

P.E.R.C. NO. 2023-3

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-2022-029

AMALGAMATED TRANSIT UNION,
NEW JERSEY STATE COUNCIL,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies NJTBO's request for restraint of binding arbitration of the ATU's grievances contesting written disciplinary warnings issued to two bus operators. Finding that the ATU's grievances dispute whether NJTBO had proper cause for the disciplinary sanctions, but do not challenge NJTBO's managerial prerogative to upgrade its DriveCam bus surveillance system and use evidence from it in disciplinary actions, the Commission declines to restrain arbitration. The Commission also finds that, because issues of notice of changes to the DriveCam system and how it may be used in discipline are mandatorily negotiable, the ATU is not precluded from raising its claims of lack of sufficient notice of DriveCam changes as part of its proper cause defense in disciplinary arbitrations.

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, McElroy Deutsch Mulvaney & Carpenter, LLP, attorneys (John J. Peirano, of counsel and on the brief; David M. Alberts, of counsel and on the brief)

For the Respondent, Cohen, Leder, Montalbano & Connaughton, LLC, attorneys (Paul M. Montalbano, of counsel and on the brief; Brady M. Connaughton, of counsel and on the brief)

DECISION

On February 3, 2022, New Jersey Transit Bus Operations, Inc. (NJTB0) filed a scope of negotiations petition seeking to restrain arbitration of two disciplinary grievances filed by the Amalgamated Transit Union, New Jersey State Council (ATU). The grievances contest written disciplinary warnings issued by NJTB0 to ATU bus operators Toska and Mercado.

NJTB0 filed a brief accompanied by exhibits and the certifications of John McCarthy, Deputy General Manager of Vehicle Maintenance, and David M. Alberts, NJTB0 counsel. The

ATU filed a brief accompanied by exhibits and the affidavit of Orlando Riley, Chairman of the ATU's State Council. These facts appear.

The ATU represents NJTBO employees including, but not limited to, bus operators. NJTBO and the ATU are parties to a collective negotiations agreement (CNA) with a term of July 1, 2021 through June 30, 2024, which renewed and modified their previous July 1, 2017 through June 30, 2021 CNA. The grievance procedure ends in binding arbitration.

Orlando Riley, Chairman of the ATU, certifies that the Management Rights clause of the parties' CNA requires NJTBO to have proper cause to discipline an employee. He certifies that when an employee is involved in misconduct, NJTBO utilizes coaching and counseling to notify and advise an employee of expectations of proper conduct, which is not disciplinary, and also utilizes progressive discipline which includes steps such as a warning letter and various levels of suspensions. Following NJTBO's formal written notice to an employee of alleged misconduct, a First Step Hearing is conducted. If after that hearing, the NJTBO determines the facts support a finding of misconduct, NJTBO will exercise its discretion to issue discipline, which is set forth as a written "Employee Incident."

John McCarthy, NJTBO's Deputy General Manager of Vehicle Maintenance, certifies that NJTBO's buses are equipped with the

DriveCam system, which consists of a series of cameras and microphones mounted inside the bus for video and audio recording. The DriveCam system first utilized the DC3/DC3P camera, which recorded video and audio continuously and only stored video and audio footage following the occurrence of a triggering "g-force" event, or by bus operators manually saving footage. NJTBO then upgraded the DriveCam system with the SF64 cameras, which generally operate like the DC3/DC3P model but continuously store 50 hours of video and audio data before overriding.

In 2020, NJTBO began upgrading its DriveCam systems with SF300 cameras. The SF300 model continuously records video and audio and saves 50 hours of video and audio data before overriding. It automatically saves and stores 20 seconds of video and audio footage following a g-force triggering event and permits operators to manually trigger the save-and-store function. Unlike the previous DriveCam cameras, the SF300 camera is equipped with a mechanism that detects and saves video and audio footage of when an operator: (a) is using a cell phone while driving; or (b) fails to come to a complete stop at a stop sign or traffic signal. These videos are automatically transmitted to NJTBO officials and can be accessed and reviewed by NJTBO from DriveCam's website. McCarthy certifies that the SF300 cameras were installed for the same purpose as the original DriveCam cameras: to obtain information that would bring about

better mass transit services, more reliable operations, lower liability, and enhance the safety of NJTBO's operations.

McCarthy certifies that in or around August 2020, the ATU began requesting information about the DriveCam system's new SF300 cameras. He certifies that the ATU objected to NJTBO's decision to use SF300 cameras for disciplinary purposes and complained that NJTBO did not notify the ATU of the upgraded technology. Riley certifies that, to his knowledge, notices and videos explaining the capabilities of the new DriveCam cameras were not provided to the bus operators and only cursory outlines had been provided to the ATU State Council. Riley certifies that the ATU's requests for more detailed information were ignored. McCarthy, on the other hand, certifies that NJTBO provided the requested information. The parties submitted documentary evidence of multiple e-mail correspondences between the ATU and NJTBO during the period of August 4, 2020 to April 21, 2021 discussing the installation and capabilities of the upgraded DriveCam system and its use in disciplinary actions.

On October 8, 2020, NJTBO issued a First Step Hearing notice to bus operator Toska for a September 22, 2020 offense of "Failure to Obey Signals/Signs." Listed under "Evidence" was "Drive Camera" and the facts listed for the charge stated: "The Operator was observed on DriveCam failing to come to a complete stop at a posted stop sign. The video was saved for review."

