P.E.R.C. NO. 90-96

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NJ TRANSIT BUS OPERATIONS, INC.
Petitioner,
-and-
AMALGAMATED TRANSIT UNION, NEW JERSEY COUNCIL,
Respondent,
-and-
NJ TRANSIT CORPORATION,
Intervenor.

Docket Nos. SN-87-88, SN-87-92, SN-87-93

NJ TRANSIT MERCER, INC.,
Petitioner,
-and-
AMALGAMATED TRANSIT UNION, DIVISION 540,
Respondent,
-and-
NJ TRANSIT CORPORATION,
Intervenor.

Docket No. SN-87-89

NJ TRANSIT BUS OPERATIONS, INC.,
Petitioner,
-and-
UNITED TRANSPORTATION UNION, LOCAL NO. 33 (PATERSON & WARWICK DIVISIONS),
Respondent,
-and-
NJ TRANSIT CORPORATION,
Intervenor.

Docket Nos. SN-87-91, SN-88-8

NJ TRANSIT BUS OPERATIONS, INC.,
Petitioner,
-and-
TRANSPORT WORKERS UNION OF AMERICA LOCAL No. 225,
Respondent,
-and-
NJ TRANSIT CORPORATION,
Intervenor.

Docket No. SN-87-90

SYNOPSIS

Pursuant to an Appellate Division remand order, the Public Employment Relations Commission determines that various provisions in the parties' contract are mandatorily negotiable, but others are not.

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Appearances:

For NJ Transit Bus Operations, Inc., NJ Transit Corporation, and NJ Transit Mercer, Inc.,
Peter N. Perretti, Jr., Attorney General
(Jeffrey Burstein, Deputy Attorney General; Harriet H. Miller, Deputy Attorney General, on the brief)

For the Amalgamated Transit Union,
Bredhoff & Kaiser, attorneys
(Jeffrey Freund, on the brief)
Earle Putnam, General Counsel, on the brief;
Weitzman & Rich, attorneys
(Richard P. Weitzman, on the brief)
Reitman, Parsonnet, Maisel & Duggan, attorneys (Bennett D. Zurofsky, Jesse H. Strauss, and Tara Levy, on the brief)

For the Transport Workers Union,
O'Donnell & Schwartz, attorneys
(Malcolm A. Goldstein, of counsel)
For the United Transportation Union,
Friedman & Wirtz, attorneys
(Edward D. Friedman, of counsel)

DECISION AND ORDER

On May 10, 1989, the Appellate Division of the Superior Court remanded these scope of negotiations petitions to the Commission for "reconsideration and redetermination" in conformity with In re NJ Transit Bus Operations, Inc., 233 N.J. Super. 173 (App. Div. 1989), rev'g P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988).[1/] P.E.R.C. No. 88-74 held that under the New Jersey Public Transportation Act of 1979, N.J.S.A 27:25-1 et seq. ("NJPTA"), proposals that settle an aspect of the relationship between NJ Transit and its employees are mandatorily negotiable, unless an

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1/ Certification has been granted, S. Ct. Dkt. No. 30,622 (10/19/89).

agreement would prevent NJ Transit from fulfilling its statutory mission.[2/] The Court found that mandatorily negotiable subjects for these employees should be determined by using the standards applicable to public employees covered by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("EERA"). That standard is set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982).

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The Court's remand directs the Commission to apply the Local 195 tests to the issues raised in the scope of negotiations petitions.

The Commission invited supplemental briefs. NJ Transit and the Amalgamated Transit Union, New Jersey Council and Division 540, have filed additional briefs and affidavits. The other parties

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2/ New Jersey Transit Bus Operations, Inc. and New Jersey Transit Mercer are subsidiaries of NJ Transit Corporation. Unless otherwise indicated, "NJ Transit" refers to all of those entities. This case does not involve NJ Transit's rail operations.

rely on their prior submissions. ATU has requested oral argument. We deny that request.

P.E.R.C. No. 88-74 discusses the procedural background of these cases, the disputed proposals, and the parties' initial arguments concerning their negotiability. Some issues are no longer controverted because the proposals were withdrawn during negotiations or rejected by Interest Arbitrator Robert Mitrani, whose January 12, 1989 award resolved negotiations impasses between NJ Transit and negotiations units represented by the ATU, New Jersey Council. In addition, NJ Transit has withdrawn its objections concerning the negotiability of some of the other proposals, including the ATU's proposed amendment to the Employee Assistance provision.

