P.E.R.C. NO. 88-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

N.J. TRANSIT BUS OPERATIONS, INC.

Petitioner,

-and-

AMALGAMATED TRANSIT UNION NEW JERSEY COUNCIL,

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

Respondent,

-and-

N.J. TRANSIT CORPORATION,

Intervenor.

N.J. TRANSIT MERCER, INC.,

Petitioner,

-and-

AMALGAMATED TRANSIT UNION DIVISION 540,

Docket No. SN-87-89

Respondent,

-and-

N.J. TRANSIT CORPORATION

Intervenor.

N.J. TRANSIT BUS OPERATIONS, INC.,

Petitioner,

-and-

UNITED TRANSPORTATION UNION LOCAL NO.33 (PATERSON & WARWICK DIVISIONS),

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

Respondent,

-and-

N.J. TRANSIT CORPORATION,

Intervenor.

N.J. TRANSIT BUS OPERATIONS, INC.,

Petitioner,

-and-

TRANSPORT WORKERS UNION OF AMERICA LOCAL No. 225,

Docket No. SN-87-90

Respondent,

-and-

N.J. TRANSIT CORPORATION,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission determines the scope of negotiations under the New Jersey Public Transportation Act. The Commission determines that the scope is similar to what the employees had before their companies were acquired by N. J. Transit, but negotiations cannot preclude N. J. Transit from fulfilling its statutory mission. The Commission then applied its standard to the various provisions in the parties' contract and determine that certain proposals were mandatory subjects of negotiations, but others were not.

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TRANSPORT WORKERS UNION OF AMERICA LOCAL No. 225,

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-and-

N.J. TRANSIT CORPORATION,

Intervenor.

Appearances:

For NJ Transit Bus Operations, Inc., NJ Transit Corporation, and NJ Transit Mercer, Inc.,
Hon. Cary Edwards, Attorney General
(Jeffrey Burstein, Deputy Attorney General)

For the Amalgamated Transit Union,
Bredhoff & Kaiser, Esqs. (Jeffrey Freund, at argument and on the brief; Julia Penny Clark, on the brief)
Earle Putnam, General Counsel, on the brief;
Weitzman & Rich, P.A. (Richard P. Weitzman, on the brief)
Reitman, Parsonnet, Maisel & Duggan, Esqs. (Bennett D. Zurofsky and Jesse H. Strauss, on the brief)

For the Transport Workers Union,
O'Donnell & Schwartz, Esqs.
(Malcolm A. Goldstein, of counsel)

For the United Transportation Union,
Friedman & Wirtz, Esqs. (Edward D. Friedman, at argument and on the brief;
Robert E. Nagle, on the brief)

DECISION AND ORDER

Background

On June 23 and August 28, 1987, New Jersey Transit Bus Operations, Inc. and New Jersey Transit-Mercer, Inc. ("NJ Transit") filed scope of negotiations petitions. The parties have filed briefs and replies. On November 16, 1987, oral argument was held. NJ Transit seeks a determination that substantial portions of collective negotiations agreements with its unions contain provisions which are not mandatorily negotiable and therefore must be excluded from the successor labor agreements.[1/] These petitions require us for the first time to decide the scope of negotiations under the New Jersey Public Transportation Act of 1979, N.J.S.A. 27:25-1 et seq. ("NJPTA").[2/]

1/ NJ Transit contends the following clauses, or portions of, are not mandatorily negotiable: purpose clause -- requiring purchaser to assume labor agreement, recognition clause, management rights, grievance procedure, union security, schedules, overtime, vacation scheduling, seniority and bidding of runs, uniforms, snow work, filling of vacancies, promotions, leaves of absences, part-time employees, and exact fare system.

2/ NJ Transit has also argued, citing several of our cases, that we have consistently interpreted the NJPTA as being limited to that which is mandatorily negotiable under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("EERA"). The short answer to that argument is that we have neither considered nor decided this issue. In fact, in N.J. Transit Mercer, P.E.R.C. No. 85-43, 10 NJPER 626, 629, n. 6

Footnote Continued on Next Page

Before the NJPTA, these bus operations were carried on by private sector carriers -- the Transport of New Jersey and its subsidiary, the Maplewood Equipment Company. Private sector precedents controlled their bargaining relationships with their employees' majority representatives.[3/] See generally Amalgamated Transit Union v. Byrne, 568 F.2d 1025 (3rd Cir. 1977). The State Department of Transportation subsidized these bus companies; by 1979 subsidies had grown to fifty million dollars. Despite this help, ridership had decreased by 41% between 1970 and 1978; fares were unstable; service was poor, and a comprehensive route system was absent.

Under the Urban Mass Transportation Act of 1964, P.L. 88-365 (49 U.S.C. §1602) ("UMTA"), the federal government made monies available to help state and local governments take over mass transit programs. Recipients, however, had to meet a key condition: the Secretary of Labor had to certify that there would be protective arrangements including "the continuation of collective bargaining

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2/ Footnote Continued From Previous Page

(¶15301 1984), we expressly declined to decide such issues. The cases cited by NJ Transit are all unfair practice cases and the permissible scope of negotiations was not directly before us. The case principally relied on by NJ Transit is N.J. Transit Bus Operations, P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986). That case did not involve the scope of negotiations; rather, it involved whether certain NJ Transit actions were in retaliation for employees' exercise of union activity.

3/ Bus operations of New Jersey Transit-Mercer were carried on by the Mercer County Improvement Authority.

rights." See Jackson Transit Auth. v. Local Div. 1285, ATU, 457 U.S. 15, 110 LRRM 2513 (1982); Transit Union v. Donovan, 767 F.2d 939, 119 LRRM 3185 (D.C. Cir. 1985).

Because its subsidies had not made the private bus carriers efficient and because the federal government had made monies available, the Legislature created a public transportation service by passing the NJPTA. The N.J. Transit Corp. was chartered to provide public transportation service "in the most efficient and effective manner," N.J.S.A. 27:25-2(b), and empowered to acquire public or private entities providing public transit service, N.J.S.A. 27:25-13, provided continuing representation for collective negotiations was assured, N.J.S.A. 27:25-14e, and an entity's labor contracts were assumed and observed. N.J.S.A. 27:25-14f.[4/] In 1980 NJ Transit acquired Transport of New Jersey and Maplewood Equipment Company, assumed their collective bargaining agreements, and entered into agreements with their unions to preserve and continue the collective bargaining rights of employees covered by the agreements. The parties' entered into agreements on April 19, 1985 covering the periods from March 24, 1981 through March 23, 1987 and from March 24, 1984 through March 23, 1987. In 1984, NJ Transit filed similar scope of negotiations agreements, but withdrew these petitions without prejudice after entering into the agreements. It did so as a "result of a policy decision that the resolution in the

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4/ New Jersey Transit Bus Operations, Inc. and New Jersey Transit Mercer are subsidiaries of N.J. Transit Corporation.

contract of issues contested in the scope petitions is consistent with New Jersey Transit's present policy." These scope petitions have been filed during the course of collective negotiations for new labor agreements.

The Legislature was mindful that continued labor stability was a necessary ingredient in the success of NJ Transit's statutory mission to provide an efficient and effective transportation service. It proceeded to address labor-management relations in detail in subchapter 14 of the NJPTA. We excerpt the relevant sections, underlining the words and phrases which bear on the scope of negotiations.

