

P.E.R.C. NO. 2018-31

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-2018-003

AMALGAMATED TRANSIT UNION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies NJTBO's request for a restraint of binding arbitration of the ATU's claim contesting the refusal to provide employees with the difference between workers' compensation benefits that were received based upon then-existing wages and workers' compensation benefits that would have been provided based upon a retroactive wage increase. Finding this matter indistinguishable from P.E.R.C. No. 2013-61, a prior case between the parties involving the same issue, the Commission denies a restraint of arbitration.

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, Capehart & Scatchard, P.A.,
attorneys (Ralph R. Smith, III, on the brief)

For the Respondent, Cohen, Leder, Montalbano
& Connaughton, LLC, attorneys (Paul A.
Montalbano, on the brief)

DECISION

On July 14, 2017, New Jersey Transit Bus Operations, Inc. (NJTBO) filed a scope of negotiations petition seeking a restraint of binding arbitration demanded by the Amalgamated Transit Union (ATU).^{1/2/} The ATU alleges that NJTBO violated the parties' collective negotiations agreement (CNA) when it refused

1/ The parties' dispute regarding whether the ATU filed a grievance and/or proceeded through the steps of the grievance procedure is an issue of contractual arbitrability that was raised with, and apparently resolved by, the American Arbitration Association.

2/ An application for interim relief seeking a temporary restraint of binding arbitration was filed together with the scope petition. On August 23, 2017, a Commission Designee issued an interlocutory order denying the application.

to provide "approximately three to four hundred employees" with the difference between workers' compensation benefits that were received based upon then-existing wages and workers' compensation benefits that would have been provided based upon a retroactive wage increase.

NJTBO filed a brief and exhibits. The ATU filed a brief and exhibits. NJTBO also filed a reply brief and exhibits. These facts appear.^{3/}

The ATU represents NJTBO employees in job titles including, but not limited to, operators, cleaners, custodians, servicemen, garagemen, janitors, utilitymen, repairmen, mechanics, maintenance men, stock clerks, project laborers, watchmen, storemen, drivers, technicians, communications specialists, and storeroom specialists. NJTBO and the ATU are parties to an expired CNA in effect from July 1, 2010 through June 30, 2017, the terms of which were established by an interest arbitration award issued on October 22, 2015. The grievance procedure ends in binding arbitration.

The grievants are NJTBO employees who were injured and received workers' compensation benefits sometime during the

^{3/} Neither party provided a substantive certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

period from July 1, 2010 through October 22, 2015.^{4/5/} After the

4/ N.J.S.A. 34:15-12, entitled "Schedule of payments", provides in pertinent part:

a. For injury producing temporary disability, 70% of the worker's weekly wages received at the time of the injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the "unemployment compensation law" (R.S. 43:21-1 et seq.) and a minimum of 20% of such average weekly wages a week. This compensation shall be paid during the period of such disability, not however, beyond 400 weeks. . . .

b. For disability total in character and permanent in quality, 70% of the weekly wages received at the time of injury, subject to a maximum and a minimum compensation as stated in subsection a. of this section. This compensation shall be paid for a period of 450 weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for the employee to obtain wages or earnings equal to those earned at the time of the accident, in which case further weekly payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by that portion thereof that the wage, or earnings, the employee is then able to earn, bears to the wages received at the time of the accident. . . .

c. For disability partial in character and permanent in quality, weekly compensation shall be paid based upon 70% of the weekly wages received at the time of the injury, subject to a maximum compensation per week of 75% of the Statewide average weekly wages

(continued...)

interest arbitration award was issued on October 22, 2015, the ATU sought the difference in the workers' compensation calculation to reflect the retroactive wage increase.^{6/}

On July 29, 2016, the ATU filed a demand for arbitration with the American Arbitration Association (AAA) (Case No. 01-16-0004-2687) contesting NJTBO's "wrongful refusal to pay retroactive wage adjustment to employees injured during the course of employment" On October 17, NJTBO objected to the ATU's failure to comply with the grievance procedure set forth in the parties' CNA. On October 21, the ATU requested that

4/ (...continued)

(SAWW) earned by all employees covered by the "unemployment compensation law" (R.S. 43:21-1 et seq.) and paid in accordance with the following "Disability Wage and Compensation Schedule" and a minimum of \$35.00 per week.
. . .

5/ N.J.A.C. 12:235-1.6, entitled "Maximum workers' compensation benefit rates", provides in pertinent part:

(a) In accordance with the provisions of N.J.S.A. 34:15-12.a, the maximum workers' compensation benefit rate for temporary disability, permanent total disability, permanent partial disability, and dependency is hereby promulgated as being \$903.00 per week.

6/ N.J.S.A. 34:15-37, entitled "Wages; computation", provides in pertinent part:

"Wages," when used in this chapter shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.

the AAA continue processing the demand for arbitration and that the designated arbitrator resolve any procedural issues.^{7/} The AAA continued to process the demand for arbitration and designated an arbitrator. On July 14, 2017, the instant petition ensued. An arbitration hearing was held on August 31, 2017. To date, an award has not been issued.

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 grievance or any contractual defenses the employer may have.

