BOARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING
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In the Matter of

UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner, DECISION NO. B-13-74

-and- DOCKET NO. BCB-175-74

THE UNIFORMED FIRE OFFICERS ASSOCIATION,

Intervenor,

-and-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, and THE OFFICE OF LABOR RELATIONS., CITY OF NEW YORK,

Respondents._

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DECISION AND ORDER

On June 28, 1973, in Decision No. B-7-74, the Board of Collective Bargaining addressed itself to the motion of the Uniformed Firefighters Association and the Uniformed Fire Officers Association for an order restraining and staying the City from implementing and installing on July 1, 1974, certain Fire Department programs which, the Unions charged, constituted a violation of the status quo provision of the New York City Collective Bargaining Law. The Board in its Determination of Motion denied the motion on the ground that the Unions had not shown that irreparable harm, would be done their members if the temporary relief were not granted

We turn now to the substantive issues presented by the petition filed by UFA on May 23, 1974, alleging that the two programs, generally known as the Attack Units Program and the Interchange-Weighted Response Index Program, unilaterally inaugurated by the Fire Department during the current period of contract negotiations between the City of New York and the UFA, violated §1173-7.0 d. of the NYCCBL. UFOA intervened only to so much of the UFA charge of status quo violation as related to the Interchange-Weighted Response Index Program. The Attack Units Program objected to by UFA is a matter of agreement between the City and UFOA and constitutes a part of the productivity provisions of the recently concluded collective agreement between them.

Section 1173-7.0 d of the NYCCBL reads as follows:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations,

> and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral chances, or the rights and duties of public employee and employee organizations under state law. For purpose of this subdivision the term 'period of negotiations' shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

The Attack Units Program involves a reduction in the number of officers serving in command of engine companies and of ladder companies. The UFA alleges that this program will result in firefighters working under less than the "immediate supervision" provided for by the firefighter job specification which is incorporated into the current agreement between the parties by reference thereto in Article V of the agreement ("Job Description"). It is further alleged that institution of the program would necessarily increase the duties and responsibilities of firefighters by causing them to assume some of the duties and responsibilities of officers and that this would entail performance of out-of-title work by firefighters or possibly

creation of a new title or rank. The union alleges other possible contract violations relating to manning and maintains that implementation of a new title or rank would complicate the current bargaining between the parties.[1] In addition, the UFA alleges that the Attack Units and Interchange - W.R.I. programs are mandatory subjects of bargaining the implementation of which not only violates contract provisions but also constitutes independent violations of the status quo provisions of the NYCCBL.

The City in its answer and brief responds that the petition alleges violation of contract provisions; that such controversies are subject to grievance and arbitration under the contract rather than to adjudication by this Board; that the implementation of the Interchange -W.R.I. and Attack Units programs are proper exercises of the City's management rights, and did not violate the status quo provisions of the NYCCBL; and that the petition should, therefore, be dismissed.

The Interchange Program finds its earliest origins in Decision No. B-9-68 (Case No. BCB-16-68) of this Board in which we considered allegations by the Uniformed Firefighters Association and the Uniformed Fire officers Association that manning decisions taken by the City in the exercise of management prerogatives had resulted in a practical impact upon the working conditions of unit employees. That decision interpreted the provisions of 51173-4.3 b., which reads as follows:

[1]We not that a collective bargaining agreement has been completed between the parties, subject to ratification by the UFA membership and approval as to form by the Corporation.

> It is the right of the city, or any other public employer, acting through its agencies, to deter-nine 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 actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer 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.

In Decision No. B-9-68, we set forth, inter alia, the procedures to be followed in dealing with allegations of practical impact. It reads in pertinent part as follows:

> 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.[2] 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

[2] Section 5 of Executive Order 52 is now Section 1173-4.3 b of the NYCCBL.

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 I 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 bargain 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 impasse 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.

As a result of that decision, Eric J. Schmertz, Esq., was appointed by this Board as a hearing officer to conduct the prescribed inquiry as to whether a practical impact existed in Case No. BCB-16-68. After extended hearings and through Mr. Schmertz's services as a mediator, the parties entered into a Memorandum of Understanding in September 1969, whereby it was agreed, inter alia, as follows:

> 4. Public member Eric J. Schmertz of the Office of Collective Bargaining will establish 'workload standards and provide for review of these and other standards.