27:25-14. Employer-employee relations

a. As used in this section:

"Employee" means:

(1) An employee of the corporation, or

(2) An employee of any public or private entity acquired, owned or operated by the corporation.

"Employee" does not include an employee of a public or private entity, other than as provided in subsection g. and paragraphs (1) and (2) of this subsection, which provides public transportation services pursuant to operating rights granted by a regulatory body or pursuant to authority arising from contractual agreements entered into with the corporation pursuant to section 6 of this act. Execpt as provided in subsection h. of this section, <u>"employee" does not include a supervisory employee as defined under the "Labor Management Relations Act, 1947" (29 U.S.C. 141 et seq.) or a managerial executive or confidential employee as defined under the "New Jersey Employer-Employee Relations Act," P.L. 1944, c. 100 (C. 34:13A-1 et seq.).</u>

"Employer" means an employer of an employee.

"Acquisition by the corporation of a public or private entity which provides public transportation services," or words of like import, means an acquisition effected by a purchase or condemnation of all of or a controlling interest in the stock or other equity interest of the entity, or purchase or condemnation of all or substantially all of the assets of the entity.

b. In accordance with law, employees of the employer shall have and retain their rights to form, join, or assist labor organizations and to negotiate collectively through exclusive representatives of their own choosing.

c. The enforcement of the rights and duties of the employer and employees shall be governed by the "New Jersey Employer-Employee Relations Act" P.L. 1944, c. 100 (C. 34:13A-1 et seq.) and shall be within the jurisdiction of the Public Employment Relations Commission (Commission) established pursuant to that act. In carrying out this function, the Commission shall be guided by the relevant Federal or State labor law and practices, as developed under the "Labor Management Relations Act, 1947" or under the "Railway Labor Act," (45 U.S.C. 151 et seq.), provided however that employees shall not have the right to strike except as provided by the "Railway Labor Act." Whenever negotiations between the employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the Commission shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse, including the assignment of a mediator. In the event of a failure to resolve the impasse by mediation, the Commission shall, at the request of either party, invoke factfinding with recommendations for settlement of all issues in dispute. Fact-finding shall be limited to those issues that are within the required scope of negotiations. In the event of a continuing failure to resolve an impasse by means of the procedure set forth above, and notwithstanding the fact that such procedures have not been

exhausted, but not later than 30 days prior to the expiration of a collectively negotiated contract, the procedures set forth in paragraph (2) of subsection d. of Section 3 and Sections 4 through 8 of c. 85, P.L. 1977 (N.J.S.A. 34:13A-16(d)(2) through 34:13A-21) shall be the sole method of dispute resolution unless the parties mutually agree upon an alternative form of arbitration; provided however, that the cost to the State of the first year portion of any arbitration award shall not exceed the appropriations permitted within the provisions of the "State Expenditures Limitation Act," P.L. 1976, c. 67 (C. 52:9H-5 et seq.) and the arbitrator, in determining such award, should consider pending supplemental appropriation bills, any pending salary negotiations for State employees and any sums which have not yet been appropriated, which would be necessary to fund any recently concluded agreements.

d. The majority representative of employees in an appropriate unit shall be entitled to act for, and negotiate successor agreements covering, all employees in the unit and shall be responsible for representing the interests of those employees without discrimination. It shall be the mutual obligation of the employer and the majority representative of any of its employees to negotiate collectively with respect to mandatorily negotiable subjects which intimately and directly affect the work and welfare of employees. These subjects include wages, hours of work, the maintenance of union security and check-off arrangements, pensions, and other terms and conditions of employment. The obligation to negotiate in good faith encompasses the responsibility to meet at reasonable times and to confer on matters properly presented for negotiations and to execute a written contract containing an agreement reached, but the obligation does not compel either party to agree to a proposal or require the making of a concession.

e. In acquiring, operating, or contracting for the operation of public transportation services, the corporation shall make provision to assure continuing representation for collective negotiations on behalf of employees, giving due

consideration to preserving established bargaining relationships to the extent consistent with the purposes of this act. Such relationships may be changed only in accordance with the principles established under the "Labor Management Relations Act, 1947" and the "Railway Labor Act." [Emphasis added]

f. Upon acquisition by the corporation of a public or private entity which provides public transportation services, the corporation shall assume and observe all existing labor contracts of such entity for their remaining term. All of the employees of the acquired entity, as defined in subsection a., shall be transferred to the employment of the employer and appointed to comparable positions without examination subject to all the rights and benefits of this act, and these employees shall be given sick leave, seniority, vacation, and pension credits in accordance with the records and labor agreements of the acquired entity.

g. For purposes of this subsection:

* * *

Except as provided herein, employees whose positions are worsened with regard to wages, hours, seniority and other terms and conditions of employment, shall be protected for a period of 5 years from the date of the first acquisition by the corporation. This time limitation does not apply to protections afforded to employees whose positions are worsened as a result of acquisitions or contracts which transfer responsibility for the provision of substantially similar motorbus regular route or paratransit service from one entity, including the corporation, to another. With regard to any acquisition or contract transferring service responsibility, only claims arising from actions taken within 18 months therefrom shall be eligible for protection.

Issue

The issue is what scope of negotiations did the Legislature authorize when it enacted the NJPTA. The majority representatives argue that the Legislature retained the scope of negotiations set out under the federal Labor-Management Relations Act, 29 U.S.C. §141 et seq. ("LMRA"). NJ Transit argues that the Legislature limited the scope of negotiations to that provided for New Jersey public employees as set forth in New Jersey court cases interpreting the EERA.

The unions' position would require us to apply the LMRA. Under that act, private sector employers must bargain with their employees' majority representatives over "wages, hours, and other terms and conditions of employment...." 29 U.S.C. §158(d). That language requires bargaining over issues which settle an aspect of the employer-employee relationship. Chemical Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 LRRM 2974 (1971). This scope is not unlimited, however. It does not require bargaining over decisions which have only an indirect and attenuated impact on the employment relationship or which change an enterprise's nature or direction. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 at 223 (1979), 57 LRRM 2609, 2617 (Stewart, J. concurring). Management decisions that have a substantial impact on continued employment must be bargained over only if the benefits from labor-management relations and the collective bargaining process outweigh the burdens placed on the conduct of business. First

National Maintenance Corp. v. NLRB, 452 U.S. 666, 107 LRRM 2705 (1981). See also, Peerless Publications, 269 NLRB No. 162, 115 LRRM 1282 (1984); United Technologies, 263 NLRB No. 54, 124 LRRM 1331 (1987). Decisions which turn on labor costs are usually suitable for bargaining.

