

P.E.R.C. NO. 2020-32

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-2019-050

AMALGAMATED TRANSIT UNION,
NEW JERSEY STATE COUNCIL,
ATU LOCALS 540, 819, 820, 822,
824, 825 AND 880,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Bus Operations, Inc. (NJTBO), for a restraint of binding arbitration of grievances filed by various locals of the Amalgamated Transit Union, New Jersey State Council (ATU), challenging the disciplinary terminations of five bus operators who were discharged for alleged negligence in relation to bus accidents. The Commission finds NJTBO has not demonstrated how permitting ATU unit members to present evidence of alleged visual obstruction caused by certain bus design elements as a mitigating factor in determining their culpability in accidents would prevent NJTBO from fulfilling its statutory mission. The Commission further finds that these issues are not statutorily preempted by the fact that the buses met minimum federal safety standards, nor has the NJTBO cited any other statutes or regulations that would preempt 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, Gurbir S. Grewal, Attorney General
(Michael S. Rubin, Deputy Attorney General)

For the Respondent (Amalgamated Transit Union, New
Jersey State Council), Cohen, Leder, Montalbano &
Connaughton, LLC, attorneys (Paul A. Montalbano, of
counsel and on the brief; Brady M. Connaughton, of
counsel and on the brief)

For the Respondent (ATU Local 819), Jameson, Esq., LLC,
attorneys (Curtiss T. Jameson, of counsel)

DECISION

On February 22, 2019, New Jersey Transit Bus Operations,
Inc. (NJTBO) filed a scope of negotiations petition seeking a
restraint of arbitration of five grievances filed by various
locals of the Amalgamated Transit Union, New Jersey State Council

(ATU).^{1/} The grievances challenge disciplinary actions NJTBO imposed on five separate employees.

NJTBO filed a brief, exhibits, and the certification of Director of Equipment Design and Engineering Christopher G. Moog. The ATU filed a brief, exhibits, and the certifications of ATU Chairman Raymond W. Greaves, ATU Local 819 President Tiran Billups, ATU Local 823 President Dana Burgess, and ATU Local 880 President Joseph Romeo. ATU Local 819, which filed two of the underlying grievances, also filed a respondent's brief.^{2/}

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, which was established by an October 22, 2015 interest arbitration award. The grievance procedure ends in binding arbitration.

The grievants are all bus operators and were all discharged by NJTBO for alleged negligence in relation to bus accidents.

1/ NJTBO also filed an application for interim relief, which a Commission Designee denied on April 22, 2019. I.R. No. 2019-20, 45 NJPER 351 (¶92 2019).

2/ ATU Local 819's brief relies on the certification of its President, Tiran Billups, which the ATU submitted.

Moog's certification sets forth how NJTBO procures buses, who manufactures them, and the federal design safety regulatory factors the buses must comply with. He certifies that NJTBO develops its bus management plan and procurement packages without any negotiation or involvement with the ATU. He certifies that NJTBO solicits feedback from ATU operators regarding new bus prototypes, but that any modification to the fleet arising from those comments is made in NJTBO's sole managerial discretion. He certifies that the ATU occasionally asks for additional safety features for operators, such as plastic shields in the operator area, but that NJTBO's decision to add them to some buses is made in its sole managerial discretion.

ATU Chairman Greaves certifies that the ATU negotiated the Accident Grading and Discipline System with NJTBO. He certifies that the ATU handles contract interpretation and enforcement disputes, but the ATU Locals are responsible for grieving and arbitrating disciplinary issues. The Billups, Burgess, and Romeo certifications also state that the ATU Local unions process disciplinary matters and decide whether to arbitrate disciplinary grievances. Greaves certifies that the ATU has not filed a grievance, demanded arbitration, or demanded negotiations regarding the design of any bus owned or operated by NJTBO.

Grievant 1 was disciplined on August 12, 2016. ATU Local 823's grievance challenging the discipline was denied at every

step, so it demanded arbitration on October 21, 2016. Grievant 2 was disciplined on August 25, 2016. ATU Local 819's grievance challenging the discipline was denied at every step, so it demanded arbitration on January 13, 2017. Grievant 3 was disciplined on August 21, 2017. ATU Local 823's grievance challenging the discipline was denied at every step, so it demanded arbitration on March 6, 2018. Grievant 4 was disciplined on April 3, 2018. ATU Local 819's grievance challenging the discipline was denied at every step, so it demanded arbitration on July 10, 2018. Grievant 5 was disciplined on September 25, 2017. ATU Local 880's grievance challenging the discipline was denied at every step, so it demanded arbitration on December 18, 2018. On February 22, 2019, NJTBO filed this petition to restrain the arbitrations.

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.

The standard for determining mandatorily negotiable topics under the New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq. (NJPTA), the 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). In deciding what scope of negotiations the NJPTA authorized, we and the Supreme Court 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 NJTBO from fulfilling its statutory mission to provide a "coherent public transportation system in the most efficient and effective manner." N.J. Transit, 14 NJPER at 174; N.J.S.A. 27:25-2. 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

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.]

