COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	
	: Case No.	PERA-R-99-358-E
	:	(PERA-R-83-106-E)
MONROE COUNTY TRANSPORTATION	:	
AUTHORITY	:	

FINAL ORDER

On June 23, 2000, the Monroe County Transportation Authority (Employer) filed timely exceptions and brief in support with the Pennsylvania Labor Relations Board (Board) to a Nisi Order of Certification (Nisi Order) issued by the Board Representative on June 6, 2000. The Nisi Order certified the Amalgamated Transit Union, Local No. 819 (Union) as the exclusive representative for the purpose of collective bargaining with respect to wages, hours and terms and conditions of employment of a subdivision of the employer unit comprised of

> [a]ll full-time and regular part-time blue-collar nonprofessional employes including but not limited to drivers, mechanics, and shared ride operators; and excluding white-collar nonprofessional employes, management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act.

In its exceptions, the Employer advances the same four arguments that were rejected by the Board's Hearing Examiner in a March 23, 2000 Order Directing Submission of Eligibility List (Order). The Employer asserts that: the inclusion of the "shared-ride" drivers in the unit with "fixed route" drivers (1) is contrary to the Union's Petition; (2) is contrary to the parties' bargaining history; (3) would result in an unworkable collective bargaining agreement because federal funding arrangements restrict fixed route drivers' right to strike; and (4) is contrary to settled principles of law because the shared ride and fixed route drivers do not share a sufficient community of interest. On July 27, 2000 the Union filed a Statement in Opposition to the exceptions of the Employer.

This case originated on September 10, 1999 with the Union filing a Petition for Representation (Petition). In the Petition, the Union sought to include "share ride operators" and alleged that thirty percent of the employes wished to be represented by the Union. On September 21, 1999 the Secretary of the Board issued an Order and Notice of Hearing directing a hearing for September 27, 1999. The Employer filed a motion for continuance which was denied by the Hearing Examiner. Two days of hearing followed on September 27, 1999 and October 26, 1999. Both parties filed post-hearing briefs and the Hearing Examiner issued the Order on March 23, 2000 finding the unit appropriate. The Eligibility List was received on March 30, 2000 and the Board Representative issued an Order and Notice of Election on April 18, 2000 directing an Election for May 25, 2000. The election was held as scheduled and a majority of the voters voted for representation by the Union.

In its exceptions, the Employer does not challenge any of the Hearing Examiner's findings of fact. The Hearing Examiner found that the Authority provides public transportation for county citizens through (1) a fixed route

bus service with regularly scheduled stops operated by fixed route drivers and (2) a specialized para-transit, door-to-door, by appointment service operated by shared ride drivers. The fixed route drivers are required to have a commercial driver's license with an air brake endorsement, operate large buses that carry 30-40 people and work hours between approximately 5 a.m. and 9 p.m. weekdays and some hours on weekends. The shared ride drivers are also required to have a commercial driver's license (though, not an air brake endorsement), operate mini buses and vans and generally work weekdays between the hours of 8 a.m. and 4 p.m. (sometimes later) and operate a shopping mall shuttle on weekends. On occasion, shared ride drivers who have an air brake endorsement also operate fixed route buses. Each classification of drivers has a different dispatcher and a different rate of pay. However, each is required to use a time clock to record their hours of work; operate under the same work rules; and share similar benefits, including vacation and insurance. The Hearing Examiner concluded that the shared ride drivers share a sufficient community of interest with the fixed route members of the bargaining unit previously certified at Case No. PERA-R-83-106-E.

Without citing to the notes of testimony adduced at the hearings in this case, the Employer argues that "the hearing examiner made it clear that the Board intends to treat the 'R' Petition in this case as a unit clarification matter resulting in the inclusion of 'shared-ride' drivers in the existing bargaining unit of 'fixed route' drivers." (Employer, Br. at 3). The Employer argues that the Petition as filed "explicitly seeks representation of a unit consisting only of 'shared-ride operators'" and inclusion of the shared ride drivers into the existing unit is contrary to the Petition. (Id.)(emphasis in original). Further, the Employer's argument overlooks the fundamental distinction between a representation petition, to be used to resolve a question of representation and a unit clarification petition which can be entertained only where no question of representation exists. 34 Pa. Code §95.23(a). The Board did not treat this matter as a unit clarification, as evidenced by the election conducted on May 25, 2000 in which the shared ride drivers voted for representation by the Union in the blue collar nonprofessional employe unit. The Board has thoroughly reviewed the record and finds no support for the Employer's argument and therefore dismisses this exception.

Contrary to the Employer's argument, the Hearing Examiner explained at the hearing that "although this case appears under an R number, it is really a Westmoreland intermediate unit election to accrete larger than 15 percent of the existing union into an already existing bargaining unit. Specifically the Union wishes to include share-ride operators into a unit [which includes] drivers, mechanics . . . . " (September N.T. 5). The Employer's assertion to the contrary is simply without record support. First, the Union's Petition on its face states that "the Union requested the share riders' be included into the current bargaining unit." (Petition). Second, the Hearing Examiner's opening remarks at the hearing explain that the Board intended to treat the Union's Petition as a petition to accrete the shared ride drivers into the existing unit. Third, the Hearing Examiner fully dispensed with the Employer's argument by explaining the holding in Westmoreland Intermediate Unit, 12 PPER ¶ 12347 (Order and Notice of Election, 1981) in his Order.