NJ Transit's position would require us to apply the EERA. That act requires public employers to bargain over "terms and conditions of employment." N.J.S.A. 34:13A-5.3. By 1978, the New Jersey Supreme Court developed three tests for determining a subject's negotiability under this statute: (1) it must not be preempted by a statute or regulation setting a term and condition of employment; (2) it must intimately and directly affect the employees' work and welfare, and (3) it must not significantly interfere with governmental policy decisions. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978); State v. State Supervisory Employees Ass'n, 78 N.J. 44 (1978).5/ To decide whether negotiations would significantly interfere with government policy, the Courts balanced the effect of a proposal or agreement upon employees against its effect on government. Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980)The Courts' application of the balancing approach has resulted in a narrower scope of negotiations than in

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5/ All three tests were established by these cases, but they were not included in a comprehensive formula until Local 195, IFPTE v. State, 88 N.J. 393 (1982).

the private sector. The Courts ruled out negotiations over personnel matters which in the private sector would have been viewed as settling an aspect of the employment relation, e.g., Ridgefield Park (transfers and assignments); N. Bergen Bd. of Ed. v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976) (promotions). The courts even ruled out negotiations over disciplinary determinations and review procedures, Local 195, IFPTE v. State, 145 N.J. Super 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982), a holding the Legislature overruled. N.J.S.A. 34:13A-5.3. Application of the balancing approach also led to economic decisions substantially affecting continued employment being declared non-negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1980). However, there remains a core group of items which are mandatorily negotiable: work hours, compensation, physical arrangements and facilities and customary fringe benefits. E.g. Englewood Bd. of Ed. v. Englewood Teachers, 64 N.J. 1, 6-7 (1973).[6/]

6/ Another difference between the private and the New Jersey public sector is the existence of a permissive category in the former, but not the latter except for police and firefighters. Contrast Borg-Warner, 356 U.S. 342, 42 LRRM 2034 (1958) with Ridgefield Park. Also, in the private sector, even if a decision is not mandatorily negotiable its effects are, while in the public sector "effects" bargaining is limited to those terms and conditions of employment which are severable from the managerial decision. City of Elizabeth v. Elizabeth Fire Off., 198 N.J. Super. 382 (App. Div. 1985).

Analysis of the NJPTA

Our duty is to determine what the Legislature intended. AMN, Inc. v. So. Bruns. Tp. Rent Leveling Bd., 93 N.J. 518, 525 (1983). We must construe the NJPTA as written and not according to some unexpressed intention. E.g., Dacunzo v. Edgye, 19 N.J. 443, 451 (1955). We must further read the statute as a whole. In Waterfront Comm'n of N.Y. Harbor v. Mercedes-Benz, 99 N.J. 402 (1985), the Supreme Court stated:

> [O]ur focus must be broad enough to consider the policy of the Act in its entirety, as disclosed by its legislative history. Although individual words and phrases are instructive, they cannot be regarded as controlling:
>
> > We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." [Richards v. United States, 369 U.S. 1, 11, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962); footnotes omitted]
>
> We adhere to the canon of statutory construction that "the general intention of a statute will control the interpretation of its parts." [Id. at 414]

Our Legislature could have easily provided that the scope of negotiations would be the same as for New Jersey public employees or the same as for employees covered by the LMRA. But it did not do so. Rather, it enacted a statute much more complicated. It is thus doubtful that the Legislature fully accepted either party's

position. Therefore, applying the principles set forth in Waterfront Comm'n of New York, we will now review the NJPTA.

Subsection b provides that employees "retain" their right to negotiate collectively. The word "retain" suggests that the Legislature contemplated retention of private sector rights which existed prior to takeover.

Subsection b introduces a word used throughout the statute: negotiate. This word suggest a legislative desire to differentiate between private sector "bargaining" and public sector "negotiations." Lullo v. IAFF, 55 N.J. 409, 436-441 (1970) made such a distinction in construing the EERA. See also West Windsor Tp. v. PERC, 78 N.J. 98, 114 (1978); New Jersey Turnpike Employees Union, Local 194 v. New Jersey Turnpike Auth., 64 N.J. 574, 581 (1974). The main reason for the distinction, according to Lullo, was the legislative desire to withhold the right to strike, but the Legislature was also conscious that public agencies cannot abdicate or bargain away all their continuing legislative obligations or discretion. Id. at 440.

Here, the Legislature chose the word "negotiate" despite an earlier bill using the word "bargain," a draft in turn based on a statute conferring "bargaining" rights on Mercer County Improvement Authority employees. Division 540, ATU v. Mercer Cty. Improvement Auth., 76 N.J. 245 (1978). During the legislative hearings, Senator Gagliano, a member of the Transportation Committee, stated:

> [w]hen we discuss collective anything in the public sector we often call it collective

> negotiations, not collective bargaining because there is no right to strike on the part of public employees.

It thus appears that withholding the right to strike was the main concern behind using the word "negotiate." But we are not prepared to say it was the only concern.

The first sentence of subsection c provides that the EERA governs the enforcement of employer-employee results and duties and that the Commission has jurisdiction over that enforcement. This sentence, which immediately follows subsection b's guarantee of retained substantive rights, establishes the procedures and forum for seeking enforcement of rights and duties, rather than their substantive boundaries. The word "enforcement" therefore pertains to our power and duty to decide disputes and issue remedial orders. See Burl. Cty. Evergreen Pk. Mental Hosp. v. Cooper, 56 N.J. 579, 593 (1970). The Legislature had to choose a State forum to superintend labor relations under this statute and it chose us and our procedures.

The second sentence of subsection c bears on the substantive boundaries of legal rights and duties. It tells us where to look for guidance. The answer is relevant federal or State labor law and practices, as developed under the Labor Management Relations Act or the Railway Labor Act ("RLA"). The qualifier is critical. Omitted is any reference to the act we usually administer. The relevant federal or State labor law and practices are instead confined to those developed in implementing specified private sector laws. The

Governor, on the day he signed the NJPTA, essentially made the same jurisdiction/substance distinction. His press release stated: "Employees of acquired companies will maintain full collective bargaining rights...and the corporation will utilize PERC for the resolution of disputes."7/ A DOT press release similarly stated that these provisions retained "full collective bargaining rights" and created "a broad range of mandatorily negotiable issues."

The factfinding limitation in subsection c does not help us determine what the required subjects of negotiations are. It simply reflects an intent to exclude, unless the parties agree otherwise, permissive subjects of negotiations from the impasse resolution mechanisms of fact-finding and interest arbitration.

Subsection d defines the mutual obligation of employers and employee representatives to negotiate collectively. The definition specifically includes subjects which intimately and directly affect the work and welfare of employees, but does not exclude subjects which would significantly interfere with governmental policy-making. The Legislature adopted one-half, but not the other half, of the Supreme Court's balancing approach for other public

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7/ The Department of Transportation introduced the amendments that, after changes, ultimately gave us jurisdiction over labor relations disputes. One of the changes was a deletion of a declaration that these employees were not public employees. When proposing the amendments, DOT issued a press release stating that the amendments provided for the "retention of full bargaining rights," the "creation of a broad range of mandatorily negotiable issues," and "ultimate recourse for employees to the Public Employment Relations Commission on procedural matters."

employees. The negotiations test in effect when the NJPTA was passed was set forth in State v. State Supervisory Employees Ass'n, 78 N.J. 44, 67 (1978):

> [N]egotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

We must presume, as a matter of statutory construction, that the Legislature was aware of this test. Quaremba v. Allen, 67 N.J. 1 (1975); Yacenda Food v. N.J. Highway Authority, 203 N.J. Super. 264, 273 (App. Div. 1985). Nevertheless, it did not adopt it for these employees. Rather, it adopted only the "intimately and directly" part and avoided the limiting references to managerial prerogatives. This test is nearly identical to the statutory scheme in the private sector. See 29 U.S.C. §158(d). The implication is that the Legislature wanted these employees to retain a broader scope of negotiations than that existing for New Jersey's other public employees.