Before applying Local 195 to the disputed proposals, we note our limited jurisdiction:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations.... [A]ny 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. [Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975)]

We do not consider a proposal's wisdom. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App Div. 1977). We also note two other limiting factors. First, the parties have agreed that the existence or extent of a permissive category of negotiations is not before us;

therefore, we decide only whether the topics are mandatorily negotiable. Second, this case arises based on contract provisions and proposals that may be susceptible to various meanings; we decide these questions based on our understanding of the disputes.

Individual Scope Rulings

I. NJ TRANSIT BUS OPERATIONS, INC. AND AMALGAMATED TRANSIT UNION, NEW JERSEY COUNCIL
Docket No. SN-87-88

> Purpose Clause (Successorship and Subcontracting)
> In the event that the Company shall dispose of its transit properties and business by sale or other transfer or shall lease the same, the Company shall make it a condition of such sale or transfer or lease that the purchaser or transferee or lessee shall become a party to the Labor Agreement in force with the Union and its Divisions affected by such sale, transfer or lease.
>
> In the event that NJ Transit Bus Operations Inc. or a subsidiary corporation of NJ Transit Bus Operations, Inc. acquires a bus company as a subsidiary corporation in which it has a substantial interest and the subsidiary has routes competing with NJ Transit Bus Operations, Inc. routes, NJ Transit Bus Operations will not decrease operations on routes which compete with the subsidiary company, where the effect is to increase operations of the subsidiary company for the purpose of taking advantage of lower labor costs.

ATU has also proposed to amend the first sentence of the first paragraph to include "or parts thereof."

The first paragraph is not mandatorily negotiable. Local 195 holds that a public employer is not obligated to negotiate a decision to subcontract, even where the subcontracting is undertaken to save labor costs. The requirement that a successor assume the

terms of labor agreements negotiated by NJ Transit could block a contemplated subcontract.

NJ Transit argues that the second paragraph compromises its prerogative to subcontract under Local 195. ATU claims that Local 195 permits negotiations over subcontracting to reduce labor costs. We agree with NJ Transit's view of Local 195. This clause, as discussed by the parties, is not mandatorily negotiable.

Subcontracting, Section 15(I) provides:

> 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.
>
> 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.
>
> 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. The Company agrees to notify the Union in advance of any contracting out of work by reason of this paragraph. It is specifically understood that no maintenance work will be subcontracted to a subsidiary company.

We held in P.E.R.C. No. 88-74 that this section was not mandatorily negotiable. The unions contend that the second sentence of the third paragraph may remain in the contract as a notice provision. We agree. Local 195 allows a majority representative to discuss contemplated subcontracting with an employer. Notice that the employer is considering subcontracting would be necessary to make discussions meaningful. But we cannot agree that a prohibition on subcontracting designed to save labor costs is mandatorily negotiable under Local 195.

Recognition Clause

> Pursuant to and in conformity with the Public Employment Relation Commission, the Company recognizes the Union as the sole and exclusive Bargaining agency for the employees in the units certified by the Public Employment Relations Commission.
>
> The Company agrees to meet and treat with the newly accredited officers and Committee with the Union upon all questions.

We reaffirm our prior determination on this issue. There is no need to replace "Public Employment Relations Commission" with "New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 et seq. Although the Appellate Division has ruled that the scope of mandatory negotiability under the EERA and the NJPTA are the same, NJ Transit's employee relations are governed by the latter statute. Our other comments on this issue were not dependent on a broader scope of negotiability and are still pertinent. See Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 31-32 (1973). The union's proposal to amend the recognition clause, discussed in P.E.R.C. No. 88-47 at 30, 14 NJPER at 177, was rejected by the interest arbitrator and is no longer in dispute.

Seniority and Bidding of Runs

> Before the Company can move a line from one location to another, a full general pick must be first posted in the garage the line is moving from. All employees must then bid on all jobs. Where such consolidation or amalgamation causes undue hardship and the employee shows cause, the Company agrees to pay for reasonable moving expenses incurred by the employee in following their work.
>
> When a run is transferred from one garage to another, an operator will pick to go with the run. For every three runs, four operators will be allowed to pick. For every six (6) hours of

> additional work one (1) additional operator will be permitted to transfer with this work. In each of these situations, operators transferring shall carry their full seniority with them.

