may modify a benefit; and, that the grievant's benefits were properly calculated as to his salary at the time he was injured.

ATU responds that entitlement to workers' compensation benefits for the grievant is not in dispute as NJTBO is a self-insured provider of benefits and did not deny grievant's claim. The issue in dispute is whether the employer will provide the

grievant with a retroactive negotiated wage increase.

NJTBO replies that it complied with the workers' compensation law by providing grievant with a percentage of his contractual pay rate in effect at the time of his injury; the fact that NJTBO is self-insured does not alter its obligation to conform with the statutory method for calculating benefits; and whether to grant an increased benefit is within the sole jurisdiction of the workers' compensation court.

Pursuant to N.J.S.A. 34:15-12, employees temporarily disabled by a work-related injury are entitled to be paid workers' compensation benefits of 70% of the employee's weekly wages received at the time of injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the unemployment compensation law and to a minimum of 20% of such average weekly wages a week. The Division of Workers' Compensation has exclusive original jurisdiction to determine whether an employee has suffered a work-related injury entitling that employee to statutory benefits. N.J.S.A. 34:15-49.

We find this grievance to be negotiable as an alleged agreement between the parties to provide the grievant with a new calculation based on the retroactive salary - where entitlement to benefits is not in dispute - does not substantially impair the ability of NJTBO to operate and manage mass transit efficiently

and effectively in New Jersey. The issue here is wages. Not entitlement to benefits. Post-arbitration review pursuant to N.J.S.A. 2A:24-8 is available to ensure that any award does not exceed the statutory requirements.

ORDER

The request of New Jersey Transit Bus Operations for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: February 28, 2013

Trenton, New Jersey