On September 23, 1971, Mr. Schmertz issued his decision pursuant to the Memorandum of Agreement, in which he held:

> 1. I am persuaded that the workload to measure consists of those duties that make up the primary responsibility of" firemen and fire officers - namely, responding to alarms and fighting fires. I find that under present fire fighting conditions

> and techniques, the best method to measure that workload is by a Weighted Response Index. The Index I have developed, based on those conditions and techniques, includes all pertinent fire fighting activities, and accords point credit to those activities. That Weighted Response index, which is attached hereto and made a part hereof as Exhibit 3, shall constitute the workload standards. The point scores accorded each activity shall be used in measuring the quantity of the workload From the statements of the Fire Department in the record, I an satisfied that an accurate administration of the Weighted Response Index by the Fire Department is fully feasible.
>
> 2. Under the Weighted Response Index, it shall constitute a "practical impact" within the meaning of §1173-5.0a(2) of the New York City Collective Bargaining Law and Decision B-9-68 of the Board of Collective Bargaining dated November 12, 1968, when, based on the work it performs a company accumulates 300 or more points in each of a total of 27 weeks within a consecutive 52-week period.
>
> The first consecutive 52-week period shall commence on January 1, 1972.

Mr. Schmertz'S decision gave the parties until July 10, 1973, to seek review of the proposed index, and further set forth that "disputes over the application of the foregoing shall be submitted to me for final and binding arbitration. "

Thus, the Weighted Response Index is a device for measuring workload and thereby to determine the pactical impact, if any, of a given manning scheme

Subsequent application of the W.R.I. has established, and it is conceded by all interested parties, that in six companies a practical impact existed as of July 1, 1973. The data establishing this fact became available in May 1974. Studies under the W.R.I. as presently constituted as well as consideration of possible adjustments of the W.R.I. are currently going forward.

The collective bargaining agreement between UFA and the City, dated April 8, 1974, covers the period July 1, 1973 to June 30, 1974. Article XXVIIA (Productivity Issues) of the contract provides for application of the W.R.I. as follows:

Section 1.

The Union recognizes that the provisions of this Article XXVIIA are matters concerning which the City has the right to act unilaterally. Notwithstanding the above, the parties agree to the following sections.

* * *

Section 4.

Weighted Response Index ("W.R.1.")

A. The impact of the W.R.I. decision is suspended until July 1, 1973.

B. Between December 31, 1972 and July 1, 1973, the Impartial Chairman shall study data presented to him by the parties in order to determine:

(1) What the data shows with respect to the W.R.I.

(2) Whether the Impartial Chairman wants to make changes in the cut-off numbers in the W.R.I.

C. If after July 1, 1973, there is an application of the W.R.I. as it is now or may be changed by the Impartial Chairman, the 52-week period of measurement referred to in the decision shall be July 1, 1972 to July 1, 1973, or such later period as the Impartial Chairman may provide.

D. After July 1, 1972, the City may make unilateral changes and install programs unilaterally subject to the following:

(1) No less than 2 weeks notice of the change is to be given to the Union.

(2) Within the two weeks the Union is to be given an opportunity to discuss the changes with the city.

(3) if no agreement is reached as a result of such discussion, the City may install the program; and the Union reserves all rights it has to oppose the same.

A section identical to-Article XXVIIA of the UFA contract appears in the UFOA contract as Article XXV. [3]

[3] The Board is advised that provisions identical to those contained in Article XXVIIA of the UFA contract have been included in the recent settlement reached by the UFA and the City for the period July 1, 1974 - June 30, 1976.

Pursuant to §4, Subdivision D, above, the City gave notice to both unions on May 17, 1974, of its intention to base its Interchange Program upon W.R.I. points rather than on number of runs as had been the practice for some time. The Interchange Program is a system under which companies serving in areas of heavy demand for firefighting services exchange places with companies serving in areas of low demand. The notice makes clear that the purpose of the announced change is to use the Interchange Program and the W.R.I. together to distribute the total City-wide demand for firefighter services in such a way as to keep the workload of each company below the level of 300 W.R.I. points per week, which is the level established in Mr. Schmertz's decision of September 23, 1971, as the level at which practical impact (excessive workload) exists.