In P.E.R.C. No. 88-74, we held the disputed language negotiable under LMRA standards. Standards under the EERA were articulated in Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144 (1978) which held that employee transfers were not mandatorily negotiable. A line of cases distinguishes between non-negotiable criteria and negotiable procedures attendant to personnel actions such as transfers. See Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed. 91 N.J. 18 (1982); Local 195; State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981); Bor. of Fair Lawn Bd of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980); Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 161 N.J. Super. 75 (App. Div. 1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); and N. Bergen Tp. Bd. of Ed. v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976). Applying these cases, we find that both underlined passages are not mandatorily negotiable. Rather than describing procedures attendant to transfers, they compel transfers when runs are moved from one garage to another.

Vacancies

> All vacancies in any department shall be filled by promoting regular employees, provided they are qualified. Foremen and Union representatives shall determine within thirty (30) days whether an employee is qualified or not. Employees failing to qualify within the thirty (30) day period shall be moved back to their former job. The thirty (30) day period may be extended by mutual consent. Any employee bidding on a vacancy shall retain the rate of his former position until qualified in the new position. Upon qualification, an employee shall be paid the new rate retroactively for the thirty (30) day qualification period.
>
> All vacancies in the General Shops shall be filled by promoting employees in the department, provided they are qualified, before hiring new men. Foremen and Union representatives shall determine within thirty (30) days whether an employee is qualified or not. Employees promoted to Repairman C shall pass an examination, ninety (90) days after such promotion, to determine their aptitude and ability to perform Repairman's work. Employees failing such examination shall be moved back to their former job. Any employee bidding on a vacancy shall retain the rate of his former position until qualified in the new position. Upon qualification, an employee shall be paid the new rate retroactively for the thirty (30) day qualification period.

We noted in P.E.R.C. No. 88-74 that the underlined portions would not be mandatorily negotiable under the EERA. We now so hold. See, e.g., Paterson Police PBA v. Paterson, 87 N.J. 78 (1981) (employer cannot be compelled to fill vacancy within a specific time frame or at all); see also North Bergen (employer cannot be limited to promoting from among current employees); Burlington Cty. Coll., P.E.R.C. No. 90-13, 15 NJPER 513, 517 (¶20213 1989) (promotional decisions cannot be shared with majority representatives and employer is free to designate which management employees shall

decide promotions); Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J. (promotional criteria, including decisions as to whether to use an examination, not mandatorily negotiable).

> Part-Time and Seasonal Operations[3/]
>
> a. 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. [The Part-time operators will receive only the pay and benefits specifically provided for in this section.]
>
> b. The introduction of part-time operators is not intended to, and shall not affect adversely the continued employment of full-time operators by taking work away from full-time operators and transferring it to part-time operators. To accomplish this objective, no part-time operator shall work at a time when a full-time operator is on economic layoff (not employed by NJT Bus) and willing to work.
>
> c. No part-time operator shall work more than 30 hours in any work week, except where unavoidably delayed on assignments which have been picked, or by weather or breakdown on the last day worked. [This limitation shall refer only to actual driving hours.]
>
> d. Part-time operators shall work up to 10% of the scheduled platform hours per week [in the system.] The determination of the amount of scheduled platform hours available to be worked by part-time operators will be based upon the total number of scheduled platform hours in each garage at the time of the general pick.
>
> f. If the company adds unscheduled extra pieces after the general pick, no more than 10%

3/ The interest arbitration award added some language, contained in brackets, to this section. Where the additional language has been challenged, that language is underlined. Where the language is in a section not in dispute it is not shown here. The award also deleted subparagraph e which was in dispute in P.E.R.C. No. 88-74.

> of the platform hours of such pieces shall be assigned to part-time employees.
>
> g. Part-time operators may work all charters, subject only to the provisions of paragraph "C" above, and provided that there are no full-time operators in the garage who are assigned or who volunteer to work same.
>
> The hiring of part-time operators is subject to a 10% limitation of the full-time work force of operators at each location.
>
> In addition to part-time operators, the Company may hire seasonal operators in the Southern Division. Said seasonal operators may only work between May 1st and September 15th. Seasonal operators will be considered full-time operators for the purposes of pay calculation and picking of runs, and shall be entitled to and covered by the contract provisions for Union membership and checkoff on a non-discriminatory basis and the grievance procedure after completion of the probationary period, but they shall not be entitled to any of the rights of Section 12 of the contract (Layoffs or Transfers), nor shall they be entitled to any accumulation of seniority in the event the employee works more than one season. Employees who were previously employed as seasonals and who are recalled to work shall maintain their rate of pay.