The third sentence of subsection d marginally indicates a broader scope of negotiations. It authorizes negotiations over a subject -- pensions -- non-negotiable in the public sector and uses private sector terminology -- maintenance of union security and check-off arrangements. See also N.J.S.A. 27:125-14g (seniority rights may not be worsened).

Subsection e, like subsection c, makes substantive rights dependent on private sector laws, again the LMRA and the RLA. In this instance the substantive rights concern the preservation of bargaining units. The subsection states, however, the preservation must be "consistent with the purposes of this Act."

Subsection f requires, upon acquisition, the assumption and observance of existing labor contracts for their term. The Legislature did not seek to excise terms which might have conflicted with public sector negotiability tests.8/

We conclude that the Legislature intended that the employees have negotiations rights similar to what they had before the takeover. But this is not the end of the matter. As we have seen, it would have been easy for the Legislature to have simply adopted the LMRA model. But it did not do so. In this regard, the NJPTA does not refer to "collective bargaining." Rather, it refers, on several occasions, to "collective negotiations."

Although this was largely because of the absence of the right to strike, the Supreme Court has also stated that it reflects the limitations inherent in the public sector. The Court in Lullo stated:

> It is crystal clear that in using the term "collective negotiations" the Legislature intended to recognize inherent limitations on the bargaining power of public employer and employee...the authorization for "collective

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8/ When NJ Transit took over these bus companies, it entered protective agreements and assumed labor contracts.

> negotiations"...was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector. Finally, it signified an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service. [55 N.J. at 440]

We must presume, as a matter of statutory construction, that the Legislature was aware of this meaning when it adopted this term. Quaremba; Yacenda.

Private sector principles can be partly, but not fully transferred to NJ Transit's labor relations. In the private sector negotiations are not required on a matter "essential for the running of a profitable business" and at the "core of entrepreneurial control." To the extent these limits pertain to NJ Transit's right to determine the nature and direction of its operation, they apply here. But NJ Transit is not in business to make a profit. Indeed, a main reason it exists is because the private sector was unable or unwilling to provide public transportation services. NJ Transit's statutory mission is to provide "a coherent public transportation system in the most efficient and effective manner." N.J.S.A. 27:25-2. Negotiations cannot preclude NJ Transit from fulfilling this mission. Thus, to the extent of this statutory limit, labor

relations rights are more limited than they were when these employees were in the private sector.9/

In view of the legislative intent, and specifically the omission of the second half of the Supreme Court's balancing approach, this limitation must be more narrowly construed than the negotiability limitation under the EERA. This limitation must come from the NJPTA and NJ Transit's responsibility under that statute and cannot be based upon some broad and undefined exercise of managerial authority. The critical distinction would be that "issues that settle an aspect of the relationship between the employer and the employee," see First National Maintenance, 107 LRRM at 2709, quoting from Chemical & Alkali Workers, are mandatorily negotiable under this standard even if not under the EERA. However, other issues which would prevent NJ Transit from fulfilling its statutory mission would not be. For instance, determinations as to what type of service and when to provide it would not be mandatorily negotiable.

We now apply these principles to the proposals NJ Transit seeks to have declared non-negotiable. We first note our limited jurisdiction in making scope of negotiations determinations:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope

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9/ The unions have argued that section 13(c) of UMTA requires that private sector bargaining rights be fully preserved as a condition to receiving federal funds while NJ Transit responds that New Jersey's public sector principles satisfy that condition. We lack authority to resolve this issue.

> of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [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 (1975).]

We also note two other limiting factors. 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. Also, this case arises, not in a specific factual setting, but based on contract language provisions and proposals that may be susceptible to various meanings. We decide these questions based on our understanding of the parties' disputes.

Individual Scope Rulings

I. AMALGAMATED TRANSIT UNION, NEW JERSEY COUNCIL
Docket No. SN-87-88

> Bus operators and maintenance department employees: there are 3,808 employees in this unit, including bus drivers, utility workers, repairmen, mechanics, service workers, cleaners, custodians, janitors and clerks.

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."

NJ Transit contends the first paragraph conflicts with its statutory right to "sell or otherwise dispose of...real and personal property...in the exercise of its powers and the performance of its duties." It also contends it is non-negotiable because it attempts to impose contract terms on third parties.

It contends the second paragraph is non-negotiable because it "has a significant impact on NJ Transit Bus' ability to deliver public transportation services in the most efficient manner possible." It also contends that it would prohibit subcontracting.

ATU contends the clauses are mandatory subjects of bargaining under federal law.10/

The first paragraph is commonly known as a successorship clause. It is a mandatory subject of negotiations under federal law. Lone Star Steel Co., 231 NLRB No. 88, 96 LRRM 1083, aff'd in pertinent part 639 F.2d 545, 104 LRRM 3144 (10th Cir. 1980). See also Morris, The Developing Labor Law, at 841 (2d ed. 1983). In Lone Star, the Board said:

> We are persuaded that a successor's assumption of any collective bargaining agreement negotiated between the Union and Lone Star would be vital to the protection of Starlight employees' previously negotiated wages and working conditions, as it is clear that the general rules governing successorship guarantee neither employees' wages nor their jobs. In view of the foregoing, we agree that the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of the Act, as an agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership. [231 NLRB at 575]

We find this clause mandatorily negotiable under the NJPTA as well. NJ Transit would retain the right to sell its properties, subject to only one restriction -- the buyer must assume its labor agreement. That restriction protects the fundamental interest of employees in maintaining their terms and conditions of employment, an interest the Legislature thought so vital it required NJ Transit to assume

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10/ That is its position on nearly every issue.

and observe labor agreements for their remaining term. N.J.S.A. 27:25-14(f). It would be anomalous for the Legislature to guarantee labor contracts when NJ Transit acquires assets, but to prohibit NJ Transit from negotiating such protections when it sells. Of course, not all conditions upon a sale of assets would be mandatorily negotiable (i.e., requiring the union's approval of the prospective purchaser), but this one is. The employer's freedom to manage its business, including its right to sell parts of it should be "balanced here by some protection to the employees from a sudden change in the employment relationship." Lone Star, 693 LRRM at 555.11/

The second paragraph effectively prohibits NJ Transit from using a subsidiary corporation to do work done by ATU employees where the reason for the change was lower labor costs. Until recently all aspects of subcontracting, at least from the NLRB's point of view, were mandatory subjects of bargaining. It changed its policy in United Technologies, 269 NLRB No. 162, 115 LRRM 1281, 1283 (1984) when it stated:

> [W]e hold that excluded from Section 8(d) of the Act are decisions which affect the scope, direction, or nature of the business. For example, we are aware that in the past the Board's decisions reflected an almost reflexive response to "subcontracting" decisions as requiring bargaining. We emphasize, again, that

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11/ We add that this successorship clause can only apply to employees working at the operations purchased and cannot require the purchaser to extend the contract to other operations and employees.