The Union filed the appropriate representation petition in this case. In Westmoreland Intermediate Unit, the union "petitioned the . . . Board to represent a pocket of unrepresented employes" and the Board representative explained that "an employe organization shall be authorized to file a petition for representation of unorganized employes who share a community of

interest with presently represented employes . . . ." Id. at 524. In this type of situation, when "the total number of [unrepresented employes] comprises more than 15% of the overall unit, an election will be held to determine whether the [unrepresented employes] wish to be added to the [existing unit]." In the Matter of the Employes of Temple University, 24 PPER ¶ 24076 at 195 (Order Directing Submission of Eligibility List, 1993). The Union appropriately filed a Petition for Representation and because the total number of unrepresented shared ride drivers comprised more than 15% of the overall unit, an election was held. The procedure outlined in the Westmoreland Intermediate Unit decision was followed in this case and the Board finds no merit in the Employer's argument that the Petition should be dismissed.

In its next exception, the Employer argues that the Nisi Order should be reversed because the inclusion of the shared ride drivers into the existing unit is contrary to the parties' bargaining history. The Employer bases this argument on the existence of a 1991 collective bargaining agreement that covered only the shared ride drivers. The fact that a 1991 agreement was labeled "203 Unit, only"[1] and referred to the funding source of the shared ride program (the State Lottery) is insufficient to justify separate units for the two types of drivers.

The employer's argument that this 1991 agreement represents the parties "bargaining history" is without merit. Similarly, the Board finds no merit in the argument that "the parties' recognition of a separate unit for the 'shared-ride' drivers was based on their understanding that the '203 program' was properly recognized as a separate collectively (sic) bargaining unit." (Employer Br. at 3). In order to have a "bargaining history" the union must be certified by the Board. Neither party argues that the Union was certified by the Board to represent the shared ride drivers for purposes of collective bargaining. Section 602(a) of PERA "plainly requires certification by the Board before a public employer may recognize a union for collective bargaining purposes." Professional and Public Serv. Employees Union Local 1300 v. Trinisewski, 504 A.2d 391 (Pa. Cmwlth. 1986). Therefore, the voluntary 1991 agreement covering the 203 Unit is irrelevant to the Board's decision.

The Employer's final two exceptions may be considered together. The Employer argues that because the fixed route operations are funded through federal funds acquired through the Urban Mass Transportation Act of 1964, Section 13(c), 49 U.S.C. § 5333(b)(formerly 49 U.S.C. §1609(c)) and the shared ride program is financed through the State Lottery, the two classifications of drivers do not share a community of interest and should be in separate collective bargaining units. As support for this argument, the Employer relies on Exhibit A-3, which was submitted at the October hearing and is entitled, "Special Section 13(c) Warranty for Application to the Small Urban and Rural Program" (Section 13(c) Warranty). The Employer asserts that the Section 13(c) Warranty requires that the terms of a new collective bargaining agreement between the Employer and the Union be submitted to binding interest arbitration in the event of a dispute lasting more than 30 days. The Employer next asserts that the Section 13(c) Warranty therefore denies fixed route drivers the right to strike and that "inclusion of the shared ride drivers in the existing collective bargaining agreement would result in the anomalous situation where more than one-half of the members of the bargaining unit would be entitled to strike, while the remaining members

[1] Exhibit A-1.

of the union would be obligated to pursue interest arbitration." (Employer, Br. at 5). The Board rejects this argument as a basis for reversing the Nisi Order and excluding the shared ride drivers from the existing unit.

First, the Board has thoroughly reviewed the Section 13(c) Warranty and, like the Hearing Examiner, does not find sufficient proof in the record that the Section 13(c) Warranty either requires interest arbitration or prohibits fixed route drivers from striking. The language quoted by the Employer in its brief does not support its theory that the fixed route drivers are required to submit to interest arbitration. It provides as follows,

> (4) Any dispute or controversy arising regarding the application, interpretation, or enforcement of the provisions of this arrangement which cannot be settled by and between the parties at interest within thirty (30) days after the dispute or controversy first arises, may be referred by any such party to any final and binding disputes settlement procedure acceptable to the parties . . .