In P.E.R.C. No. 88-74 we determined this issue based on LMRA standards. We now apply Local 195.

The use of part-time employees affects important employee interests such as preserving the work of full-time employees, including the opportunity to work overtime, and the ability to determine the hours of work and rates of pay for unit positions. On the other hand, an employer must be able to set its levels of service and to employ a work force capable of meeting those needs. Thus NJ Transit must have the right to assign part-time employees where it can demonstrate that it cannot otherwise deliver its

service. See Burlington Cty. Coll. Fac. Ass'n v. Burlington Cty. Coll., 64 N.J. 10, 12 (1974) (faculty work hours must be negotiated in light of the college calendar). Another employer interest is in keeping its labor costs low. However, that is an economic interest, not one of inherent managerial prerogative, and does not outweigh the interests of employees in maintaining their jobs and negotiating about their hours of work and pay rates. As we said in N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88):

> The Authority retains the sole right to determine when its services will be offered, what work must be done, how many employees are needed to staff its operations, and what qualifications an employee must possess in order to work.
>
> * * *
>
> The first question is which employees will work these extra work hours and here there is no dispute that the regular full-time employees who normally perform such tasks are fully qualified to work these weekend hours as well. The second question is what rate employees will be paid for working these weekend hours. That question is wholly economic and indeed is what triggered these grievances. The Authority may have legitimate budgetary concerns about that question, but such concerns do not make this rate of pay issue non-negotiable in the abstract. Woodstown-Pilesgrove [Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582,] 594 [1980]; Piscataway Tp. Bd. of Ed. v. Piscataway Principals Ass'n, 164 N.J. Super. 98, 101 (App. Div. 1978); Rutgers [The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), aff'd App. Div. Dkt. No. A-3651-78 (7/1/80)] and [Rutgers, the State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12274 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83)]; Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83); Park Ridge Bor., P.E.R.C. No. 87-55, 12 NJPER 851 (¶17328 1986); State of New Jersey, P.E.R.C. No.

> 86-139, 12 NJPER 484 (¶17185 1986); Moorestown Tp., P.E.R.C. No. 84-122, 10 NJPER 268 (¶15132 1984). [13 NJPER at 495-496, footnote omitted]

See also Bor. of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1989), aff'd App Div. Dkt. No. A-2418-88T2 (12/22/89); Bor. of Highland Park, P.E.R.C. No. 90-29, 15 NJPER 606 (¶20251 1989).

The Local 195 standards require us to balance the competing interests of the employees and the employer to determine whether a proposal is mandatorily negotiable. NJ Transit's argument that the clauses all interfere with its statutory mission is too broad. We recognize that NJ Transit has an interest in minimizing labor costs and that the proposal might affect that goal by requiring NJ Transit to pay bus operators for time that they are available but not driving buses. However, the unrestricted right to employ part-time employees to reduce labor costs could totally undermine the work and welfare of full-time unit personnel. Full-time employees have an interest in being paid for those hours that they have made themselves available to work because they have effectively removed themselves from the labor market for that period. In general, this dispute is grist for the negotiations mill, although no absolute limits can be set on the use of part-time employees. We will therefore consider each disputed portion of this section separately.

The underlined portion of section a is mandatorily negotiable. It merely recites that the use of part-time employees will be as set forth in the contract. It will apply only to the disputed restrictions we find to be mandatorily negotiable and to those portions of the article not in dispute.

Section b is mandatorily negotiable because it bears predominantly on job security for full-time employees. The clause applies only in situations of economic layoff and does not prevent the employer from determining levels of service or qualifications.[4/] The clause also protects the employees' interest in keeping unit work traditionally performed by full-time unit members from encroachment by part-time or non-unit employees and from being performed at less than negotiated rates. Sports and Exposition Auth.; Belmar.

Section d is not mandatorily negotiable as written. A finite limitation on the amount of hours part-timers can work may prevent the employer from providing additional or special service if circumstances are such that only part-time operators are available. A finite limitation is different from a clause which establishes preferences among employees based on seniority or full-time status. Compare Sports & Exposition Auth.