> the appellation of the decision is not important. Fibreboard "subcontracting" must be bargained not because the decision turns upon the label, but because in fact the decision turns upon a reduction of labor costs. In First National Maintenance the Court explained that its holding in Fibreboard derived from the fact that the employer's decision to subcontract did not turn upon a change in the basic operation, but rather turned upon a reduction of labor costs. [269 NLRB at 893]

Under Board law, therefore, this aspect of subcontracting is mandatorily negotiable because it turns on labor costs.

We now consider whether such a clause is nevertheless non-negotiable under the NJPTA. The starting point is Local 195, IFPTE v. State, 88 N.J. 393 (1982), where our Court held that the substantive decision to subcontract was non-negotiable under the EERA. It distinguished, however, between decisions based upon fiscal reasons and those based on non-fiscal reasons. Id. at 409-410. Under the former, a proposal to "discuss" such topics would be mandatorily negotiable. This distinction is relevant here. Where subcontracting is done to save labor costs, the matter, as in the private sector, is mandatorily negotiable. Where it is done for other reasons pertaining to NJ Transit's mission, it would not be. Because the former is involved here and there are no other specific facts involved, we hold that the clause is mandatorily negotiable.

Two other clauses pertain to 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.

As written and because of the reasons already stated, this clause so limits NJ Transit's power to subcontract that it is not mandatorily negotiable.

The second provision is entitled "Snow Work:"

> "Maintenance Department employees above the rate of Garagemen shall operate diesel and gasoline engined powered cinder and salt loaders and Company vehicles engaged in plowing snow from driveways and yards at garages, terminals and loops. Maintenance Department employees, including Garagemen, shall clean snow and ice from sidewalks at such locations.
>
> A list shall be posted each year for Maintenance Department employees to qualify for spreading cinders and salt on roads and streets, after their regular tour of duty has been completed, or on their regular days off. Maintenance Department employees who qualify for snow work shall be used for such work, and operators shall only be used in emergencies.
>
> Employees performing snow work shall be paid time and one-half their regular wage rate.

This clause is mandatorily negotiable to the extent it merely concerns unit work being performed by other public employees. That is mandatorily negotiable under both the EERA and private sector

law. Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1979), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83). But to the extent this clause would be invoked to block subcontracting based on reasons other than labor costs, it is not mandatorily negotiable. Finally, it could not be interpreted to limit NJ Transit's ability to assign sufficient manpower to perform the duties.

Management Rights

> The Management of the Company and the direction of the working forces, including the right to hire, suspend, discharge for proper cause, promote, demote, or transfer, and the right to determine the size of the working forces are recognized to be in the Company, but each employee covered in this agreement shall have the right provided in this agreement for the adjustment of grievances.

NJ Transit Bus contends the underlined provision should be deleted because "employees do not have the right to grieve over non-mandatory subjects of negotiation." Not true. N.J. Const. (1947), Art. I, para. 19. See Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). We also reject the underlying assumption that all the subjects of this clause are not mandatorily negotiable. The Legislature, for example, has expressly authorized agreements to arbitrate disciplinary actions such as suspensions, discharges and demotions if the employees can't go somewhere else. If a dispute arises over the legal arbitrability of a grievance, a scope petition can be filed.

Grievance Procedure

The current grievance procedure permits arbitrators to be chosen in accordance with the rules of the American Arbitration Association or the New Jersey Mediation Service. NJ Transit argues that since we have jurisdiction over the parties, only we may select arbitrators to resolve grievances. We disagree. Both organizations currently provide arbitration services in public employment relations disputes. The decision as to which arbitration service to use is simply an administrative matter pertaining to arbitration.

Employee Assistance Programs and Leaves of Absence

> The Company and Union shall set up an Employee Assistance Committee, composed of Union-Management representation equally. Troubled employees shall be referred to a drug and alcohol program set up by company and Union.
>
> Employees suspended from employment after January 1, 1985 because of revocation of their driver's licenses shall be granted a leave of absence for a period of not more than six (6) months. While on leave of absence, the suspended employee shall not bid on any open jobs. Employees will return to their prior location after leave of absence. The Company may use a part-time employee to cover the leave period and the part-time hours involved shall not count against the percentage limitations upon the use of part-time employees.

NJ Transit contends this subject has been preempted by the disciplinary amendments to N.J.S.A. 34:13A-5.3. We disagree because these employees are not governed by that statute. It also contends that NJ Transit has the managerial prerogative to determine that certain incidents related to drug or alcohol use warrant discipline or discharge. We do not read this clause as prohibiting discipline

of employees whose performance or conduct has been poor. The clause is silent on disciplinary matters and whether a particular disciplinary discharge was just should be made under the facts of a particular case. See Misco, __ U.S. __, 126 LRRM 3113 (1987).12/ In general, however, as in the private sector, NLRB v. Licorice, 309 U.S. 350, 6 LRRM 674 (1940), disciplinary matters are mandatorily negotiable.

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.

NJ Transit contends that Public Employment Relations Commission should be replaced by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 et seq. ("EERA"). We disagree. Its premise is incorrect. Its labor relations are governed by the NJPTA, not the EERA.

It also contends "bargaining" agent should be replaced with "negotiations" agent because the statute refers to "collective negotiations." Again, we disagree. We interpret the term to be a short-hand term which both parties have used informally. It cannot, of course, be interpreted to imply a right to strike or a scope of negotiations broader than the NJPTA authorizes.

12/ UTU states that its proposal does not limit discipline for misconduct.

Finally, it contends that it is mandated to meet with the union only on questions "within the mandatory scope of negotiations." We disagree. Even where a matter is not a mandatory subject of negotiations, discussion has been endorsed by our Supreme Court. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 31-32 (1973).

The union has proposed this new clause:

> The Company's refusal to meet with the Union on any dispute will give the Union the right to submit directly to arbitration.

We agree that this clause should be modified to reflect that not all disputes may be submitted to arbitration; rather, it is only those disputes that can legally be submitted to arbitration. The clause will be mandatorily negotiable if modified to reflect this limitation.

Benefits - Retirees

> All current retirees who retired prior to March 24, 1976, shall receive a 20% increase in their pensions. Those retiring between March 24, 1976 and March 24, 1984, shall receive a 10% increase in their pension.

Pensions are, in general, mandatorily negotiable under the NJPTA. N.J.S.A. 27:25-14. N.J.S.A. 34:13-8.1 is not applicable to these employees. However, the instant clause is not a mandatory subject of negotiations, even in the private sector, because it would require negotiations concerning employees already retired. Pittsburgh Plate Glass.

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.

NJ Transit contends that the underlined portions are non-negotiable under Local 195 standards. But these provisions are negotiable under the LMRA. Employee transfers, as well as reassignments, intimately and directly affect employees and settle an aspect of the employer-employee relationship. United States Gypsum Co., 94 NLRB 112, 28 LRRM 1015 (1951). See generally, Morris at 802-804. The clause does not limit the employer's right to transfer operations, it simply regulates the procedures and circumstances for employee transfer.

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.

The underlined portions would be non-negotiable under the EERA, e.g., Paterson Police PBA v. Paterson, 87 N.J. 78 (1981). But, these proposals concern an aspect of employer-employee relationship specifically mentioned by N.J.S.A. 27:25-14(g). In fact, in the private sector, seniority provisions are rarely litigated in NLRB proceedings because, as Morris states, it is "so obviously a condition of employment" (at 803). We further note that the clause limits promotional opportunities to those qualified to do the work.[13/] An employee who can do the job has a legitimate interest in being considered for promotion.