Section 13(c) Warranty, (B)(4) at 25). The Commonwealth Court examined this precise language in Amalgamated Transit Union, ATU, Local 168 v. The County of Lackawanna Transit System, 678 A.2d 1225 (Pa. Cmwlth. 1996). In that case, the union requested that the parties proceed to binding interest arbitration over the terms of a successor collective bargaining agreement pursuant to the Section 13(c) Warranty and the Employer refused. Citing the United States Supreme Court in Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15, 102 S.Ct. 2202 (1992), the Commonwealth Court explained that "[w]hile . . . Section 13(c) required the 'preservation of benefits under existing collective-bargaining agreements and the continuation of collective bargaining rights' . . . the consistent theme running throughout Section 13(c) was that 'Congress intended that labor relations between transit workers and local governments would be controlled by state law." Amalgamated Transit Union, 678 A.2d at 1228 (emphasis omitted). The Court refused to order the parties to submit to interest arbitration under the federal Section 13(c) Warranty. The Court noted that there was no reference to interest arbitration in the parties' existing collective bargaining agreement and ordered the parties to settle their dispute over whether interest arbitration was even available to them under Pennsylvania law. This decision supports the Hearing Examiner's rejection of the Employer's argument that the Section 13(c) Warranty deprives the fixed route drivers of the right to strike granted by Pennsylvania law. Further, Section (B)(6) of the Section 13(c) Warranty explicitly provides that "[n]othing in this arrangement shall be construed as depriving any employee of any rights or benefits which such employee may have under existing employment or collective bargaining agreements, nor shall this arrangement be deemed a waiver of any rights of any union or of any represented employee derived from any other agreement or provision of federal, state or local law." Section 13(c) Warranty, (B)(6) at 25.

Section 1003 of PERA grants public employes the right to strike. "The Board has found on prior occasions that the waiver of a statutory right including this, the most fundamental right of public employes to strike, must be intentional, clear, express and unequivocal." West Shore School District v. West Shore Education Association, PSEA/NEA, 20 PPER ¶ 20113 (Final Order, 1989)(citing Commonwealth, Venango County Board of Assistance v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983)). By its own terms, the Section 13(c) Warranty does not attempt to waive any existing rights under Pennsylvania law, and

therefore it does not constitute the required "intentional, clear, express and unequivocal" waiver of the right to strike. The Board will not reverse the Nisi Order on this basis.

The Employer last argues that the employes do not share a community of interest. The Board is required by Section 604 of PERA to determine the appropriateness of a collective bargaining unit by taking into consideration two principles:

> (i) public employes must have an identifiable community of interest, and
>
> (ii) the effects of overfragmentation.

43 P.S. § 1101.604(1). The Board and courts have set forth the factors to be considered in determining whether an identifiable community of interest exists: common or similar work duties, hours of employment, rates of pay, responsibilities, interchange of employes, fringe benefits, bargaining objectives, manner of hiring and supervision. Methacon School District, 11 PPER ¶ 11040 (Decision and Order, 1980); Montgomery County Intermediate Unit No. 23, 11 PPER ¶ 11036 (Decision and Order, 1980); Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974). An identifiable community of interest may exist despite some differences in those areas. Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1990). The Pennsylvania Supreme Court recently provided the Board with guidance for complying with the first principle of Section 604(1) of PERA:

> [t]o determine whether employees share an identifiable community of interest, the PLRB and/or court should consider such factors as the type of work performed, educational skills requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures and bargaining history.

FOP, Conference of Liquor Control Board Lodges v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999). Noticeably absent from this list of factors is the existence/waiver of the right to strike, yet this is the only case that the Employer cites as support for that argument. As the Hearing Examiner explained, in FOP, Conference of Liquor Control Board Lodges, supra the two classifications of employes at issue, enforcement officers and licensing analysts, performed vastly different job duties. The enforcement officers conducted undercover investigations, executed raids, made arrests, received firearms training and were issued firearms. However, the licensing analysts duties included auditing and other regulatory work and they did not participate in criminal investigations, enforcements, raids or carry firearms. That case is fundamentally dissimilar to this, wherein the primary duty of both the shared ride drivers and fixed route drivers is driving public transit vehicles.

The Hearing Examiner applied the traditional community of interest analysis to the shared ride drivers and fixed route drivers and concluded that they shared a sufficient community of interest so as to be included in the same unit. As the Hearing Examiner explained, "[t]he Board's job is to determine whether the requested position is properly included in the unit based upon 'the actual functions of the job.'" (Order, at 3)(citing School Dist. of the Township of Millcreek v. Millcreek Ed. Assoc., 440 A.2d 673 at 675 (Pa. Cmwlth. 1982)). The Employer does not dispute that both

classifications of drivers actually drive vehic les that transport members of the public. Both shared ride and fixed route drivers: are required to have a commercial driver's license; work weekdays and some weekends; are dispatched; use a time clock to record their hours of work; operate under the same work rules; share similar benefits, including vacation and insurance; operate vehicles that are housed in the same garage and are maintained by the same mechanics. The Board agrees that the two classifications of drivers share a sufficient community of interest so as to belong in the same collective bargaining unit. In In the Matter of the Employes of the County of Lebanon Transportation Authority, Case No. PERA-R-98-266-E (Nisi Order of Certification, 1998), the Board certified a transportation authority unit that included both shared ride and fixed route drivers. The Board finds no reason to reverse the Nisi Order based on the Employer's argument that a community of interest is lacking because the shared ride drivers: have a rest period/lunch in the middle of the day; work by appointment; are separately dispatched; or because they seldom work weekends.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and affirm the Nisi Order of Certification.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the above case number be and the same are hereby dismissed and the Nisi Order of Certification be and the same is made absolute and final.

SEALED, DATED AND MAILED pursuant to the Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this nineteenth day of September, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.