P.E.R.C. NO. 93-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY
(GARDEN STATE PARKWAY)

Respondent,

-and- Docket No. CO-H-92-41

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 193C, AFL-CIO

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the New Jersey Highway Authority based on an unfair practice charge filed by IFPTE, Local 193C. The charge alleged that the Authority violated the Act when it unilaterally required unit employees to stop commuting in Authority vehicles and refused to negotiate over the economic consequences of the changed policy. The Commission concludes that the Authority did not change its policy of providing vehicles for commuting during the winter months only and the charging party did not prove the factual predicate for its negotiability claim.

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Charging Party.

Appearances:

For the Respondent, Schwartz, Simon & Edelstein, attorneys (Nicholas Celso III, of counsel; Nicholas Celso III and Andrew Brown, on the brief)

For the Charging Party, Leonard J. Cornwall, IFPTE International Representative

DECISION AND ORDER

On August 1, 1991, the International Federation of Professional and Technical Engineers, Local 193C, AFL-CIO filed an unfair practice charge against the New Jersey Highway Authority (Garden State Parkway). The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (5) and (7),[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

when, on May 20, 1991, it unilaterally required unit employees to stop commuting in Authority vehicles, thereby eliminating an economic benefit. The charge further alleges that the Authority refused to negotiate over the economic consequences of the changed policy.

On December 27, 1991, a Complaint and Notice of Hearing issued. On January 13, 1992, the Authority filed its Answer admitting that it directed employees to discontinue their use of Authority vehicles beyond the work day, except during winter, consistent with its policy first implemented on November 2, 1990. It further admits that it refused to negotiate over the economic impact of its actions, but claims that it acted pursuant to a managerial prerogative and contractual right. Finally, the Authority claims that the charge is untimely.

On June 4 and September 24, 1992, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

On March 11, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-19, 19 NJPER 174 (¶24089 1993). He found that the Authority merely continued a practice, predating representation by Local 193C, that permitted employees to commute in Authority vehicles during the winter only.

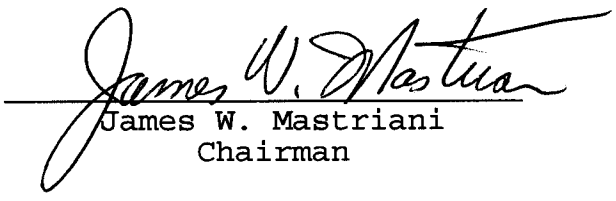
The Hearing Examiner served his decision on the parties and informed them that exceptions were due by March 24, 1993. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We adopt the Hearing Examiner's undisputed findings of fact (H.E. at 3-26). We also adopt the Hearing Examiner's conclusion that the Authority did not change its policy of providing vehicles for commuting during the winter months only. Thus, Local 193C has not proved the factual predicate for its negotiability claim. Accordingly, in the absence of exceptions, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 20, 1993
Trenton, New Jersey
ISSUED: May 21, 1993

H.E. NO. 93-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY
(GARDEN STATE PARKWAY)

Respondent,

-and- Docket No. CO-H-92-41

IFPTE, LOCAL 193C, AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the New Jersey Highway Authority did not violate the New Jersey Employer-Employee Relations Act by refusing to negotiate with IFPTE, Local 193C over requiring employees to cease commuting in Authority-owned vehicles in May 1991. The Hearing Examiner concluded that the Authority's actions were consistent with established practice, thus, no change occurred which would give rise to negotiations over economic matters.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 93-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY
(GARDEN STATE PARKWAY)

Respondent,

-and- Docket No. CO-H-92-41

IFPTE, LOCAL 193C, AFL-CIO

Charging Party.

Appearances:

For the Respondent, Schwartz, Simon & Edelstein, attorneys (Nicholas Celso III, of counsel; Nicholas Celso III and Andrew Brown, on the brief)

For the Charging Party, Leonard J. Cornwall, IFPTE International Representative

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On August 1, 1991, International Federation of Professional and Technical Engineers, Local 193C (IFPTE) filed an unfair practice charge with the Public Employment Relations Commission alleging that the New Jersey Highway Authority, Garden State Parkway (Authority) violated subsections 5.4(a)(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in

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IFPTE alleged that on or about May 20, 1991 the Authority unilaterally changed a term and condition of employment by requiring "maintenance supervisors" to cease commuting to and from work in Authority-owned vehicles thereby eliminating an economic benefit. It further alleged that on May 28, 1991 it requested negotiations over the economic impact of the Authority's action, but that the Authority refused to negotiate on or about June 18, 1991.

A Complaint and Notice of Hearing was issued on December 27, 1991. The Authority filed an answer and affirmative defenses on January 13, 1992. The Authority denied it made a unilateral change or eliminated an economic benefit. It admitted directing "maintenance supervisors" on or about May 20, 1991 to discontinue using Authority vehicles beyond the work day except in the winter season; that IFPTE requested negotiations over economic impact but that it refused to negotiate over the impact of its actions. The Authority asserted a managerial prerogative, contract, and statute of limitations defenses.[2/]

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regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ Although both parties referred to the relevant title here as "maintenance supervisor," there is no such title. The relevant title is "crew supervisor."

Hearings were held on June 4 and September 24, 1992.[3/] After IFPTE rested its case on June 4, the Authority moved to dismiss. I denied that motion by letter of June 29, 1992.

After the close of hearing both parties filed briefs, and reply briefs, the last of which was received on February 8, 1993.

Based upon the entire record I make the following:

Findings of Fact

1. On December 19, 1989 IFPTE was certified as majority representative for a unit including crew supervisors, equipment trainers, garage supervisors, sign shop supervisors and pavement marking supervisor. There is no position entitled "maintenance supervisor."

The Authority was reorganized in November 1988, and the crew supervisor title and the equipment trainer title were created in December 1988 (T305). The crew supervisor title replaced two former titles: assistant district supervisor (ADS), and foreman, which were eliminated during the reorganization (T305).

The ADS employees had not been represented by a labor organization, but the foreman had been included in IFPTE, Local 196 (not the charging party here) (T351).

2. Dan Noxon was hired as the Authority's Director of Maintenance in July 1986. Since at least from that time and until

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3/ Although there were two days of hearing the transcripts were prepared with continuous pagination. Thus, the transcripts will be referred to as "T," followed by the page number. The second day of hearing began with page number 186.