The disciplinary action taken was a "Written Warning." On February 8, 2022, NJTBO issued a First Step Hearing notice to bus operator Mercado for a January 12, 2021 offense of "Failure to Obey Signals/Signs." Listed under "Evidence" was "Drive Camera" and the facts listed for the charge stated: "On 1-12-21 a DriveCam event was recorded showing the Operator failing to come to a complete stop at a stop sign. The incident was saved for review." The disciplinary action taken was a "Written Warning." The ATU filed a grievance that was unresolved through the steps of the grievance procedure, and was submitted to binding grievance arbitration before the New Jersey State Board of Mediation. The Toska arbitration hearing was opened on February 7, 2022. At the arbitration hearing, NJTBO and the ATU agreed that the issue for arbitration was: "[W]hether there was proper cause for the discipline . . . [a]nd if not, what shall be the remedy?" (Transcript at 9-10).^{1/}

NJTBO asserts that arbitration should be restrained because the ATU's grievance improperly challenges its right to use SF300 camera evidence in a disciplinary case. Citing N.J. Transit Bus Operations, P.E.R.C. No. 2015-53, 41 NJPER 392 (¶123 2015), it argues that, even though there have been technological upgrades to DriveCam through the new SF300 cameras (e.g., cell phone use

^{1/} The parties did not include any factual history about the Mercado arbitration.

and stop sign/traffic signal violations), its decision to use DriveCam evidence for the imposition of discipline against ATU members is non-negotiable. NJTBO contends that the ATU should be restrained from arguing in arbitration that there was a lack of sufficient notice to the ATU about the capabilities of the new SF300 cameras. It argues that it was not required to notify the ATU of the DriveCam upgrades or of its use of evidence from SF300 cameras to detect cell phone and stopping violations and impose discipline based on such evidence. NJTBO contends that ATU has been aware of the upgraded cameras since at least August 2020.

The ATU asserts that its disciplinary grievance arbitration does not challenge NJTBO's managerial authority to install the upgraded DriveCam SF300 cameras and does not challenge NJTBO's utilization of evidence captured by the DriveCam system. It argues that the grievances focus on whether the level of discipline NJTBO issued to the grievants was appropriate. The ATU contends that in P.E.R.C. No. 2015-53, the Commission recognized the importance of NJTBO providing the ATU with information about the capabilities of the DriveCam system at the time. The ATU asserts that NJTBO only provided it with limited information about the new SF300 camera's capabilities. It argues that it only seeks that the disciplinary warning letters be rescinded. The ATU contends that permitting arbitration to

proceed over proper cause for the issuance of a disciplinary warning letter would not impair the statutory mission of NJTBO.

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) 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). 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); 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).

In this case, the ATU does not dispute that NJTBO has a managerial prerogative to upgrade its DriveCam system with the SF300 cameras and utilize their cell phone and rolling stop detection capabilities as evidence in disciplinary actions against ATU bus operators. See P.E.R.C. No. 2015-53, supra (where NJTBO had informed the ATU of DriveCam camera placement and fields of view, NJTBO had a non-negotiable managerial prerogative to utilize DriveCam recordings for employee discipline). The grievance arbitrations underlying this scope petition concern whether NJTBO had proper cause for imposing certain disciplinary sanctions on two bus operators for their alleged failure to come to a complete stop as captured by the DriveCam system. As part of its proper cause argument, the ATU asserts that because NJTBO had allegedly not provided the bus operators with adequate notice of the full capabilities of the upgraded DriveCam system, the level of discipline issued by NJTBO should not be sustained. NJTBO objects to the ATU's notice claims and seeks that the ATU be restrained from arguing in arbitration that NJTBO did not sufficiently notify it about the capabilities of the new SF300 cameras.

In Belleville Ed. Ass'n and Belleville Bd. of Ed., P.E.R.C. No. 2015-79, 42 NJPER 41 (¶12 2015), aff'd, 455 N.J. Super. 387

(App. Div. 2018), the Commission found that, while the Board had a managerial prerogative to install an extensive video security system, the new security system created severable and negotiable impact issues, including: notice procedures if camera recordings will be used for employee discipline; and notice procedures for significant changes to the cameras. The Appellate Division affirmed, finding that the Commission struck "a proper balance between the Board's managerial prerogative and obligation to ensure the safety of students and staff, and the BEA's right to advocate and negotiate for the interests of its members" including, e.g., "the establishment of notice protocols" if the surveillance data is "used to support disciplinary charges." Belleville, 455 N.J. Super. at 401.

Applying Belleville to this case, we find that the issues of notice of significant changes to surveillance systems such as DriveCam and notice of how new DriveCam data may be used for employee discipline are mandatorily negotiable. Thus, the ATU is not precluded from raising its claims of lack of sufficient notice concerning the upgraded DriveCam systems as part of its proper cause defense in its disciplinary grievance arbitrations. Such a procedural challenge in the context of a disciplinary arbitration would not "substantially impair" NJTBO's statutory mission of efficiently and effectively operating a safe, responsive public transportation system. N.J. Transit, 125 N.J.

at 61. It is therefore legally arbitrable. See N.J. Transit, P.E.R.C. No. 2020-32, 46 NJPER 278 (¶68 2019) (although bus design is a managerial prerogative, the ATU was not restrained from arguing in disciplinary arbitrations that flawed bus design should be a mitigating factor in determination of proper cause for terminating ATU bus operators involved in bus accidents).

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, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: August 18, 2022

Trenton, New Jersey