Section f is not mandatorily negotiable because it establishes an inflexible limitation, rather than a preference.

Section g is mandatorily negotiable because it establishes a preference for full-timers, rather than a bar against using part-timers. If full-time employees do not volunteer for such assignments, the employer will be free to use part-timers. See Belmar.

4/ We infer that the phrase "willing to work" means that the employee is also "able" to work.

Finally the disputed language restricting the use of seasonal operators is mandatorily negotiable. Seasonal employees are apparently full-time employees who are not afforded certain contractual rights. They are creatures of the parties' agreement and therefore the parties are free to limit when employees hired by NJ Transit shall be subject to these limited benefits. This clause does not restrict NJ Transit's right to hire as many employees as it wants, whenever it wants, for however long it wants. It simply provides that the employer cannot label these employees as seasonal for purposes of limiting their contractual rights.

Scheduling

NJ Transit wants the underlined portions of the following article deleted:

> A. Regular runs shall consist of paying not less than eight (8) hours and having no more than a 2-hour swing. Runs may consist of assignments of six (6) hours but less than eight (8) hours and in such cases shall pay eight (8) hours. Except on pull-in trips and certain late runs, relief shall be made as soon as possible after seven (7) hours and forty-five (45) minutes of work. Any straight piece of work of at least seven (7) hours shall not be combined into a swing run. However, pieces of work between six (6) and seven (7) hours may be combined with other pieces of work to form swing runs. At least 66% of these regular runs must be straight runs and the balance, or 34% will have no more than a 2-hour swing. The Company agrees to make on each schedule the maximum number of such regular runs.
>
> The Company shall have the right, after a schedule is broken in accordance with the percentages for straight and swing regular runs, to add one additional regular swing run, if available, instead of using the pieces for making combination runs.

> B. In addition to regular runs, all other combinations of two or more pieces of work totaling at least six (6) hours but less than eight (8) hours with spread of not over twelve (12) hours will be made into runs to pay eight (8) hours. Where two or more pieces of work totaling at least six (6) hours but less than eight (8) hours, an additional piece of work cannot be added. Additional half time after a spread of ten (10) hours and thirty (30) minutes will be paid. Such spread runs may be formed of pieces from more than one line.
>
> In addition to combination runs, all pieces of scheduled line work totaling at least six (6) hours but less than eight (8) hours shall be paid eight (8) hours....
>
> D. Straight runs are to be divided as evenly as practicable between day and night runs....
>
> H. The matter of straight or swing runs on Sunday schedules is to be decided on a garage basis....
>
> I. Any schedule which may be considered objectionable shall be subject to check and revision at the request of the Union promptly.
>
> J. The Company will do its utmost to keep trippers at a minimum. The practice of indiscriminate patching of schedules is to be discontinued except in agreed-upon emergencies.

In P.E.R.C. No. 88-74, we construed this article to predominantly involve the work schedules of drivers rather than the schedules of the bus routes. We find it mandatorily negotiable under the EERA to the extent adherence to the provisions would not require the altering of bus routes and bus schedules. The relationship between the frequency of service on NJ Transit routes and the schedules of the drivers is analogous to the relationship between a school calendar and the days and hours of work of teachers. In Burlington Cty. Coll., the Supreme Court held:

> While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and

> hours of work by individual faculty members or their work loads or their compensation. These matters...are mandatorily negotiable under the Act though the negotiations are to take place in light of the calendar. [64 N.J. at 12]

We thus reaffirm our discussion in P.E.R.C. No. 88-74 at 37, 14 NJPER at 179. NJ Transit's remaining objections in its briefs and affidavits center on labor costs and are insufficient to negate a negotiations obligation. The restriction on using trippers is no longer in dispute, having been rejected by the interest arbitrator, and the provision on reviewing schedules does not give the union the right to reject schedules.

Working Conditions

ATU has proposed to amend an overtime clause to limit overtime to volunteers. An affidavit submitted by NJ Transit's Director of Transportation states that overtime opportunities are often unanticipated or emergent.[5/] The affidavit states that the current practice is to offer overtime opportunities to volunteers where the existence of overtime is known 18 hours in advance. If the opportunities are not taken, then overtime is assigned.