April 1988, ADS employees were allowed to commute to and from work in their assigned Authority-owned vehicle on a year-round basis. Foreman were not allowed to commute in their assigned vehicles, but could drive them to the Authority location nearest to their homes during the winter season (T294-T295).

By memorandum of February 3, 1988 (CP-1), the Authority's finance director notified Noxon, and other high-level employees, that pursuant to Federal law, an additional $651 would be included as income for employees commuting in Authority-owned vehicles.[4/] A follow-up memo with the same information was issued on February 23, 1988 (CP-2). The ADS employees were affected by CP-1 and CP-2, but once those ADS employees who became crew supervisors became represented by IFPTE, they were no longer subject to the requirements of CP-1 (T198-T201).[5/]

4/ The employees were not "charged" $651 for personal use of Authority vehicles. Rather, $651 was added to their W-2 salary as income, but pursuant to CP-1, no income tax was charged or deducted on that $651. Thus, some employees might have had to pay a bit more income tax than was otherwise deducted from their pay checks (T202-T203).

5/ Salvatore Barletta, the Authority's Chief Accountant, was responsible for payroll, and was the Authority official responsible for adding $651 to affected employees' W-2 statements pursuant to CP-1 (T200). Except for one instance which was inadvertent, Barletta did not add $651 to the W-2 forms of any employees once their titles were included in any labor organization's unit (T198-T200). Employee James Thomas, a crew supervisor, and current IFPTE secretary, testified that he "had to pay the $651" from when he was hired to the time his vehicle was taken away, presumably May 1991 (T32). First,

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3. After reviewing the use of its vehicles, the policy of allowing ADS employees to commute in Authority vehicles changed in March/April 1988. By memorandum of March 2, 1988 (R-8), re: "Assignment of Authority Vehicles," the Authority's director of central purchasing notified Noxon that employees holding ADS titles (and some other employees) were not justified in having Authority vehicles on a 24-hour basis. Exhibit R-8 stopped the policy of year-round 24-hour vehicle assignment to ADS employees and began the new policy of vehicle assignment (T294). The new policy was the assignment of vehicles to ADS employees during the workday on a year-round basis, but they were required to leave the vehicles at the Authority location nearest to their homes in the evening, except during the winter season when they would be allowed to commute in their vehicles. Thus, the new policy meant the employees would only be allowed to commute in their vehicles on a seasonal basis (T304).

Exhibit R-8 was representative of similar memos sent to other department heads, notifying them which employees were affected by the policy change (T295). Both Fred DeFeo and James Thomas were

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5/ Footnote Continued From Previous Page

as explained in note 4, supra, employees were not required to pay $651 for the use of the vehicles, they were only liable to pay the tax on an additional $651 of income. Second, while $651 may have been added to Thomas' W-2 after IFPTE began representing crew supervisors, that does not negate Barletta's testimony. Barletta explained that $651 was inadvertently added to one crew supervisor's W-2. The record does not show who that was, but it may have been Thomas. Thus, I credit Barletta's testimony and find that CP-1 did not apply to crew supervisors after IFPTE became their majority representative.

ADS employees specifically listed on R-8 as losing their assigned vehicles for commuting. They subsequently became crew supervisors and IFPTE union officials.

The Authority knew that its policy change would affect employee commuting, thus R-8 included the following implementation paragraph:

> We realize that there needs to be a grace period provided so that employees effected by this reduction of assigned vehicles can arrange for alternate commuting transportation. Therefore, the effective date for the implementation of this policy is Monday, April 4, 1988. (Emphasis added).

Pursuant to the R-8 directive, Noxon notified the ADS employees, by memorandums of March 16, 1988, about the new vehicle policy and the loss of their vehicles for commuting (Exhibits R-9 - R-14).[6/] Both DeFeo and Thomas received copies of the memorandum (R-10, R-11, T296-T298).

That memorandum provides:

6/ In its post-hearing brief IFPTE generally questioned whether the Authority actually changed the vehicle commuting policy that had pre-existed R-8, or merely "interrupted" it. I find that the evidence shows, conclusively, that the Authority intended to end the year-round 24-hour assignment of vehicles to ADS employees and R-8, Noxon's testimony, and subsequent notices to employees (R-9 - R-14) are credible evidence of the Authority's intent. By issuing R-8 and notifying employees (R-9 - R-14 and similar memos), the Authority, in fact, began implementing the new policy.

While IFPTE strongly suggested there was no real change in policy after April 1988, and even argued that the Authority did not "promulgate" a seasonal commuting policy to the employees, it could offer no credible evidence to rebut Noxon's testimony (at T304) that the new policy included the use of vehicles for commuting only on a seasonal basis.

> After a comprehensive study on use of Authority vehicles, it was determined that certain positions cannot justify a vehicle being assigned to them on a 24 hour basis. These positions can be adequately serviced by vehicles available at the Motor Pools in Woodbridge and Central Maintenance or various Maintenance Districts. Yours is one of the Maintenance positions for which a vehicle will no longer be provided for commuting purposes.
>
> We realize that there needs to be a grace period provided so that employees effected can arrange for alternate commuting transportation. Therefore, the effective date for the implementation of this policy is Monday, April 4th, 1988.
>
> Effective that date, your vehicle is to be delivered to your work location. Those vehicles in the Districts will be assigned as part of the District fleet and available on a daily basis for work purposes. Those vehicles assigned to Central Maintenance should have all personal items removed and all keys and credit cards personally given to Art Taylor. Some of these vehicles will be returned to the Motor Pool and some will be retained for a Central Maintenance Motor Pool.

As directed by the March 16 memorandums, the ADS employees, including DeFeo and Thomas, stopped using their vehicles for commuting purposes effective April 4, 1988 (T125, T258, T297-T303, T325-T327). Some ADS employees may have used their vehicles for commuting after that date, but they were not authorized to do so except during the winter season (T304, T327, T352).[7/]

7/ Noxon testified that he served both DeFeo and Thomas with the March 16 memorandums (R-10 and R-11, respectively) and that both men complied with the directive on or about April 4, 1988 (T296-T298, T325). He further testified that this was a permanent change, and, thereafter, he did temporary reassignments (for commuting purposes) for the winter season

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4. During the spring/summer of 1988 the Authority had decided to reorganize the maintenance department. Noxon remained its Director. In November 1988 the Authority technically abolished the ADS and foreman positions which were replaced by the newly created crew supervisor position (T82, T305). The equipment trainer position was also created at that time.

