City v. L. 94,UFA & L. 854, UFOA,1 OCB 9 (BCB 1968) [Decision No. B-9-68 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of
THE CITY OF NEW YORK
(Fire Department) Docket No. BCB-16-68

and

Decision No. B-9-68

UNIFORMED FIREFIGHTERS ASSOCIATION
of GREATER NEW YORK, LOCAL 94,
I.A.F.F., AFL-CIO

and

UNIFORMED FIRE OFFICERS ASSOCIATION,
LOCAL 854, I.A.F.F., AFL-CIO

DECISION AND FINAL DETERMINATION

The parties to this proceeding agreed to submit to the Board of Collective Bargaining for final determination, pursuant to Section 1173-5.0 a(2), of the New York City Collective Bargaining Law, a dispute as to whether certain matters are within the scope of collective bargaining and thus subject to the recommendations of an impasse panel. The question submitted is as follows:

> (1) "If a practical impact is found by an impasse panel to exist on the workload of members of the Uniformed Firemen's Association and the Uniformed Fire Officers Association, what restrictions, if any, are placed on the panel's authority under Chapter 54 of the New York City Administrative Code and Mayor's Executive Order 52 to make specific recommendations regarding the alleviation of the said impact?"

Section 5a (1) and Section 5c of the Executive Order provides:

> "Subject to the provisions of paragraph (c) below

the City shall have the duty to bargain in good faith:

with the certified employee organizations of mayoral agency employees on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions..."

(C) "It is the right of the City, acting through its agencies to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary action to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The City's decisions on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

The question asks for a determination on the scope of

bargaining and of the extent of an impasse panel's authority since under the terms of the statute the report of an impasse panel must be confined to matters within the scope of bargaining, Section 1173-7.0 c (3) (b).

The submission to the Board followed an agreement by the parties, on August 1, 1968, that the City would add approximately 500 men to the Fire Department workforce. The August 1st agreement of the parties also provided that the UFA and UFOA reserved the right to expeditiously present to the Board of Collective Bargaining a request for a ruling on the proper scope of recommendations that can be made by an impasse panel following the finding of impact as a result of managerial decisions in the area of workload and manning.

Also pursuant to stipulation of the parties, they exchanged written memoranda and presented oral argument and exhibits to the Board on August 19, 1968. Four members of the Board of Collective Bargaining were present on that date, but it was stipulated by the parties that all members of the Board could participate in the decision.

In this proceeding, the parties have stipulated that "If a practical impact is found by an impasse panel to exist...", the assumption being that an impasse panel has already determined that an impact exists. Counsel for the City, the UFA and UFOA agree that the question as submitted was phrased to avoid having the Board in this instance make a determination as to the existence or non-existence of impact.

The employee organizations in a pending case before this Board requesting the designation of an impasse panel, Docket No. I-22-68, have alleged the existence of a practical impact. The City denies the existence of any practical impact and all parties have reserved their rights on that question.

While there is no agreement on whether a practical impact exists, it appears that there is a substantial agreement between the parties as to the definition of a practical impact. The term "practical impact" on employees, as used herein, refers to unreasonably excessive, or unduly burdensome workload, as a regular condition of employment.[1]

The parties have proceeded in this action on the assumption that an impasse panel will have the authority to, and will, decide whether there has been a practical impact upon the employees. However, the determination of whether or not a practical impact exists, if the parties do not agree, is a question of fact to be determined by this Board. The Board believes that consistency in the determination of disputes over the scope of bargaining is necessary and that such consistency of decision and the application of overall standards on a very important issue will be achieved if questions of the existence of practical impact are determined by the Board of Collective Bargaining.

Moreover, we believe that this result is required by our statutory obligation under the New York City Collective Bargaining Law. The authority of impasse panels is limited to matters within the scope of bargaining, but where a practi-

[1] The transcript and briefs contain references by the parties to "excessive workload" p. 12; "excessive or unduly dangerous workload" p. 22; "unreasonably onerous workload"; "unduly hazardous workload" p.26; and "unreasonable workload" p.79.

cal impact is alleged by a union and disputed by the City, there can be no resolution of any bargainable issue arising out of the alleged impact until the question of whether the practical impact exists has been determined. In other words, the determination of the existence of practical impact is a condition precedent to determining whether there are any bargainable issues arising from the practical impact. Hence, the question of practical impact is a proper subject for final determination by this Board under Section 1173-5 (a) (2). Thus, if this Board should determine that a practical impact exists, it will retain jurisdiction over the subject matter of the dispute for the purposes hereinafter stated. However, since the parties assume that a practical impact exists for the purpose of answering the questions submitted to us, this Board will proceed to answer the question of the authority of an impasse panel to make recommendations to alleviate such impact.

This Board is charged with the duty and responsibility of interpreting Section Sc of the Executive Order. This Section - the so-called Management's Rights provision - reserves to the City certain enumerated areas over which the City has exclusive control and which remain outside the scope of collective bargaining. If this were all to Section S, our task would be simple. But it is not all, and the result is not simple. The last sentence of Section Sc contains a proviso which goes to the heart of the question before us. That sentence reads:

> "The City's decisions on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of work-

> load or manning, are within the scope of collective bargaining."