The change proposed by the ATU is not mandatorily negotiable under the EERA because the rest of the clause does not

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5/ An example was a suspension of PATH train service between Jersey City and Harrison. Forty-one extra buses were called out during the three hours the rail service was out. Absent the ability to mandate overtime, the Director states, the required drivers might not be available or there might not be enough time to canvass for volunteers.

preserve NJ Transit's prerogative to make involuntary overtime assignments in emergencies or where employees have been contacted in accordance with negotiated procedures and have not volunteered. NJ Transit must have the reserved right to mandate overtime, in the absence of qualified and available volunteers, to ensure that its services are delivered.

II. NJ TRANSIT MERCER AND AMALGAMATED TRANSIT UNION, DIVISION 540, Docket No. SN-87-89

On July 12, 1979 NJ Transit Mercer and ATU Division 540 executed a memorandum of agreement resolving their negotiations impasse.[6/] Some issues, e.g. "Part-time Employees," were resolved consistent with the Mitrani award. Other portions of the existing contract challenged by NJ Transit were unaffected by the memorandum. Our order concerning Division 540 will incorporate our rulings in part I to the extent they apply. The Division 540 proposal seeking an increase in retirees' benefits was not incorporated into the memorandum of agreement and is no longer in dispute. In its brief on remand, ATU now concedes that the following issues discussed in P.E.R.C. No. 88-74, pertaining to employees represented by Division 540, would not be mandatorily negotiable under the EERA: Right To Strike; Accident Reports and Disciplinary Standards; Sick Leave Policy and Work Assignments. We now consider the remaining issues.

6/ This memorandum is in the files of our Division of Conciliation and Arbitration. We take administrative notice of it.

The part-time and seasonal operators portion of the Division 540 contract contains an additional paragraph which does not appear in SN-87-88. The challenged section reads:

> (h) The Company's right to use part-time operators shall terminate if repeated proven violations of the limitations contained in this section occur and continue to occur following written notice of the nature and approximate dates of such violations delivered to the General Manager of the Company by the Union. If a bonafide dispute arises concerning the occurrence of such violations alleged to have been repeated, the matter may be submitted directly to arbitration at the request of either party pursuant to the applicable terms of this agreement.

We have ruled in SN-87-88 that provisions restricting the use of part-timers are mandatorily negotiable unless they set absolute limits which would prevent the employer from providing the levels of service it determined were necessary. Thus paragraphs (d) and (f), which contained absolute limits, are not mandatorily negotiable and paragraph (h) is not mandatorily negotiable to the extent it would incorporate them. Without paragraphs (d) and (f), this paragraph provides a means of enforcing mandatorily negotiable restrictions on the use of part-time employees. Hence this paragraph, so construed, would also be mandatorily negotiable. If it is invoked in a manner which would prevent the employer from delivering its desired level of service, a restraint of arbitration can be sought at that time.

Union Security and Check-Off[7/]

> All present employees and all new Union employees shall become and remain members in good standing of the Union as a condition of continuous employment with the Company. Employees entering the service of the Company shall become members of the Union after 30 days. However, the 90-day probationary period agreed to by the employee on applying for a position with the Company will be recognized.
>
> Members of the Union suspended from the Union for failure to pay initiation fees, periodic dues or assessments required by the Union as a condition of acquiring or retaining such membership, shall be suspended from the service of the Company upon written request of the President of the Union stating such cause for suspension. In case the company feels that the any member of the Union has been suspended for a cause other than that stated in the written request from the President of the Union, the question will be submitted to arbitration upon the request of the Company in accordance with the procedure set out in Article V.

N.J.S.A 27:25-14(a) specifically authorizes union security agreements. At the time that section was enacted, there was no comparable public sector legislation authorizing agency shop fees. N.J. Turnpike Employees Union v. N.J. Turnpike Auth., 123 N.J. Super. 461, 463-464 (App. Div. 1973), aff'd 64 N.J. 579 (1974). Thus, the Legislature must have had in mind private sector precedents on this issue.

We do not agree that the NJPTA was amended by subsequent amendments to the EERA authorizing representation fees. "Employees" as defined by the NJPTA (N.J.S.A. 27:25-14(a)) is not equivalent to

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7/ Only the first paragraph of the following provision is at issue in SN-87-88.

"public employee" as defined by the EERA (N.J.S.A. 34:13A-3(d)). The provisions of N.J.S.A. 34:13-5.5 through 5.9 apply only to EERA "public employees."