The crew supervisors were to report to crew managers. The crew managers were to report to one of three division superintendents, and they reported to Noxon (T219, T239, T293). The

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7/ Footnote Continued From Previous Page

in November of each year (T325). DeFeo testified that in early 1988 he received a memo from Noxon, presumably R-10, resulting in his vehicle being taken away (for commuting purposes) "for a period of about two months" (T119). Thomas testified at this hearing but gave no testimony about whether he received or complied with R-11 or whether he commuted with his vehicle between April and November 1988.

I credit Noxon's testimony and find that both DeFeo and Thomas received and complied with the March 16 memorandums, and did not use -- or at the very least were not authorized to use -- their vehicles for commuting between April and November 1988. First, Thomas did not rebut Noxon's testimony that he received and complied with R-11. Having observed Noxon while testifying I find he had good command of the facts and I found him to be a trustworthy witness. DeFeo admitted he received R-10 and complied with it for about two months. I do not accept that testimony, however, to rebut Noxon's testimony that the vehicle commuting policy had changed as of April 1988; prove that DeFeo was authorized to commute in his vehicle prior to November 1988; or prove that DeFeo even used his vehicle for commuting before November 1988. DeFeo only testified his vehicle was taken away for a period "of about" two months. That is not conclusive testimony. He gave this testimony four years after the event, and since he could not be certain, I cannot rely on the testimony to overcome Noxon's testimony.

equipment trainers were to report to the equipment manager (T147, T219).

Although the official reorganization action eliminating the ADS and creating the crew supervisor position occurred in November 1988, most crew supervisors were not officially appointed until September 1989 (T329). The former ADS and foreman employees first had to be interviewed for the crew supervisor positions (T305-T306). In the interim between the elimination of ADS titles and the crew supervisor appointments, the ADS designation for the affected employees remained in use (T329).

During the same month the reorganization was proceeding, November 1988, Noxon received authority to reassign the vehicles to ADS employees on a 24-hour basis for the winter season. The 24-hour reassignment was terminated in early spring 1989 (T304, T307, T325, R-16).[8/]

8/ On cross-examination IFPTE's business representative asked Noxon if he recalled reassigning DeFeo's vehicle to him on a 24-hour basis for the winter season. Noxon indicated he had no specific recollection but remembered reassigning vehicles to ADS employees. IFPTE's business representative concluded that Noxon had no recollection of doing it (T326). In its post-hearing brief IFPTE argued that Noxon's testimony was so uncertain it could not be concluded that a clear policy of seasonal assignment of vehicles for commuting was established in the fall of 1988. I do not agree. As I explained in note 6, supra, Noxon clearly explained the new vehicle commuting policy. His inability to specifically recall reassigning 24-hour vehicle use to DeFeo in the fall of 1988 is not proof that no such policy existed. I will not draw a negative inference from Noxon's testimony. Rather, I found his explanation of the policy and events of 1988 and 1989 reasonable and believable, and I credit it here.

After the ADS and foreman positions were technically abolished, the employees holding those positions who were interested in becoming crew supervisors applied for and were interviewed for that position. Noxon had appointed three superintendents, one for each area of the State. Those superintendents conducted screening interviews of ADS employees and informed Noxon which applicants met the minimum qualifications for crew supervisor. Then Noxon, and an assistant, interviewed all of the qualified applicants for the crew supervisor positions (T305-T306). The appointments were all made by September 1989 (T329).

Noxon did not direct the superintendents to inform the applicants that they would have year-round 24-hour vehicle use, nor did Noxon, himself, tell applicants they would have such vehicle use (T306-T307, T329-T331).[9/]

9/ On cross-examination Noxon admitted he did not know what the superintendents told the applicants, and that he did not tell the superintendents not to tell the applicants they would have 24-hour vehicle use (T330-T331). In its post-hearing brief IFPTE, once again, drew a negative inference from that testimony asserting that the applicants were not told about only a seasonal use of vehicles for commuting, and concluded, therefore, that there was no credible evidence of such a seasonal commuting policy. I reject IFPTE's argument and inferences. Noxon's admission that he was uncertain what was said to the applicants, does not negate earlier testimony, and R-8 and R-9 - R-14, that there was a new policy. Noxon's testimony was that the superintendents were not told to tell the applicants that they would have 24-hour vehicle use, and IFPTE has not rebutted that testimony, nor did it prove that crew supervisor applicants were told they would have 24-hour vehicle use. IFPTE had the burden to prove there was no policy change from the pre-1988 policy, and it did not offer evidence to rebut Noxon's testimony or documents about the new policy. Therefore, I credit Noxon's testimony here.

5. In the spring of 1989 the Authority, consistent with its new policy, withdrew the vehicles from ADS employees for commuting purposes. On October 12, 1989 IFPTE filed a representation petition with the Commission (RO-90-57) seeking to represent crew supervisors, equipment trainers, and other employees. On November 27, 1989 Noxon, for the second year in a row, sent a memo to Authority Executive Director, George Zilocchi, (R-16) requesting the seasonal assignment of vehicles for commuting to crew supervisors on a 24-hour basis. Exhibit R-16 provided:

> Past practice has established the policy which allowed Supervisors to take their vehicles home during the winter (snow) months. I would like to continue this policy and allow our Crew Supervisors this same practice. As in the past, this would allow Supervisors to be on call 24-hours a day and reduce the response time for any road emergency.
>
> Allowing vehicle use on a temporary basis as requested should be interpreted as not setting any precedent for full time use until such time as other determinations are made.
>
> Only the Crew Supervisor would be allowed to operate this vehicle. The transporting of any other employees to or from a work area would be prohibited.10/

10/ The "past practice" referred to in R-16 was the policy the Authority had developed which allowed certain supervisors to take their vehicles home during the winter season. A similar request had been made for the ADS employees the previous year (November 1988). (T309). In its post-hearing brief IFPTE argued that Noxon had merely assumed what period the past practice covered and that crew supervisors were not aware of it. That argument lacks merit. Noxon answered the past practice question directly and informatively. It was a matter of fact answer that showed he knew he had made a similar request the previous year. IFPTE did not offer any direct

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Zilocchi approved R-16 on November 30, 1989. That same day, the Commission conducted an election for crew supervisors, and other employees, to determine whether they wanted to be represented by IFPTE. On December 4, 1989 Noxon gave his assistant, Barry Olszanowski, a copy of R-16 with a note he (Noxon) wrote on it which said:

> Please ensure the qualifier and restrictions are clear to everyone. We will need information of our experiences for study to determine ending, extending or making permanent (T309).11/

Shortly thereafter, the crew supervisors were allowed to commute in their vehicles for the winter season.

