State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 717 Complainant v. MANCHESTER TRANSIT AUTHORITY Respondent	CASE NO. M-0596:7 DECISION NO. 93-66

APPEARANCES

Representing Amalgamated Transit Union, Local 717:

Vincent Wenners, Esq., Counsel

Representing Manchester Transit Authority:

Robert Christy, Esq., Counsel

Also appearing:

John P. Webster, Sr., Local 717
John T. Mahoney, Local 717
Dick Pollock, M.T.A.
Leo McCullough, M.T.A.

BACKGROUND

The Amalgamated Transit Union, Local 717 (Union) filed unfair labor practice (ULP) charges against the Manchester Transit Authority (Authority) on July 22, 1992 alleging violations of RSA 273-A:5 I (e) and (h) resulting from the Authority's unilateral drug testing program without negotiating. The Authority filed its answer on August 4, 1992. Thereafter, two temporary cease and desist orders were issued by the PELRB on November 5, 1992 (Decision No. 92-170) and December 17, 1992 (Decision No. 92-190). This matter was then heard by the undersigned hearing officer on March 31, 1992.

FINDINGS OF FACT

1. The Manchester Transit Authority is a public authority created under RSA 38-A on May 1, 1973 for the purpose of acquiring, owning and operating a mass transit system. As such, it is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Amalgamated Transit Union, Local 717 is the duly certified bargaining agent of employees employed by the authority.

3. The Authority and the Union are parties to a collective bargaining agreement (CBA) effective April 1, 1991 for a period of 36 months thereafter. That document does not reference he subject of employee drug testing.

4. During the term of the CBA, the Authority unilaterally implemented a drug screening program for certain bargaining unit employees, namely, operators.

5. In addition to operating a municipal mass transit system, the Authority also requires its operators to operate buses for purposes of school transportation needs, inclusive of both home-school and school-home travel as well as school related trips of both an interstate and intrastate nature.

6. RSA 200:37, as most recently reenacted on April 20, 1992, requires employers of school bus drivers to obtain a statement from those drivers that they have been examined by a licensed physician in accordance with 49 CFR 391.41-391.49. 49 CFR 391.41 (b) (12) provides, in pertinent part, that a person is physically qualified to drive a motor vehicle if he or she "does not use a Schedule 1 drug...or other substances,...an amphetamine, narcotic, or any other habit-forming drug" unless prescribed by a licensed medical practitioner who has advised that use of those drugs will not adversely affect the driver's ability to operate a motor vehicle. 49 CFR 391.41 (c) applies to controlled substances testing for drivers in interstate commerce who operate vehicles rated over 26,001 pounds or designed to transport more than 15 people. These drivers are subject to random drug testing as defined by 49 CFR 391.85 for controlled substances defined by 49 CFR 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine).

7. Peter Trott, Enforcement Division of the Department of Safety, wrote the Union on February 14, 1991, stating that all school bus operations are exempt from coverage under the CFR "when transporting from home to school and school to home...Any school bus drivers that does any charter or activity trips must be drug tested." (Emphasis in original).

8. Bethia Reed, Pupil Transportation Supervisor for the State of New Hampshire, wrote the Authority on December 19, 1991 indicating that the Department of Safety adopted the Federal Motor Carrier Safety Regulations (FMCSR) on May 9, 1984, namely 49 CFR 390-397. Notwithstanding that this correspondence was before the passage of RSA 200:37 in its current form, Reed concluded that "Manchester Transit drivers who do trips other than to and from school must be drug tested."

9. James Daley, Jr., Director of the Division of Enforcement, N.H. Department of Safety, wrote to counsel for the Authority on February 23, 1993, summarized the Department's position by saying: "Our enforcement position is...quite clear,...school bus drivers, whether full or part time, and when operating solely school-to-home or home-to-school, are exempt under 49 CFR 390. However, any activity whatsoever beyond such operation performed by a for-hire carrier, which we consider the Manchester Authority to be, subjects those operators to all the motor carrier rules and regulations both at the state and federal level, to include the drug testing requirements."

10. The FMCSR [49 CFR 390.1 (f)] exempts school bus operations as defined in 49 CFR 390.5 and "transportation performed by...a State or any political subdivision thereof." The enactment of RSA 200:37 effectively eliminates that exemption by creating an examination standard at the state level. Further, by letter of March 20, 1992, Lawrence Abruzzesa, Officer in Charge, Federal Highway Administration, Region One, U.S. Department of Transportation advised the General Manager of the Authority that "unless the structure of the MTA has changed since 1985 they are still deemed as a for-hire motor carrier and subject to the FMCSR including subpart H---controlled substances testing requirements of both inter and intrastate drivers."

11. Authority driver operators are typically required to do more than home-to-school or school-to-home runs in the course of their employment

DECISION AND ORDER

The PELRB has spoken to the issue of whether an employer may unilaterally implement a substance abuse testing program without negotiating it with a certified bargaining agent. In State Employees Association v. State of New Hampshire Department of Corrections, Decision No. 91-54 (August 31, 1991) a PELRB hearing officer ruled that a drug testing program "is a term and condition of employment and is subject to bargaining under RSA 273-A." Similar to this case, a cease and desist order had previously issued until the case could be heard on the merits. Given the Corrections case as a baseline, the facts of this case must be examined to determine if they warrant a departure from the foregoing policy requiring collective bargaining.

The Union (brief, p.7) has suggested that "absent a regulatory mandate, the adoption by the Authority of a drug testing program is a unilateral change in the conditions of employment." Upon examination of the facts and the various responsibilities of the Authority's motor vehicle operators, it appears that there has indeed been a regulatory mandate or its equivalent as it pertains to these employees.

Full-time operators employed by the Authority are qualified to and do operate both transit buses and school buses. As such, part of their activity involves employment by a "for-hire motor carrier." (Finding No. 10, above) in both intrastate (mostly) and interstate (special trips and charters) operations. As such, they come under the FMCSR, according to state and federal regulatory authorities cited in the findings, above.

The part-time school bus drivers operate only yellow school buses for the district. In large part, if not in totality, these drivers operate buses not only on home-to-school and school-to-home routes but also on field trips, outings, sporting events and other occasions which eliminate the home-to-school and school-to-home exemptions cited in Findings No. 7, 8 and 9 above. Even if these home-to-school and school-to-home drivers were exempted under the FMCSR, RSA 200:37 would require their examination under standards, not exemptions, found in 49 CFR 391.41 - 391.49. The state statute makes no reference to the 49 CFR 390.1 (f) exclusions. Thus, there is no evidence or inference they apply.

Under the circumstances of this case, it appears that the drug testing program was implemented in accordance with regulatory requirements. It was not a requirement initiated by the Authority. Given that the implementation of a drug testing program was an imposed requirement and not merely a prerogative improperly and unilaterally implemented by management, there is no foundation for the Union's complaint of an unfair labor practice. The ULP is hereby DISMISSED.

So ordered.

Signed this 15th day of June, 1993.

PARKER DENACO
Hearing Officer