13/ In an affidavit, NJ Transit's director of labor relations has asserted that arbitrators interpreting this clause have required the promotion of unqualified employees. However, the clause only requires the promotion of qualified employees. An arbitration award going beyond these limits would be subject to vacation. N.J.S.A. 2A:24-1 et seq.

We do not believe, however, that unions may insist on negotiating a right to determine jointly with management whether an employee is qualified for a promotion. While the parties are obligated to negotiate seniority considerations and review procedures, management, at the outset, decides the promotion. This decision would, however, be subject to challenge by the union and that issue could proceed to arbitration.

Part-Time and Seasonal Operations

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.

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.

d. Part-time operators shall work up to 10% of the scheduled platform hours per week in each garage. 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.

e. The use of part-timers to work up to 10% of the schedule platform hours will be subject to the following limitations. No part-timers may work more than five (5) hours and forty-five (45) minutes of scheduled platform hours of the weekday, Monday through Friday. On Saturday, Sunday and Holidays, part-timers may not work

more than eight (8) scheduled platform hours, except when assigned a run that is scheduled for more than eight (8) hours. On holidays, fall-out operators shall have preference to work before part-time operators.

f. If the company adds unscheduled extra pieces after the general pick, no more than 10% 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.

NJ Transit contends that it has the right to use part-time and seasonal employment to meet its special service needs. Its Deputy General Manager for Operations has stated, in an affidavit, that restrictions on part-time and seasonal lead to a large number of employees being on duty when they have no assigned bus trip. He further states that NJ Transit would be able to add rush-hour services and devise new routes if restrictions on the use of part-time operations were removed.

We start with the federal model. The clause is mandatorily negotiable because it pertains to hours and days of work, work assignments and labor costs. To the extent it limits non-unit employment, it would be mandatorily negotiable as preserving unit work. NJ Transit's argument that the clauses interfere with its statutory mission is too broad. The right to employ part-time and seasonal employees without any restrictions to reduce labor costs could totally undermine the work and welfare of full-time unit personnel.

We do, however, make one exception to this general rule. NJ Transit must have the right to assign part-time and seasonal employees where it can demonstrate that it cannot otherwise deliver its service. With this limitation, however, we hold the clause to be mandatorily negotiable.

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.

NJ Transit contends the clauses are non-negotiable because they allegedly restrict NJ Transit's ability to make work assignments and schedule work. It specifically refers to section I which it asserts requires NJ Transit to negotiate before implementing new schedules. Its Deputy General Manager of Operations has stated that these contractual limitations impede efficiency because they guarantee drivers compensation for eight hours regardless of whether they have worked that amount of time.

This issue is mandatorily negotiable under the LMRA. We now consider whether it compromises NJ Transit's statutory mission. In making this determination, we contrast two situations.

On the one hand, management must have the unfettered right to determine what type of service to provide, when to provide it and how much to provide. Negotiations over such items would be incompatible with NJ Transit's statutory mission. To the extent that the contract would require negotiations on such matters, we hold them to be not mandatory subjects of negotiation. See also First National Maintenance. Compare Local 195. Therefore, Section I is non-negotiable to the extent it would require negotiations and give the union the right to object to bus "schedules" instead of simply employee schedules.

On the other hand, once NJ Transit has made determinations when its services will be offered, remaining issues, including which qualified employee is to provide the service and the compensation and hours of work for that service are mandatorily negotiable. Given our belief that the clause concerns work schedules, not bus schedules, it is mandatorily negotiable.

Working Conditions

ATU has proposed to amend an overtime clause to limit overtime to volunteers. A clause that would give preference to volunteers is mandatorily negotiable, assuming the volunteers are qualified. However, there is one significant limitation, not present in the private sector: NJ Transit must have the right to

require overtime where otherwise it would be unable to deliver the public service.

Vacations

> Each garage will have enough vacation weeks open in the summer to accommodate 12% of the workforce by location and classification.

Vacations are mandatorily negotiable in the private sector, e.g. Jimmy-Richard Co., 210 NLRB 802, 86 LRRM 1591 (1974), aff'd 527 F.2d 803, 90 LRRM 3258 (D.C. Cir. 1975). In fact, vacation scheduling is also mandatorily negotiable in the public sector so long as it does not significantly interfere with staffing requirements. Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 141 (¶12006 1980). On the record before us, there is nothing to indicate that this clause would prevent the delivery of services. This article is mandatorily negotiable.

Union Security

> All present employees and all new 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.

NJ Transit contends this provision conflicts with N.J.S.A. 34:13A-5.5 and is unconstitutional. We do not decide the constitutional question. Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472, 479 (¶14199 1983), aff'd 99 N.J. 523 (1985). We simply note that union security arrangements entered into by NJ Transit are subject to the

same constitutional limitations that apply to public sector agency shop. Chicago Teachers Union, Local No. 1 v. Hudson, __ U.S. ___, 106 S.Ct., 1066, ___ L.Ed.2d __ (1986); Robinson v. New Jersey, 741 F.2d 598 (3rd Cir. 1984), cert. den. __ U.S. __, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). We do not believe that this provision is preempted by the representation fee statute in view of the plain language of the NJPTA which expressly declares "the maintenance of union security" to be mandatorily negotiable. But it is clear under federal law that such clauses are limited to "financial core membership" and cannot be construed to require more than that. NLRB v. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963).

M. Traveling Time

ATU has proposed:

> All employees must report to their home garage or regular work location before being sent out on company business.

NJ Transit objects because this clause would (1) increase the length of time an employee would be on duty and (2) "affect emergency assignments by preventing NJ Transit from requiring an employee to report directly to the location where the employee is needed most."

In general, this clause is mandatorily negotiable. It predominantly involves hours of work and compensation. An employee has a negotiable interest in starting work from his work base and not being required to bear the burden of commuting to a work site. We make one limited exception: in an emergency, NJ Transit has the

right to direct an employee to report directly to a certain location. Under such circumstances, however, the compensation for being required to respond would be mandatorily negotiable.

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

> Bus operators and maintenance employees employed by NJT Mercer: there are 163 employees in this unit.

We have already decided the following clauses in Part I: Union Security and Check-off, Successor Clause, Management Rights, Subcontracting, Vacancies, Grievance Procedure, Leaves of Absences, Work Assignments, Part-Time Employees, Garage Employees -- Vacancies, Snow Work, Pensions for Retirees, and Termination. We now decide the remaining issues.

Right To Strike

This clause implies that, under certain conditions, the employees have the right to strike. We agree that such a clause, to the extent it would be interpreted that way, is illegal. The NJPTA is clear. It provides that "employees shall not have the right to strike except as provided by the 'Railway Labor Act.'" The Railway Labor Act is not applicable to these employees.

Accident Reports and Disciplinary Standards

This clause provides:

> An employee whose regular or special driving license is revoked or suspended will be given

> first consideration for employment before the hiring of new or additional personnel, providing the individual qualifies for the position.
>
> A New Jersey driver's license will not be required of employees whose job classification does not normally require the operation of Company vehicles on the street. Employees whose duties require operating vehicles off the property will be required to have a valid New Jersey driver's license in their possession at all times.