On December 19, 1989 IFPTE was certified as majority representative for a unit including crew supervisors, and others.

10/ Footnote Continued From Previous Page

evidence to rebut Noxon's testimony about past practice. Since I found Noxon a reliable witness I credit his testimony. Whether the crew supervisors were aware of the prior practice or seasonal practice, or not, is not dispositive.

11/ Noxon wrote the "qualifier" note to Olszanowski on R-16 just to remind him to make sure the qualifiers and restrictions were made known to the crew supervisors. But Noxon did not know whether Olszanowski carried out that directive (T334). In its post-hearing brief IFPTE argued that the crew supervisors did not receive R-16, nor were they otherwise informed of the seasonal commuting policy. Whether that's accurate or not is not relevant. IFPTE did not produce evidence that R-16 was a fictitious document. The employees' ignorance of it does not negate its existence or rebut what it was intended to prove, that Noxon, consistent with his earlier testimony about the new vehicle commuting policy, was requesting for 1989-90, as he did for 1988-89, the use of vehicles for seasonal commuting. I find that R-16 supports Noxon's testimony of a seasonal commuting policy.

6. The parties began negotiating in early 1990. IFPTE prepared its proposals in February 1990 which were submitted to the Authority. One page of those proposals (R-6) contained "Section 26 Miscellaneous" and proposed adding as paragraph five the following paragraph concerning vehicle assignment:

> The Authority will assign each supervisor with an appropriate vehicle to respond to emergency callouts. This vehicle will be kept by each supervisor on a year-round basis.12/

Vehicles were discussed during negotiations and the Authority argued that vehicle assignment was not negotiable (T211).

On March 19, 1990 Noxon prepared a memo (R-1) for "Crew Supervisors and Trainers" noting the end of the seasonal assignment of vehicles for commuting that season. Noxon wanted the affected employees to be prepared to cease commuting in the vehicles after

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12/ IFPTE witnesses James Thomas, Robert Nemeth, and IFPTE President DeFeo, were all present during negotiations for a collective agreement (T40, T77, T115). At the June 4 hearing Thomas and Nemeth testified that neither IFPTE nor the Authority made a proposal regarding vehicle use (T29, T77). DeFeo testified that IFPTE discussed vehicles with the Authority, but did not offer a written proposal (T115-T116). At hearing on September 24, 1992, however, DeFeo retracted his earlier testimony, and testified that IFPTE did make a written proposal regarding vehicles (T192)(R-6). Len Cornwall, IFPTE's representative, then stipulated that the other witnesses who testified there was no IFPTE proposal were in error (T193).

This case only concerns vehicle assignment for commuting. Since these three IFPTE negotiators - including its local president - could not even recall that IFPTE had a formal proposal on vehicle assignment (R-6), I question the accuracy of their testimony regarding other pertinent details involved in this case.

March 30, 1990.[13/] The memo was distributed to the district superintendents who in turn gave them to their crew managers, who gave them to the crew supervisors (T130, T220, T221, T227, T255-256). DeFeo acknowledged receiving R-1 from his crew manager (T122, T130); and he even informed IFPTE's Business Representative, Len Cornwall, of the Authority's intent to remove the vehicles for commuting (T116, T155, T165). But three other IFPTE witnesses denied receiving R-1 (T47, T50, T68-T69, T90). Nevertheless, I find that the Authority established that it distributed and/or explained R-1 to the crew supervisors, and that IFPTE's leadership was aware of R-1.[14/]

13/ R-1 provides:

> In November 1989 you were assigned vehicles for commuter purposes on a temporary basis. The primary justification for this assignment was the ability to shorten response time, allow for roadway condition inspection and provide communication when responding for snow and ice control alerts and/or conditions. It was the intent that this assignment last throughout the Witner Maintenance Season.
>
> A review is presently underway to determine whether or not to make this assignment permanent. This review should be complete with recommendations to the Executive Director by the end of March.
>
> This is to alert you that, pending the outcome of that review, the temporary assignment will terminate March 30, 1990. You should prepare for that possibility.

14/ The record shows that R-1 was distributed to crew supervisors from their crew managers. R-1 was first given to district superintendents such as John Druzsba (T220). Druzsba, in turn, sent the memo to his three crew managers, Peter

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DeFeo received R-1 from his crew manager, but he claims he did not give it any weight and did not consider R-1 to be an official pronouncement because it was signed by George Hrunka, then assistant director of maintenance, rather than Noxon (T130-T131; T133-T136; T143). Nevertheless, DeFeo told Cornwall of the content of R-1 and admitted it prompted the negotiations session of March 29, 1990 (T116-T117; T155; T165).[15/]

At the March 29th session IFPTE questioned the Authority about vehicle assignment and whether the vehicles would be taken

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14/ Footnote Continued From Previous Page

Strumolo, John Spinello, and Donald McCloud, and the supervising equipment manager (T220-T221, T227). Strumolo and Spinello, then gave R-1 to their crew supervisors. Strumolo had four, and Spinello had five crew supervisors assigned to them, all of whom were given a copy of R-1 (T255-T256; T272-T274). Noxon had ordered that the managers make sure supervisors received R-1 (T344).

While three crew supervisors, James Thomas, Robert Nemeth, and Alton Sinclair, denied receiving R-1 (T47, T68-T69, T90), DeFeo admitted he did, and IFPTE did not present direct evidence to rebut Druzsba, Strumolo and Spinello. I found Nemeth an unreliable witness. He was unable to recall many facts. Thomas' testimony was unreliable because he could not recall IFPTE making a vehicle proposal. Sinclair's testimony was not effective. Together with DeFeo's admission, I credit Noxon, Druzsba, Strumolo and Spinello that R-1 was distributed to crew supervisors.