The Commission and courts have continued to apply this statutory mission test to negotiability disputes involving NJTBO and the ATU or its locals. See, e.g., N.J. Transit Bus Operations, P.E.R.C. No. 2018-31, 44 NJPER 310 (¶87 2018); N.J. Transit Bus Operations, P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015); New Jersey Transit and ATU, Local 822, P.E.R.C. No. 2013-45, 39 NJPER 267 (¶91 2012), aff'd, 41 NJPER 115 (¶41 App. Div. 2014); N.J. Transit Bus Operations, P.E.R.C. No. 2005-82, 31 NJPER 184 (¶74 2005); and N.J. Transit Bus Operations Inc. and Amalgamated Transit Union, N.J. State Council, P.E.R.C. No. 96-11, 21 NJPER 286 (¶26183 1995), aff'd, 22 NJPER 256 (¶27133 App. Div. 1996).

NJTBO asserts that the ATU cannot arbitrate the disciplinary grievances because the grievants' defenses in these arbitrations have included claims that their fields of vision were obstructed due to the way the buses were designed (specifically, the front "A-Pillar" structural support and the placement of the side view mirror). It argues that because bus design is its managerial prerogative, the grievants cannot arbitrate discipline if their defenses include challenges to the structural design of buses. NJTBO contends that its bus design should not be a factor for arbitrators to consider in assessing accident preventability or fault. It asserts that allowing such issues to be raised in arbitration would impede its statutory mission to deliver a coherent public transportation system in the most efficient and effective manner. NJTBO also argues that because its bus designs are regulated by federal bus engineering safety standards, the disciplinary arbitrations that involve defenses alleging defects in the bus designs are preempted.

The ATU asserts that the disciplinary grievances are negotiable, and that neither the ATU nor the ATU Locals have demanded or are seeking to negotiate the design of NJTBO buses. It argues that bus design only arises in the context of ATU Locals challenging the imposition of discipline on specific bus operators. The ATU contends that the Accident Grading and Discipline System considered in such "proper cause" disciplinary

reviews involves a determination of whether the accident was preventable and caused by employee negligence. It asserts that because such reviews consider whether visual impairment was a mitigating factor, a neutral arbitrator must be able to assess whether certain bus structures affected operator visibility during accidents. The ATU argues that its presentation of such evidence as a disciplinary defense does not prevent NJTBO from operating efficiently and effectively. Finally, the ATU argues that NJTBO's preemption argument must fail because it has not cited any specifications for exactly where the A-Pillars and side mirrors are located on NJTBO buses.

ATU Local 819 asserts that discipline is mandatorily negotiable and defending against discipline does not impinge on NJTBO's managerial prerogative to select its bus fleet design. It argues that NJTBO's prerogative to select bus design is not in dispute, but that such does not preclude ATU Local 819 from seeking review of disciplinary actions where the review may involve an alleged obstructed view and whether that obstructed view impacts the determination of bus operator negligence. ATU Local 819 contends that NJTBO failed to cite any particular federal safety regulations that preempt the issue.

The grievance arbitrations underlying this scope petition concern whether NJTBO had proper cause for imposing certain disciplinary sanctions on five bus operators for their alleged

negligence related to bus accidents. N.J.S.A. 34:13A-5.3 provides that such a disciplinary review procedure is negotiable and may include binding arbitration. State v. IFPTE, Local 195, 169 N.J. 505 (2001); Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). Neither the ATU nor the ATU Locals are seeking to negotiate or arbitrate with NJTBO over the designs of its buses. Rather, in the context of defenses in disciplinary proceedings, ATU Locals have raised mitigating factors including limited visibility due to the A-pillar and side mirror placement when presenting their cases regarding accident preventability and bus operator negligence. The arbitrators' assessments of those factors are ultimately used to uphold, deny, or modify the disciplines. We find that NJTBO has not demonstrated how permitting ATU unit members to present evidence of alleged visual obstruction caused by certain bus design elements as a mitigating factor in determining their culpability in accidents would prevent NJTBO from fulfilling its statutory mission. NJTBO has cited no precedent for the notion that an otherwise arbitrable disciplinary issue becomes non-negotiable and no longer subject to arbitral review based on a grievant's asserted defenses.

Furthermore, we do not find that NJTBO has demonstrated that the issues of A-Pillar and side mirror design and placement on its buses as implicated in these grievance arbitrations is statutorily preempted. Where a statute is alleged to preempt an

otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982).

The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). NJTBO

has not cited any statute or regulation that specifically precludes an employee from raising alleged visibility issues caused by A-Pillar or side view mirror placement buses as a mitigating factor in determining accident preventability during a disciplinary grievance arbitration. Moreover, NJTBO has not cited any statutes or regulations that mandate the particular size or location for the A-Pillar or side view mirror. The fact that NJTBO buses meet minimum federal safety standards does not remove all discretion from NJTBO for bus design and safety, but only sets a floor. Thus, statutory preemption is not a consideration in this matter.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: December 19, 2019

Trenton, New Jersey