However, as we recognized in P.E.R.C. No. 88-74, there are constitutional restrictions on union security devices which cover employees of a government entity. Many of those restrictions now apply to private entities, thus eliminating many differences between private sector and public sector forms of union security. See, e.g., CWA v. Beck, 487 U.S. ___, 101 L. Ed. 2d. 634, 128 LRRM 2729 (1988). Both forms of union security must contain the constitutional protections set forth in Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986). Thus, except for the maximum amount collectible and the methods used to collect fees, there is little difference in practice between the forms of union security available under the EERA and the NJPTA. The requirement of membership in the union is limited by law to the financial core obligation to pay dues, NLRB v. General Motors Corp., 373 U.S. 734 (1963), less that portion of dues which supports activities unrelated to "collective bargaining, contract administration and grievance adjustment." Beck. The specific language in dispute is mandatorily negotiable, provided the union security agreement is administered in accordance with the requirements of Beck, Hudson, and General Motors.

Snow Work

> All snow work shall be performed by the Maintenance Department and shall be paid at the rate of double time for the actual time worked. It is understood that snow work pertains to the clearing, salting and sanding of snow and ice not normally performed in the regular course of daily work.

In P.E.R.C. No. 88-74 we held that a similar clause was mandatorily negotiable except to the extent it prevented NJ Transit from subcontracting snow work. The thrust of this proposal is to define snow work as a premium pay opportunity reserved for maintenance department employees. As such it is mandatorily negotiable. If used to challenge subcontracting, NJ Transit can seek to block arbitration of such a grievance if and when it arises.

III. **NJ TRANSIT BUS OPERATIONS, INC. AND DIVISION NOS. 819-825 AND 880 OF THE AMALGAMATED TRANSIT UNION (Field Salaried Employees), Docket No. SN-87-92**

We have already redecided or noted the absence of a continuing dispute concerning these clauses: Purpose Clause, Recognition, Management Rights, Grievance Procedure, Union Security, Vacancies, Seasonal Employees and Part-Time and Temporary Employees. Two clauses which were addressed in P.E.R.C. No. 88-74, Seniority-Layoff and Specifications -- Various Salaried Classifications, were withdrawn during negotiations and are no longer in dispute.

IV. **NJ TRANSIT BUS OPERATIONS, INC. AND DIVISION NOS. 819-825 AND 880 OF THE AMALGAMATED TRANSIT UNION (General Office and Clerical Employees), Docket No. SN-87-93**

All the clauses in dispute were decided in Parts I to III.

V. **NJ TRANSIT BUS OPERATIONS AND UNITED TRANSPORTATION UNION (Paterson Division) Docket No. SN-87-91**

NJ Transit asserts that this unit's contract was settled in accordance with the Mitrani award. The uniform proposal discussed

in Section V of P.E.R.C No. 88-74 is no longer in dispute. The other proposals have been previously addressed (Preamble, Union Security, Leaves of Absence, Overtime Assignment/Time for Reporting and Turning In, Arbitration, and Part-Time Operators). These determinations need not be repeated. The portions of the agreement addressing strikes (Article III, Rule 23 and Article V, Rule 62) were found to not be mandatorily negotiable in P.E.R.C. No. 88-74. That determination is reaffirmed.

VI. **NJ TRANSIT BUS OPERATIONS, INC. AND UNITED TRANSPORTATION UNION (Warwick Division) Docket No. SN-88-8**

The parties' submissions indicate that the contract for this unit has not been resolved. We have already decided the negotiability of these proposals: Preamble, Union Security, Leaves of Absence, Working During Strike, Part-Time Operators, Overtime Assignments, Time for Reporting and Turning In, Arbitration, Schedules, Snow Work and Vacations. We need only consider the proposal on Emergency Work Assignments for maintenance employees:

> Two employees shall be assigned to road calls on major highways, turnpikes and parkways, and on other road calls where the services of two employees are required.

A proposal predominately involving safety is mandatorily negotiable under the EERA. See Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989). But the predominant issue raised by this proposal is staffing, not safety. As we said in P.E.R.C. No. 88-74, it would not be mandatorily negotiable under the EERA. We now so hold. Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978).

VII. NJ TRANSIT BUS OPERATIONS, INC. AND TRANSPORT WORKERS UNION OF AMERICA, LOCAL 225
Docket No. SN-87-90

Local 225 represents 225 bus operators, field salaried and maintenance department employees located in the NJ Transit Bus Fairview garage and formerly employed by the Maplewood Equipment Company.