15/ I do not credit DeFeo's claim that R-1 meant nothing to him because it was signed by Hrunka rather than Noxon. It obviously meant enough to him to tell Cornwall and to discuss the vehicle assignments at the March 29th negotiations session (T156). Similarly, while Cornwall denied being aware of R-1, he admitted DeFeo told him that the Authority had ordered supervisors to stop taking the vehicles home (T165). I credit Cornwall's admission.

away from crew supervisors for commuting purposes. Authority officials responded that it was studying vehicle assignment, but that despite the study's outcome, its position was that vehicle assignment was a managerial prerogative and non-negotiable (T211, T214, T132, T142). Authority officials did not say that crew supervisors could commute in the vehicles no matter what the study concluded (T213-T214). They did say that the vehicles would not be removed for commuting pending the outcome of the study (R-5).[16/] IFPTE officials responded that it would file an unfair practice charge if the Authority took vehicles away for commuting purposes

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16/ Cornwall testified that at the March 29th session the Authority told IFPTE officials about the vehicle study, and that vehicle assignment was non-negotiable, and that pending the outcome of the study the vehicles would not be taken away from crew supervisors for commuting (T156, T164). But he denied being told that no matter what the study's outcome, the Authority considered the vehicle assignment matter non-negotiable (T166). While I can credit some of Cornwall's testimony, at 156 and 164 for example, generally I found him to be an unreliable witness. He was often unresponsive, evasive and combative (T173-T176).

Twice DeFeo was asked if he was told at the March 29th session that despite the study's outcome, the Authority's position was that vehicle assignment was non-negotiable, and he responded "yes" both times (T132, T142). While I have not always credited DeFeo, I found him to be more reliable than Cornwall, and I credit his above testimony. In addition, Eleanor Bell, the Authority's manager of employee services who attended negotiations, testified that Authority officials did not say crew supervisors could keep vehicles for commuting no matter what the study's outcome (T213, T214). Bell's testimony was straightforward and non-evasive and I credit it here.

Thomas and Nemeth also gave some testimony about the March 29th session, but neither had a good recollection of what occurred at that session, thus I did not rely on their testimony (T40-T41, T43, T78-T79).

(T211, R-5). It wanted an economic adjustment for the loss of the vehicles for commuting (R-5).

7. Consistent with its pronouncement that it would not take away the vehicles for commuting while the vehicle study was being conducted, the Authority did not direct crew supervisors to cease commuting in their vehicles at the end of the 1989-90 winter season (T314-T315). The crew supervisors had been advised of the study (or review) by R-1, but the study was not completed by the end of March. Thus, on March 30, 1990 Noxon prepared another memorandum for crew supervisors (R-7 and R-15) notifying them that they would be allowed to retain their vehicles until the study was completed. R-7 provides:

> On the afternoon of March 29, 1990 I directed Tom Howarth to advise all Crew Supervisors that they will be allowed to retain their vehicles on an extension of the trial and evaluation period, until such time as a final determination is made on what Maintenance Department vehicles would be made available on a 24 hours basis. Mr. Howarth was directed to emphasize to the Crew Supervisors that this extension in no way indicated a permanent assignment, and was only for the period between March 30, 1990 and such time as a final decision was made.

Noxon had given R-7 to his roadway superintendent, Tom Howarth. Howarth sent R-7 to the Authority's three district superintendents, John Druzsba, John Minella and Marty Saggiomo (T222, T248-T249). Druzsba sent R-7 to his three crew managers

including Strumolo and Spinello, and they gave their respective crew supervisors a copy of it (T222; T256-T257; T275).[17/]

8. On July 1, 1990 the parties signed their collective agreement (J-1) which was effective from July 1, 1990 through June 30, 1992. The agreement did not contain a paragraph five under Sec. 26, Miscellaneous, as proposed in R-6, nor did it contain any other clause covering use of vehicles for commuting or what would occur if use of vehicles for commuting were withdrawn.

But Section 16 "Information" contained the following relevant paragraphs:

> 1. The Authority will notify the President in writing or, in his/her absence, the Vice-President of the Union, of any contemplated action regarding conditions of any employee's employment, including layoff, transfer, discipline or disability prior to official notification to the employee.
>
> 2. All past privileges and practices not covered by this Agreement shall be continued. Employees shall be subject to existing operating policies, practices, manuals, rules or regulations not herein enumerated, except as they may be modified herein, copies of which will be furnished the Union. No changes, additions or revisions shall be made or applied to employees covered by this Agreement, except and until agreed to by the Union.

9. Consistent with its earlier pronouncement that it would not withdrew vehicles for commuting pending the study's completion, the crew supervisors were allowed to commute in the

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17/ There was no reliable testimony to rebut Howarth, Druzsba, Strumolo and Spinello that R-7 was passed down through various levels to the crew supervisors. Thus, I find as a general proposition that crew supervisors were notified of and provided with a copy of R-7.

vehicles through spring, summer and early fall of 1990. But on October 29, 1990 the Authority's Executive Director, George Zilocchi, sent Noxon a memorandum explaining the study results regarding vehicle assignments (CP-5).[18/] The study concluded that crew supervisors and equipment trainers did not meet the criteria to justify a permanent vehicle assignment. CP-5 explained that affected employee vehicles should be parked at an Authority location effective November 2, 1990 and should not be used for commuting.[19/]

18/ On cross-examination Noxon was pressed to explain whether CP-5 constituted the end of the "study." Noxon was not certain (T338). I find that CP-5 did complete the study. The first sentence of CP-5 states:

> An intensive study conducted on the present policy of permanent assignments of Authority vehicles is now completed.

That sentence shows the study was completed. IFPTE did not disagree. In its post-hearing brief it said:

> A fair and objective reading of this memo [CP-5] indicated that an intensive study had just been completed...." p. 24.

19/ As indicated in note 17, above, the first sentence of CP-5 referred to the study being conducted on "the present policy of permanent assignments of Authority vehicles." On cross-examination IFPTE's representative pressed Noxon to explain the meaning of "present policy of permanent assignments." Noxon testified he could not explain what Zilocchi said (T341). In its post-hearing brief IFPTE juxtaposed Noxon's earlier testimony that there was no permanent assignment of vehicles to crew supervisors, with the above "permanent assignment" language in CP-5, and posed the question "who is correct - Mr. Zilocchi or Mr. Noxon?" (at 24). IFPTE concluded that there was no temporary or seasonal assignment of vehicles for commuting, rather vehicles were permanently assigned.

Footnote Continued on Next Page

Pursuant to CP-5, Noxon required crew supervisors and equipment trainers to cease commuting in their vehicles effective November 2, 1990 (T28; T73; T108; T317-T318). Cornwall was aware of the November 2nd deadline (T163). The Authority did not advise IFPTE or the individual employees about the rationale of its

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19/ Footnote Continued From Previous Page

I reject IFPTE's conclusion about the meaning of that language in CP-5. IFPTE has taken that language out of context with respect to the remaining content of CP-5, and in comparison to other evidence in this case. First, CP-5 covered numerous titles in addition to crew supervisors and equipment trainers, and many of the people in those other titles may have had permanently assigned vehicles. The paragraph introducing the first set of titles, for example, said: "...it has been determined that the following positions in the Maintenance Department cannot justify a permanent vehicle assignment" (emphasis added). But the sentence introducing the set of titles which included the crew supervisors and equipment trainers did not include the word "permanent." That sentence said:

> The following maintenance positions using assigned pickup trucks, etc. also do not meet the referenced criteria.