Division 540 has also proposed the following:

> When members of the union are summoned to court as a result of an accident while driving equipment owned in whole or in part by the Company, they will be suitably represented at such hearing. Union members who appear in court and are found not guilty of a charge or charges, have a charge or charges dropped or dismissed, shall not be held accountable for said charges by the Company, [and] any member who had been suspended or discharged shall be reinstated to their former position and paid for all time lost from the service of the Company.
> An employee whose regular or special driving license is revoked or suspended will be given first consideration for employment before the hiring of new or additional personnel [providing the individual qualifies for the position.]

NJ Transit contends that these clauses interfere with its right to determine the criteria and standards for employee performance and discipline. It relies on our case law interpreting the disciplinary amendments to N.J.S.A. 34:13A-5.3. However, as we have already said, this case is not governed by the EERA. These issues involve the employer-employee relationship and therefore are mandatorily negotiable.

Sick Leave Policy

The union has proposed the following:

> Where reasonable and appropriate an affidavit of the employees shall be acceptable as medical evidence, for any additional sick leave in that year unless such illness is of a chronic or recurring nature requiring recurring absences of one day or less in which case only one certificate shall be necessary for a period of six months....

NJ Transit contends that this proposal interferes with its prerogative to establish a sick leave verification policy. If this case arose under the EERA, we would agree. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982). But this issue is mandatorily negotiable under the LMRA. Cf. Womac Industries, 238 NLRB 43, 99 LRRM 1185 (1978). It is an aspect of the employer-employee relationship. Therefore, we find it to be mandatorily negotiable.14/

Work Assignments

The ATU has proposed that:

> Under no condition will any union employee be allowed to hold or perform two jobs in two departments at the same time, nor will any union employee be allowed to be taken from his bidded job for the purpose of performing another job in or outside of his department....

NJ Transit contends that this clause interferes with its prerogative to (1) establish job classifications and (2) assign employees to do work outside their classification in an emergency.

14/ The parties have not specifically addressed whether the last sentence of the first paragraph is mandatorily negotiable. We note that a clause may not conflict with the statute: the parties may not agree to a clause that would permit an employee to drive a vehicle on the property without a license if a license is required under law.

We believe that this clause, in general, is mandatorily negotiable. It is under the LMRA. Lange Co., 222 NLRB 558, 91 LRRM 1311 (1976); Pilot Freight Carriers, 221 NLRB 1026, 91 LRRM 1005 (1975). There is one limitation: NJ Transit must have the right to assign employees to work outside their classifications where otherwise it would not be able to deliver its services.

III. New Jersey Transit Bus and Division Nos. 819-825 and 880 of the Amalgamated Transit Union (Field Salaried Employees), Docket No. SN-87-92

> Field salaried employees: there are 155 employees in this unit, including depot masters, station masters, starters, roadmen, inspectors, ticket agents, typists and clerks.

We have already reviewed the following clauses: Purpose Clause, Recognition, Management Rights, Grievance Procedure, Union Security, Vacancies, Seasonal Employees and Part-Time and Temporary Employees. Two clauses remain.

Seniority-Layoff

> The salaried employee with the lowest seniority in Company's Division may "bump" in any of the Company's garages in the state, until the lowest man in seniority is laid off. Interested employees shall make application by letter to the Division Manager of the Company within three (3) working weekdays after position is posted. All applications received shall be reviewed by representatives of the Company and the Union to determine whether the applicant has the fundamental background and experience in such work to qualify and that the position to be filled is so situated as to be environmentally acceptable.

The union also seeks to amend this clause by adding the following paragraph:

> Salaried employee must be capable of doing the work performed by the employee that is being bumped. The employee shall be given a thirty day training period to see if they can qualify. Representatives of the Company and Union shall determine within thirty days whether employee is qualified or not. When it is obvious that the employee cannot qualify the thirty day training period shall not apply. Employee failing to qualify shall bump another employee in another classification.

NJ Transit contends this clause is not mandatorily negotiable because it has the managerial prerogative "to determine the qualifications of employees to fill positions." That is true under the EERA, e.g., Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1982). But, that is not the case under the LMRA. In part, we read this clause to permit an employee scheduled to be laid-off to bump a less senior employee, provided that the employee has the ability to do the work. As so understood, this clause is mandatorily negotiable. Quality Packaging, Inc., 265 NLRB 1141, 112 LRRM 1283 (1982). However, the underlined portion of the clause is not mandatorily negotiable. While the union can negotiate seniority provisions and submit such disputes to arbitration, it is not mandatorily negotiable for it to make joint managerial decisions in the first instance. Rather, management makes the initial decision subject to challenge through the grievance and arbitration proceedings.

Specifications -- Various Salaried Classifications

> The existing specifications of each salaried position are made part of this agreement.
>
> Furthermore, it is agreed that should the duties of any classification be changed or any new eligible classification established, the Company shall prepare and furnish the Union copies of the changes or new specifications and shall negotiate with the Union concerning any changes to be made therein.

NJ Transit contends the underlined portion is not negotiable because it has the managerial prerogative to establish classifications and to assign duties within the classifications.

Changes in work assignments and job classifications are mandatorily negotiable in the private sector. They can affect employee rates of pay, work hours and working conditions, Long Mile Rubber Inc., 245 NLRB 1337, 102 LRRM 1319 (1979), Charmer Industries, 250 NLRB 293, 104 LRRM 1368 (1980), enf. den. on other grounds sub nom Distillery Workers v. NLRB, 664 F.2d 107 LRRM 3137 (2d Cir. 1981) and the ability of the union to preserve the work of the bargaining unit, Central Cartage Inc., 236 NLRB 1232, 98 LRRM 1554, enf. 607 F.2d 1007 (7th Cir. 1979) and Fry Foods, Inc., 241 NLRB 76, 100 LRRM 1513 (1979), enf. 609 F.2d 267, 102 LRRM 2894 (CA 6 1979). Therefore, in general, we find this clause to be mandatorily negotiable. However, NJ Transit does have the right to change job classifications and specifications where necessary to enable it to fulfill its statutory mission. For example, where new technology has resulted in the need for employees to perform new and different assignments, NJ Transit must have the authority to direct that such work be done. For example, NJ Transit could not be

required to negotiate over its decision to purchase vehicles which might create the need for a new job specification. However, even under those circumstances, the effects of such changes (such as compensation for the different duties) are mandatorily negotiable.

IV. NEW JERSEY TRANSIT-BUS OPERATIONS AND DIVISION NOS. 819-825 AND 880 OF THE AMALGAMATED TRANSIT UNION (GENERAL OFFICE AND CLERICAL EMPLOYEES), Docket No. SN-87-93

> General office clerical: There are 201 employees in this unit, including accountants, bookkeepers, auditors, engineers, equipment inspectors, stenographers, clerks and typists

All of the clauses in dispute were decided in Parts I through III.

V. UNITED TRANSPORTATION UNION, Docket No. SN-87-91

> Paterson Division represents 158 employees at the Madison Avenue Paterson garage and formerly employed by the Maplewood Equipment Company.