TWU has agreed to the terms of the Mitrani interest arbitration award. Therefore the discussion of the disputed ATU provisions and proposals applies to TWU. The TWU "Exact Fare" "Wearing Apparel" and "Progression" proposals discussed in P.E.R.C. No. 88-74 were not part of the award and are no longer in dispute.

ORDER

THE FOLLOWING PROPOSALS ARE MANDATORILY NEGOTIABLE CONSISTENT WITH THIS OPINION:

A. NJ Transit Bus Operations, Inc. and Amalgamated Transit Union, New Jersey Council

1. Docket No. SN-87-88 (Bus Operators and Maintenance Department Employees)

Subcontracting, Section 15(I) (second sentence of third paragraph only), Recognition Clause, Part-Time and Seasonal Operations (Sections a, b, g & the paragraph concerning seasonal operators), Scheduling, Union Security.

2. Docket No. SN-87-92 (Field Salaried Employees)

Recognition Clause, Seasonal Employees, Part-Time and Temporary Employees, Union Security.

3. Docket No. SN-87-93 (General Office Clerical)

Recognition Clause, Union Security.

B. NJ Transit Mercer, Inc. and Amalgamated Transit Union, Division 540

Docket No. SN-87-89

Part-Time Employees (Sections a, b, g & h), Work Assignments, Union Security & Check-off, Snow Work

C. NJ Transit Bus Operations, Inc. and United Transportation Union, Local No. 33 (Paterson & Warwick Divisions)

1. Docket No. SN-87-91 (Paterson Division -- Garage Employees)

Preamble, Union Security, Part-Time Operators (Introductory paragraph and Sections A & F)

2. Docket No. SN-88-8 (Warwick Division -- Garage Employees)

Preamble, Union Security, Schedules, Snow Work.

D. NJ Transit Bus Operations, Inc. and Transport Workers Union of America, Local 225

Docket No. SN-87-90

Snow Work, Union Security, Schedules, Part-Time Operators.

THE FOLLOWING PROPOSALS ARE NOT MANDATORILY NEGOTIABLE CONSISTENT WITH THIS OPINION:

A. NJ Transit Bus Operations, Inc. and Amalgamated Transit Union, New Jersey Council

1. Docket No. SN-87-88 (Bus Operators and Maintenance Department Employees)

Purpose Clause (Successorship and Subcontracting), Subcontracting-Section 15(I) (except for second sentence of third paragraph), Seniority and Bidding of Runs, Vacancies, Part-Time and Seasonal Operations (Sections d and f), Scheduling, Working Conditions

2. Docket No. SN-87-92 (Field Salaried Employees)

Purpose Clause (Successorship and Subcontracting), Seniority and Bidding of Runs, Vacancies.

3. Docket No. SN-87-93 (General Office Clerical)

Purpose Clause (Successorship and Subcontracting), Vacancies

B. NJ Transit Mercer, Inc. and Amalgamated Transit Union, Division 540 (Docket No. SN-87-89)

Successorship, Subcontracting (Article II Section 2), Vacancies, Part-Time Employees (Sections d and f)

C. NJ Transit Bus Operations, Inc. and United Transportation Union Local No. 33 (Paterson & Warwick Divisions)

1. Docket No. SN-87-91 (Paterson Division -- Garage Employees)

Overtime Assignment/Time for Reporting and Turning In, Part-Time Operators (Sections C & E)

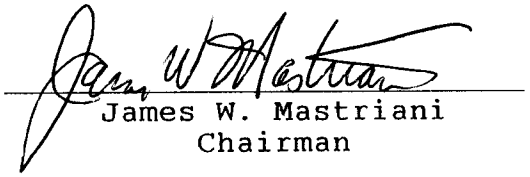
2. Docket No. SN-88-8 (Warwick Division -- Garage Employees)

Schedules, Overtime Assignment/Time for Reporting and Turning In, Part-time Operators, Emergency Work Assignments, Vacancies.

D. NJ Transit Bus Operations, Inc. and Transport Workers Union of America, Local 225 (Docket No. SN-87-90)

Purpose Clause, Scheduling, Working Conditions, Seniority and Bidding of Runs, Vacancies, Part-Time Operators.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 25, 1990