I would have expected that sentence to say "positions using permanently assigned" (emphasis mine) if there had been a policy of permanent assignment of vehicles to that group. I infer therefrom that vehicles were not permanently assigned to at least some of the employees holding titles in that group.

Second, CP-5 must be read in pari materia with other exhibits and credited testimony. R-8 and R-9 through R-14, established that ADS employees would not have permanent or 24-hour vehicle assignments, and crew supervisors inherited that policy. R-16 shows there was a policy of only temporary or seasonal assignment of vehicles to crew supervisors on a 24-hour basis, and R-1 and R-7 are consistent with Noxon's testimony that the policy was seasonal with respect to crew supervisors. Thus, I find that CP-5 does not establish that crew supervisors were included in a policy of permanent vehicle assignment.

decision (T28; T108-T109). DeFeo asked his own crew manager, Jeff Bunda, why the crew supervisors could not commute in their vehicles, but Bunda did not have the answer (T108-T109). Then DeFeo told Cornwall of the November 2nd deadline(T100).

On November 12, 1990 Cornwall sent Zilocchi a letter (CP-3) protesting the Authority's order that crew supervisors cease commuting in their vehicles. Cornwall alleged that the Authority's action violated the Act, and he requested negotiations over economic consequences of the Authority's action.[20/] The Authority received CP-3 on or about November 15, 1990, but never directly responded to that letter (T159-T160).

20/ CP-3 provides:

> I was recently informed by representatives of IFPTE Local 193C, that the Authority has ordered Crew Supervisors to turn in vehicles assigned to them no later than Friday, November 2, 1990.
>
> This action by the Authority was taken without notification, consultation and negotiations with the Union. As such, your action constitutes a unilateral determination of terms and condition of employment for employees represented by Local 193C in violation of your duty under the New Jersey Employer-Employee Relations Act. This action also constitutes an Unfair Labor Practice under the same statute.
>
> Please accept this letter as the Union's formal request to meet with the Authority's representatives and negotiate on economic and other consequences to our members caused by the change imposed on them by your order in a memorandum dated October 29, 1990.
>
> Please contact me as soon as possible so that we may schedule a mutually convenient meeting to discuss and agree upon a satisfactory resolution of this matter.

Sometime between November 2 and November 19, 1990, Noxon, consistent with the practice he had established in 1988, and for the third year in a row, requested the seasonal assignment of vehicles to crew supervisors for commuting for the winter of 1990-91 (T319). His request was approved and crew supervisors were allowed to begin commuting in their vehicles for the winter season effective November 19, 1990. The Authority did not explain its action to the employees (T28, T30, T111, T138). The vehicles were not returned to the equipment trainers for winter season commuting (T319).

Since the vehicles were returned for crew supervisor commuting on November 19, 1990, IFPTE took no further action regarding CP-3 (T111, T160). But since equipment trainers were still not allowed to commute in their vehicles, IFPTE, later on November 19, 1990, filed a grievance on behalf of equipment trainers (R-2) requesting that they, too, be allowed 24-hour vehicle use specifically for the winter season. R-2 did not suggest that equipment trainers (or crew supervisors) were entitled to permanent vehicle assignment.[21/]

21/ R-2 provides:

> On November 19, 1990, Crew Supervisors roadwide were given back use of their work vehicles to and from home once again. Not included in this reinstatement were the Equipment Trainers. These men are all members of the same bargaining unit as Crew Supervisors and from time to time provide the same functions. Equipment Trainers substitute as Crew Supervisors when staffing problems arise and are

Footnote Continued on Next Page

On November 29, 1990, Noxon, acting as hearing officer, conducted a hearing on the equipment trainer grievance. IFPTE was represented by DeFeo and Nemeth. On January 23, 1991, Noxon issued his decision (R-3) denying the grievance. He explained that crew supervisors only had vehicles for commuting purposes during the winter, and that there was, at that time, no basis to do the same for equipment trainers. He indicated, however, that an annual review of vehicle assignments would be conducted.[22/]

10. On February 13, 1991 the parties met in a negotiations-type session to resolve some contractual problems. DeFeo had earlier told Cornwall that he was concerned about the Authority once again taking vehicles away from crew supervisors for commuting purposes, so Cornwall decided to raise that as an additional issue at the February session (T160-T161). The Authority officials explained that vehicle assignment was still being studied,

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21/ Footnote Continued From Previous Page

> also utilized during the winter when relief is needed. I feel these men are essential during our winter operations and should be considered on a 24-hour emergency call out for the duration of the entire season.
>
> I hope that this was just an oversight on behalf of the Authority and will be corrected immediately. I await your response on this matter.

22/ After reviewing R-3 DeFeo appealed the grievance to step three before the Authority's new Executive Director, David Davis (T114-T115). Although DeFeo testified that Davis answered the grievance (T117), he did not indicate whether it was granted or denied. I infer that Davis denied the grievance. There was no evidence that IFPTE sought to move the grievance to arbitration.

but they did not discuss any policy (T161). They did say, however, that vehicle assignment was non-negotiable regardless of the outcome of the study (T142).

On April 12, 1991 DeFeo, as IFPTE President, received a memo from Davis (CP-4) notifying him that crew supervisors were required to cease commuting in their vehicles effective April 22, 1991 (T118-T119).[23/] On April 22, 1991 DeFeo received another memorandum (not offered for evidence) extending the date for crew supervisors to cease commuting in their vehicles to May 20, 1991. That memo, like CP-4, also said, "pending continuing study of the issue" (T120). On May 20, the crew supervisors ceased commuting in their vehicles (T119, T162, T320).

On May 28, 1991 Cornwall apparently sent Davis a letter concerning the crew supervisors' inability to commute in Authority vehicles. He apparently accused the Authority of making a unilateral change, and he demanded negotiations on certain issues. The Authority's labor counsel responded to that letter by his own letter of June 18, 1991 (R-4). He argued that the Authority did not

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23/ CP-4 provides:

> Be advised that the order to discontinue use of Authority vehicles for commuting purposes by members of the Crew Supervisors Unit Local 193C as of April 15, 1991, has been extended to April 22, 1991, pending continuing investigation and determination of benefit to the New Jersey Highway Authority.

unilaterally change working conditions or withdraw an economic benefit, and refused IFPTE's request for negotiations.[24/]

The charge was filed on August 1, 1991. On September 26, 1991, a Commission staff agent scheduled an exploratory conference for December 3, 1991.