Most of the contract provisions have been discussed with respect to the ATU's proposals. We have discussed the mandatory negotiability of the Preamble, Union Security, Leaves of Absence, Overtime Assignment/Time for Reporting and Turning In, Arbitration, Part-Time Operators and Strikes. These determinations need not be repeated.

Strikes, Picketing, Slowdown and Working During Strike

These two clauses provide:

> The Union agrees that the employees covered by this Agreement shall not participate in any strike, picketing or slow down against the Employer for any reason whatsoever and the Employer agrees that the employees shall not be locked out absent a breach of this Agreement.
>
> Rule 23 - No employee shall be required to work on any special charter or other jobs where there is a legally authorized strike in effect.

We have already held that the right to strike is not negotiable. The fact that it is over an alleged breach of contract or in support of another strike does not change the result.

Uniforms

The union has proposed "Eisenhower jackets" to be an acceptable part of NJ Transit uniforms.

NJ Transit contends that it has the managerial prerogative to determine appropriate employee uniforms. UTU contends that the clause is mandatorily negotiable because it pertains to "comfort and convenience qualities of the clothing."

In determining the negotiability of uniforms, we demarcate items predominantly relating to employee comfort and safety matters pertaining to style and design. The former are mandatorily negotiable, the latter are not. We make this distinction because we believe style and design are predominantly related to the employer's right to manage its business and have only a limited impact on the employees' terms and conditions of employment. See First National

Maintenance. Because this clause relates to the style of jacket, it is not mandatorily negotiable.

VI. UNITED TRANSPORTATION UNION Docket No. SN-88-8

> Warwick Division represents employees at the Warwick, New York bus garage and formerly employed by the Maplewood Equipment Company.

We have already decided the following 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 are left only with Emergency Work Assignments for maintenance employees. The union has proposed the following:

> 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.

NJ Transit contends this proposal is not mandatorily negotiable because it pertains to minimum staffing requirements. If this case arose under the EERA, we would agree. Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978). But this proposal would be mandatorily negotiable under the LMRA because it settles an aspect of the employer-employee relationship related to safety.

VII. 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 NJT Bus Fairview garage and formerly employed by the Maplewood Equipment Company.

Most of the contract provisions have been discussed with respect to ATU's proposals. We have discussed the mandatory negotiability of the Purpose Clause, Management Rights, Grievance Procedure, Union Security, Schedules, Working Conditions, Extra Trips, Allowances - Vacation, Seniority and Bidding of Runs, Snow Work, Vacancies, Employee Assistance Programs, Leaves of Absences, and Part-Time Operators. These determinations need not be repeated. We now decide the remaining issues.

Exact Fare System

TWU has proposed a clause requiring NJ Transit to "initiate an exact fare system." This is not a mandatory subject of negotiations because it predominantly relates to the employer's right to deliver its services.

Maintenance Department Employees - Wearing Apparel

TWU has proposed that NJ Transit be required to provide employees with "winter vests." This is mandatorily negotiable because it predominantly relates to employee comfort and safety.

Maintenance Department Employees - Progression

This clause provides:

> If the Company and the Union, represented by proper officials, agree as to employee's aptitude and ability, Repairman will move from Class C to Class B and from Class B to Class A at six month intervals.

> Similarly, Subject to approval by both parties, Maintenance men will increase from one classification to another each six months so that employees doing the same work will reach the same maximum rate.

NJ Transit has again contended that this clause is not mandatorily negotiable because it has the managerial prerogative to decide whether employees are qualified for promotions.

We believe this clause is similar to the vacancies clause. It is mandatorily negotiable with one exception: management need not negotiate over the initial determination of whether the employee has the ability to do new duties, but must negotiate over procedures for reviewing its decisions.15/

ORDER

The following proposals are mandatorily negotiable:

A. New Jersey 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), Portions of Snow Work (to the extent consistent with this opinion), Management Rights, Grievance Procedure, Employee Assistance Programs and Leaves of Absences, Recognition Clause (to the extent consistent with this provision), Seniority and Bidding of Runs, Portions of Vacancies (to the extent consistent with this opinion), Part-Time and Seasonal Operations, Portions of Scheduling (to the extent consistent with this opinion), Working Conditions (to the extent consistent with this opinion), Vacations, Union Security, Traveling Time.

15/ In the alternative, to the extent it merely involves increased compensation based on seniority, it would be mandatorily negotiable as well.

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

Purpose Clause, Recognition (to the extent consistent with this opinion), Management Rights, Grievance Procedure, Union Security, Portions of Vacancies (to the extent consistent with this opinion), Seasonal Employees, Part-Time and Temporary Employees, Portions of Seniority - Layoff (to the extent consistent with this opinion), Portions of Specifications -- Various Salaried Classifications (to the extent consistent with this opinion).

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

Purpose Clause, Recognition, Management Rights, Grievance procedure, Union Security and Portions of Vacancies (to the extent consistent with this opinion).

B. New Jersey Transit Mercer, Inc. and Amalgamated Transit Union, Division 540

1. Docket No. SN-87-89

Union Security and Check-Off, Successor Clause, Management Rights, Subcontracting (to the extent consistent with this opinion), Portions of Vacancies (to the extent consistent with this opinion), Grievance Procedure, Leaves of Absences, Work Assignments, Part-Time Employees, Garage Employees - Vacancies, Termination, Accident Reports and Disciplinary Standards, Sick Leave Policy, Work Assignments (to the extent consistent with this opinion).

C. New Jersey 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, Leaves of Absences, Overtime Assignment/Time for Reporting and Turning In and Arbitration.

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

Preamble, Union Security, Leaves of Absences, Part-Time Operators, Overtime Assignments, Time for Reporting and Turning In, Arbitration, Portions of Schedules (to the extent consistent with this opinion), Vacations and Emergency Work Assignments.

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

1. Docket No. SN-87-90

Purpose Clause, Management Rights, Portions of Snow Work (to the extent consistent with this opinion), Grievance Procedure, Union Security, Schedules, Working Conditions, Extra Trips, Allowances - Vacation, Seniority and Bidding of Runs, Vacancies, Employee Assistance Programs, Leaves of Absences and Part-Time Operators, Wearing Apparel, and Portions of Progression (to the extent consistent with this opinion).

The following proposals are not mandatorily negotiable:

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

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

Section 15I (complete prohibition on subcontracting), Portions of Snow Work (to the extent consistent with this opinion), Benefits - Retirees, Portions of Vacancies (to the extent consistent with this opinion), and Portions of Scheduling (to the extent consistent with this opinion).

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

Portions of Vacancies (to the extent consistent with this opinion), Portions of Seniority - Layoff (to the extent consistent with this opinion), Portions of Specifications - Various Salaried Classifications (to the extent consistent with this opinion).

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

Portions of Vacancies (to the extent consistent with this opinion)

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

Snow Work (to the extent consistent with this opinion), Pensions for Retirees, Vacancies (to the extent consistent with this opinion) and Right to Strike.

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

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

Strikes, Picketing, Uniforms, Slowdown and Working During Strike

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

Working During Strike, Portions of Schedules (to the extent consistent with this opinion)

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

Portions of Snow Work (to the extent consistent with this opinion), Exact Fare System and Portions of Progression (to the extent consistent with this opinion)

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
February 22, 1988
ISSUED: February 22, 1988