The Unions read the "but, notwithstanding" clause as an overriding caveat to the entire Section once it is agreed or determined that a "practical impact" on employees exists as a results. Thus, the Union argues that once an "impact" is found to exists, the rights that were formerly the City's to exercise exclusively now become matters for collective bargaining. If an impasse is thereafter reached, these matters are therefore to be heard and passed upon by an impasse panel.

The City to the contrary urges a different interpretation of the proviso. It contends that the question whether or not there is a "practical impact" on employees as a result of the exercise by the City of the enumerated rights in that Section, including as examples decisions respecting workload or manning, is a matter for bargaining. Thus, if the parties cannot agree on the question of "impact" after bargaining, such dispute becomes an issue for determination by an impasse panel. If an "impact" is found to exist, the City urges that it is free to eliminate the "impact" by its own actions with out the necessity of negotiating an acceptable course of action with the Union. If the means of alleviating the "impact" are outside the scope of bargaining, then, of course, an impasse panel would have no authority over the subject matter and therefore would have no standing to make recommendations.

Grammarians and technicians might and have argued for days over the intent and meaning to be accorded the proviso but we are confronted with a real dispute - the outcome of which is significant not only to the parties in this case, but to the future of these procedures. In that connection,

two fundamental issues are presented: the first is the obligation of this Board to recognize that the City retained primary jurisdiction in the Executive Order through Section Sc over certain activities which it deems paramount to the operation of the City government, These "rights" - those enumerated in Section Sc are not unique to municipal government, nor are their retention by the City an exception to the general pattern. These reservations are similar to rights reserved by management in private employment.

Secondly, and no less important, is the right of the employee representative, once "impact" has been found to be assured that the City will act and act expeditiously and effectively to relieve the "impact". While we are confident that the City will not shirk its responsibility and will act in good faith, nevertheless it is understandable that the collective bargaining representative and the employees it represents require a prompt and effective answer to the possibility they raise that the City has it within its power to delay interminably the imposition of corrective measures. This is particularly true because the term "practical impact" as defined herein means an unduly burdensome or unreasonably excessive workload.

The Board finds that both of the above principles are well within the intent and meaning of Section Sc and will be satisfied by adherence to the following conclusions which we now make:

1. Once this Board determines that an "impact" exists, the City will be required expeditiously to take whatever action is necessary to relieve the "impact". Relieving the impact can be done by the City on its own initiative if it chooses to act through the exercise of rights reserved to it in Section 5c. If it cannot relieve the "impact" in that manner, or it chooses to take action by offering changes in wages, hours and working conditions - means which are not reserved to the City specifically under Section 5c - then, of course, the City cannot act unilaterally but must bargain out these matters with the

Union. In that case, failure to agree will permit the Union to use the procedures of the law to the full including the use of an impasse panel.

2. If the Board should determine that an "impact" exists and (1) the City does not, or cannot, act expeditiously to relieve the "impact" as provided in paragraph 1 above, or, (2) if the Union alleges that the City having exercised rights under Section 5c has failed to eliminate the "impact", this Board will order an immediate hearing, under its rules, which shall be given priority in its schedule. If the Board should find that the "impact" still remains, the City shall bargain with the Union immediately over the means to be used and the steps to be taken to relieve the "impact", such bargaining to be limited to a period of time to be determined by the Board in each case, except as the parties may otherwise agree. In such bargaining, it shall not be open to the City to urge that Section 5c precludes the Union from requiring the City to bar gain on areas specified in that Section, and all rights there contained and heretofore reserved to the City shall for this purpose come within the scope of collective bargaining. There after, if the parties cannot agree and reach an impasse, an im passe panel shall be appointed which shall have the authority to make recommendations to alleviate the impact including, but not limited to, recommendations for additional manpower or changes in workload.

We believe these procedures are those best suited to preserve to the City that which is the City's but which also recognize that the Statute is "instinct with an obligation

imperfectly expressed". That obligation requires the City to remove the cause of a "practical impact" as quickly as is feasible and to assume the burdens and responsibilities for bargaining if it fails to do so in the manner heretofore stated.

We believe that the conclusions reached here are also supported by logic and sound labor relations as well as the provisions of the statute and Executive Order. It is unrealistic to believe that the City and its municipal unions would have agreed, and we are considering legislation agreed upon by the Tripartite Panel, that an unreasonable workload or manning problem could be found to exist, but that no appropriate remedy ultimately could be recommended for the alleviation of the problem. To deny this avenue of relief negates the purpose of the statute and opens the door for the very labor strife which the statute was expressly designed to prevent.

Dated: New York, N. Y.
November 12, 1968

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

SAUL WALLEN
MEMBER

EDWARD SILVER
MEMBER

TIMOTHY W. COSTELLO
MEMBER

HARRY VAN ARSDALE, JR.
MEMBER

PAUL HALL
MEMBER