On October 21, 1991 Noxon submitted a memo to Davis (R-17) recommending that both crew supervisors and equipment trainers (emphasis added) be allowed to commute in Authority vehicles for the winter season scheduled to end on April 17, 1992. That was the first time Noxon had included the equipment trainers in the seasonal assignment of vehicles. Davis approved the recommendation and both crew supervisors and equipment trainers were allowed to commute in

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24/ Neither party submitted a copy of Cornwall's May 28, 1991 letter. That letter was referred to in R-4, and I inferred what Cornwall said and asked for in that letter from my reading of R-4. R-4 provides:

> Your letter of May 28, 1991 addressed to Executive Director Davis has been forwarded to me for reply.
>
> Please be advised that I respectfully disagree with your contention that the action taken by the Authority with respect to the crew supervisors vehicles represented a unilateral change in working conditions and a withdrawal of an economic benefit. To the contrary, the Authority's determination to permit crew supervisors to take home their vehicles during the winter months was a seasonal decision based on the Authority's needs. As a result, it is our position that no bargaining is required, since the winter season has now ended.

their vehicles for the 1991-92 winter season. IFPTE did not grieve over this seasonal assignment of vehicles (T321-T323).[25/]

ANALYSIS

The Authority did not violate the Act, nor did it change a term and condition of employment or adversely affect an economic benefit by requiring crew supervisors and equipment trainers to cease commuting in Authority-owned vehicles in May 1991. The Authority merely continued its practice of only seasonal assignment of vehicles for commuting that had been established prior to the time IFPTE became majority representative, and IFPTE was unable to alter negotiable aspects of that practice during negotiations for its collective agreement.

Negotiable Aspects of Vehicle Use

In Morris County Park Commission, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd App. Div. Dkt. No. A-795-82T2 (1/12/84), 10 NJPER 103 (¶15052 1984), certif. den. 97 N.J. 672 (1984), the Commission held that a public employer had a managerial

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25/ R-17 provides:

> It is recommended that all Crew Supervisors and Equipment Trainers be temporarily assigned their vehicles from the Maintenance Pool Fleet for commuting purposes, from Friday, November 15, 1991 through Friday, April 17, 1992, inclusive.
>
> During this Winter Season the Maintenance Department is responsible for emergency snow and ice control, and insuring the safety of our patrons. Minimum reaction time is critical and availability of vehicles for transportation and communication without dependence on their personal vehicles is of benefit to the Authority to react to adverse weather conditions.

prerogative to prohibit or limit the use of its vehicles for employee commutation. But the Commission also recognized that the use of employer vehicles for commuting was an economic benefit, thus, it held that the Employer was obligated to negotiate over an alternative form of compensation for affected employees. See also New Jersey Turnpike Authority, P.E.R.C. No. 93-72, 19 NJPER ____ (¶_____ 2/23/93), adopting H.E. No. 93-1, 18 NJPER 381 (¶23171 1992).

A violation was found in both Morris County and New Jersey Turnpike Authority, because those employers had changed an established practice which adversely affected an economic benefit. The practice in those cases, however (commuting in employer vehicles), was not negotiable, only compensation was negotiable. The remedy, therefore, was not the return of vehicles for commuting, it was only the obligation to negotiate over compensation in response to a union demand.

By applying Morris County here, it is apparent that the vehicle assignment clause in R-6 which IFPTE sought to negotiate, was non-negotiable. IFPTE cannot negotiate over the assignment of Authority vehicles, particularly for commuting purposes. In the alternative, however, it could have negotiated, in place of the R-6 clause, over some form of compensation in lieu of receiving vehicles for commuting, but there was no showing it sought negotiations over such a clause.

Statute of Limitations

The Authority seeks to dismiss the complaint alleging the charge was untimely filed. It argued that IFPTE representatives were aware of its seasonal commuting policy on a number of occasions, but certainly knew by January 23, 1991 when R-3 issued, that crew supervisors only had seasonal commuting use of Authority vehicles, but elected not to file a charge until August 1, 1991, which was allegedly beyond the six months statute of limitations period provided by section 5.4(c) of the Act. While the Authority's argument has some merit, I cannot apply the statute of limitations to the demand for negotiations made in late May or early June 1991.

The Authority must distinguish between IFPTE's knowledge of the Authority's seasonal commuting policy and its demand to negotiate over what it believed to be was the loss of an economic benefit. Since the seasonal commuting policy here dealt with the managerial prerogative of when to allow employees to commute in employer-owned vehicles, a change in that policy could not be the basis for the unfair practice charge. The basis for the charge was the Authority's refusal to negotiate upon IFPTE's demand.

Thus, even though IFPTE may have known of the seasonal commuting policy as early as March 1990 by virtue of R-1, R-1 itself did not impose any negotiations obligation on the Authority. That can be distinguished from the events of November 1990. Once the Authority withdrew the vehicles from crew supervisors for commuting in early November, IFPTE through CP-3, demanded negotiations over what it believed was the withdrawal of an economic benefit. The

Authority did not respond to the demand, but IFPTE chose not to pursue that matter because the vehicles were returned for commuting within two weeks. Since IFPTE did not file the charge here until more than six months past mid-November 1990, IFPTE cannot litigate over whether the Authority violated the Act in failing to negotiate in November 1990.

The events in May-June 1991 began the process all over again. The vehicles were withdrawn for commuting use, IFPTE demanded negotiations, the Authority refused to negotiate, and the charge was filed less than two months later in August. The charge, therefore, was timely filed with respect to the May/June demand to negotiate, but the Authority, of course, could present its defenses based on the facts of the case.

The Merits

The question here is whether the Authority was obligated to negotiate, pursuant to IFPTE's demand, over the alleged economic effects of withdrawing the vehicles for commuting purposes in May 1991. If the Authority's action or inaction in May/June constituted a change in the economic benefit employees received for using Authority vehicles for commuting, then the Authority was obligated to negotiate over the economic effects. But if the May vehicle withdrawal for commuting did not change or deviate from the established vehicle commuting policy, then there was no obligation to negotiate.