^{7/} On December 30, 2016, the ATU filed a related unfair practice charge alleging that NJTBO failed to provide "[n]ames of employees who received workers' compensation, and date workers' compensation was commenced and . . . ended, from June 1, 2010 through December 31, 2015[,]" upon request.

The scope of negotiations under the New Jersey Public Transportation Act (NJPTA), N.J.S.A. 27:25-1 et seq.,^{8/} legislation that established NJTBO and authorized the conversion of New Jersey's mass transit system from one of private ownership to one owned and operated by the State, was established 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). With respect to NJTBO, "an issue that settles an aspect of the employment relationship is mandatorily negotiable unless negotiations over that issue would prevent NJTBO from fulfilling its statutory mission to provide a coherent public transportation system in the most efficient and effective manner." New Jersey Transit Bus Operations, P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015) (citations omitted). The

^{8/} N.J.S.A. 27:25-2 provides in pertinent part:

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.

Supreme Court of New Jersey has 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 the 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 in its first opinion have that theme. They look to the actual consequences of allowing negotiations on the ability of NJTBO 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.

[N.J. Transit, 125 N.J. at 61.]

NJTBO argues that in accordance with the workers' compensation statutes, N.J.S.A. 34:15-1 et seq., the ATU's claim is preempted because workers' compensation court has exclusive jurisdiction to enter and modify compensation awards^{9/} and an

^{9/} N.J.S.A. 34:15-49, entitled "Jurisdiction of division; salaries, qualifications, tenure of judges, etc", provides in pertinent part:

(continued...)

arbitrator cannot modify workers' compensation benefits that are time-barred.^{10/} NJTBO also maintains that the facts of this case are distinguishable from New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 2013-61, 39 NJPER 424 (¶136 2013) given that the retroactive wage increase in that matter was "voluntarily negotiated." However, NJTBO asserts that "[t]o the extent it believes that [P.E.R.C. No. 2013-61] applies to the differing facts here, [the] Commission should reexamine and reverse [that] decision." Finally, NJTBO contends that "[c]reating terms in the CNA and the interest arbitration award that do not exist will place the parties on uneven bargaining ground[]."

The ATU argues that P.E.R.C. No. 2013-61 "should be recognized as the law and precedent" given that the instant matter "concerns the exact same issue, . . . legal argument, and

^{9/} (...continued)

a. The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits under this chapter.

^{10/} N.J.S.A. 34:15-27, entitled "Modification of agreement", provides in pertinent part:

An agreement for compensation may be modified at any time by a subsequent agreement. Upon the application of any party, a formal award, determination, judgment, or order approving settlement may be reviewed within two years from the date when the injured person last received a payment on the ground that the incapacity of the injured employee has subsequently increased.

. . . parties"; the only difference is that the retroactive wage increase was awarded through interest arbitration rather than through negotiated agreement. Moreover, despite the Commission's ruling in P.E.R.C. No. 2013-61, the ATU maintains that NJTBO "did not propose in negotiation[s] or [argue] to the interest arbitrator . . . that the [instant] retroactive wage increase . . . provide an exclusion for those employees who received workers' compensation . . . during the retroactive period." The ATU represents that it does not "seek any adjustment to any workers' compensation awards" and claims that "[t]here is no issue present that requires the involvement and expertise of a workers' compensation judge."

In reply, NJTBO reiterates that arbitration is inappropriate in this matter because "the issue of retroactive wage increases for workers' compensation [recipients] was never addressed during negotiations, during four days of interest arbitration hearings . . . or in the actual interest arbitration award itself." NJTBO also requests that the Commission disregard the ATU's Exhibit 1 because it "was provided to the ATU as part of settlement discussions" related to the pending unfair practice charge (CO-2017-44).

The question before us is whether the workers' compensation statutes preempt binding arbitration regarding a claim for the difference between workers' compensation benefits that were

received based upon then-existing wages and workers' compensation benefits that would have been provided based upon a retroactive wage increase awarded through interest arbitration. We find that they do not.^{11/}

In New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 2013-61, 39 NJPER 424 (¶136 2013), a case involving the same parties here, the ATU filed a grievance claiming that NJTBO employees "[were] entitled to a retroactive increase in their workers' compensation benefits based upon the negotiated retroactive salary increase in the parties' [2008-2010 CNA]." In pertinent part, the Commission held the following:

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 the 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.

[39 NJPER at 426.]

NJTBO did not appeal the decision.

^{11/} However, any recalculation of compensation on account of the retroactive increase would be subject to the maximum weekly rate set forth in N.J.A.C. 12:235-1.6 or other applicable law. See note 5.

We find this case indistinguishable from P.E.R.C. No. 2013-61, in particular because the parties elected not to address the issue of retroactive wage increases for workers' compensation recipients during negotiations for, or interest arbitration proceedings related to, the 2010-2017 CNA. Moreover, NJTBO has not cited any new legal authority regarding preemption that was not considered in P.E.R.C. No. 2013-61. The Commission has held that "[t]he doctrine of res judicata is applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits." Hudson Cty., P.E.R.C. No. 2016-8, 42 NJPER 113 (¶32 2015).

Accordingly, we deny a restraint of binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: February 22, 2018

Trenton, New Jersey