Established Practice

Despite the arguments and inferences IFPTE made in its post-hearing briefs, I find the evidence conclusively shows that the Authority had created a seasonal commuting policy for crew supervisors prior to IFPTE's certification as majority representative. Prior to March 2, 1988, ADS employees had year-round commuting use of Authority vehicles. But that policy changed on that date when the Authority issued R-8, which began the policy of only seasonal commuting with Authority vehicles. The Authority followed up R-8 by issuing R-9 through R-14 to affected employees notifying them that their work vehicles were no longer available for commuting and that commuting use would end by April 4, 1988. Future IFPTE president DeFeo received R-10 and subsequently ceased commuting in his vehicle.

In November 1988, Noxon, consistent with his explanation of the seasonal commuting policy, requested and received permission to allow the ADS/crew supervisor employees to use their vehicles for commuting for the 1988-89 winter season. Consistent with the policy that assignment ended in early spring 1989. By September 1989 the crew supervisor title had fully replaced the ADS title, and in November 1989 Noxon again received permission to allow crew supervisors to commute in Authority vehicles, this time for the 1989-90 winter season. IFPTE was certified as majority representative the following month. Based upon this scenario I find that the practice in effect when IFPTE was certified was a seasonal commuting policy.

In its post-hearing briefs IFPTE argued that the Authority failed to prove that it had established a seasonal commuting policy and concluded that the former permanent 24-hour vehicle assignment policy was still the practice. IFPTE argued that there was no clear seasonal commuting policy, that no new policy had been "promulgated to employees," and that the employees had not been notified of a change in policies.

IFPTE's arguments lack merit. First, R-8 clearly shows that the Authority had ended the 24-hour year-round assignment of vehicles to ADS employees. R-9 through R-14 was clear and adequate notice to employees that the prior practice had ended. Those documents, in conjunction with Noxon's testimony and the consistent practice of requesting and receiving permission in November of each year to allow ADS/crew supervisors to commute in Authority vehicles for the winter season, established the seasonal commuting policy. Second, public employers are not required to "promulgate" policy changes to its employees, particularly unrepresented employees. IFPTE did not define what it meant by "promulgate." In legal terms it generally means the obligatory public publishing of a new law or rule. Blacks Law Dictionary, Fourth Edition 1968. If IFPTE meant the Authority was required to publicly announce its new policy to employees or publish or post a notice of the policy to employees, it is mistaken. The notice the employees received in R-9 through R-14 was reasonable and adequate.

The burden in this case was on IFPTE, not the Authority. IFPTE did not produce evidence challenging the efficacy of R-8 through R-14 nor negate the significance of Noxon's November requests for seasonal 24-hour vehicle assignments in relationship to those documents. That evidence, in conjunction with Noxon's credited testimony, establishes that a seasonal commuting policy was the practice in place at the time IFPTE was certified as majority representative.

Post-Certification Consistent Practice

The Authority's actions after IFPTE was certified were consistent with the seasonal commuting policy it had implemented prior thereto. R-1, issued in March 1990, reminded crew supervisors of the temporary commuting use of Authority vehicles, and even though some employees may not have received it, DeFeo did, and it was distributed to many other employees. R-7, also issued in March 1990, notified crew supervisors that they would be allowed to continue commuting in Authority vehicles until the vehicle study was completed. That study was not completed until October 29, 1990 after which the crew supervisors were not allowed to commute in Authority vehicles for two weeks (beginning November 2, 1990) until the regular seasonal assignment of vehicles for commuting again became effective.

IFPTE inferred that since crew supervisors were allowed to commute in Authority vehicles from approximately December 1989 (the 1989-90 seasonal assignment) until November 2, 1990, that there

really was no seasonal commuting policy. In fact, IFPTE argued that since employees commuted in their vehicles between December 1989 and May 20, 1991, but for a two-week period (November 2-19, 1990), it was evidence that the practice just prior to the May 1991 requirement to cease commuting in Authority vehicles, was a year-round commuting policy. I do not agree.

In R-7 the Authority carefully explained that the extension of time for commuting use of vehicles was not a permanent assignment, and was only extended during the study evaluation period. The Authority, acting consistent with the established practice, made it clear it was not changing the seasonal commuting policy, and its March 1990 extension of time cannot be used to infer that the Authority was waiving or changing that policy. In fact, consistent with the seasonal policy and the established practice, Noxon, in November 1990, for the third year in a row, requested and received approval for the seasonal assignment of vehicles for commuting.

Negotiations

IFPTE had the opportunity to negotiate a clause dealing with any economic concerns the crew supervisor may have had as a result of the Authority's seasonal commuting policy. IFPTE proposed the clause in R-6 dealing with vehicle assignment, but withdrew that proposal apparently because it realized the subject of the proposal (assignment) was non-negotiable. But certainly by spring 1990 DeFeo and Cornwall knew, through R-10, R-1, R-7, and statements made by

Authority negotiators in negotiations, that crew supervisors were not authorized to commute in Authority vehicles on a permanent or year-round basis. IFPTE could have demanded negotiations over a clause dealing with the economic effect (compensation) of crew supervisors not being allowed to commute in Authority vehicles for half the year, but there is no evidence that such a demand or proposal was made, and no such clause appears in J-1.

The most relevant contract clause to this case in J-1 is Section 16, Paragraph 2. It provides that past practices not covered by the agreement shall continue, and that employees were subject to existing policies. Since I have already found that the established practice was a seasonal commuting policy, and since that subject is not otherwise covered in J-1, the Authority was acting consistent with Section 16, Paragraph 2 of J-1 by maintaining the seasonal commuting policy in May 1991 which required the withdrawal of Authority vehicles for commuting at that time of the year.[26/] Having concluded that the May 1991 withdrawal of vehicles for commuting was not a change in the established practice, and that J-1 did not contain a clause dealing with the economic effect of not using Authority vehicles for commuting, I find that the Authority was not obligated to negotiate with IFPTE over that subject in May/June 1991.

26/ The parties should remember, however, that since the assignment of Authority vehicles for commuting is a managerial prerogative, Morris County, the Authority has the right to change or eliminate that practice. If that occurs, the Authority would be obligated to negotiate upon demand over the economic effect of such an action.

Remaining Allegations

There was no evidence that the Authority discriminated against employees or violated any Commission rule or regulation by its actions.

Accordingly, based upon the above findings and analysis, I make the following:

RECOMMENDATION

I recommend the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: March 11, 1993
Trenton, New Jersey