Discussion

Attack Units

In Decision No. B-1-72, this Board elaborated its general policy in regard to status quo violation cases, declaring:

> We hold, therefore, that in this case, the status quo includes the terms and conditions established by the prior contract between the parties, and that all such terms and conditions are continued by operation of the statute in full force and effect during the period of negotiations, during impasse panel proceedings, and for thirty days after issuance of impasse panel reports . . . . The rights and duties of the parties during the status quo period are statutory in nature.

Then addressing itself to the situation in such cases Wherein there are raised underlying issues which might be dealt with either as alleged breaches of contract, using the grievance and arbitration provisions of the expired contract, or as breaches of the statutory obligation of full faith compliance and preservation of the status quo during the negotiating period, the Board held:

> In this and all such cases as this arising under the status quo provisions of the New York City Collective Bargaining Law this Board has and will exercise primary jurisdiction in determining, on a case by case basis, the means to be employed in dealing with the specific controversies presented. Since each case arises out of an alleged violation of law which it is the duty, of this Board to administer, the Board has exclusive power and discretion to determine whether a given matter should be dealt with as such or whether it is

> appropriate in a given case to direct that the-matter be referred to an arbitratcr following the arbitration provisions and procedures of the prior contract between the parties, if such provisions were included and, if not, in accordance with the arbitration provisions of Executive Order No. 52.

In that case, the Board found that the underlying controversy (the elimination of certain permanent Civil service lines and the attendant dismissal of some unit employees) derived solely from the statutory extension of the "Job Security" provision of the prior contract, and, therefore, referred the matter to grievance arbitration.

The Attack Units Program is provided for in the UFOA contract and is part of the general productivity, program which the City has sought to negotiate in many recent contracts with employee organizations. The Fire Department's right to install Attack Units is expressly recognized by the UFOA in the 1973-1974 contract (Article XXVA, Sl) but is limited to a maximum of ten units. The Attack Units Program is not, however, a part of the expired or new UFA contract. The contentions of the UFA's petition that the Attack Units Program will result in firefighters working under less than "immediate supervision," in violation of Article V of the UFA-City

agreement; increase responsibilities of firefighters and entail performance of out-of-title work; and involve other breaches of contract with respect to manning, all constitute allegations of contract violation.[4] These allegations are most properly dealt with by grievance arbitration under the statutorily extended contract.

In this respect, this matter is similar to that dealt with in our Decision No. B-6-70, wherein a union filed a petition alleging violation of the status quo provision. That decision stated that the best evidence of the matters to be maintained in status quo under the provisions of §1173-7.0 d was the expired contract, which dealt with the issues in dispute. Our decision in that case reads, in pertinent part, as follows:

> Article VII . . . expressly deals with changes in work schedules and the issue between the parties is whether there

[4] As to the allegation that institution of Attack Units may ultimately require the creation of a new rank or title, we find that the allegation is speculative and anticipatory and constitutes neither a claim of current contract violation nor of failure to comply with applicable provisions of the NYCCBL. We note, however, that in Decisions Nos. B-3-69 and B-1-70 we have held that the creation of a new position or title is a managerial right as contemplated by §1173-4.3 b.

> has been a violation of that provision. That question manifestly involves, "the application and interpretation" of Art. VII and thus is within the arbitration provision of Art. XV.
>
> As no request for arbitration and waiver has been served and filed, we shall dismiss the petition herein without prejudice to the petitioner's right to seek arbitration of the dispute.

In accord with our finding in Decision No. B-6-70, we shall, therefore, dismiss UFA's charge of status quo violation growing out of the Fire Department unilateral implementation of the Attack Units Program, without prejudice, however, to UFA's right to seek arbitration of the issues involved. Should any issues develop from the Attack Units Program which involve statutory matters that are not within the authority of the arbitrator to rule upon, the Union has the right to bring such matters before this Board (Dec. No. B-9-68).

Thus, while we hold that the Attack Units Program, unless barred by some contractual provision with the UFA, represents an exercise of a management right as defined in §1173-4.3 b of the NYCCBL,[5] we wish to make clear that the practical impact, if any, of the Attack Units Program on UFA members would be a subject appropriate for submission to this Board. No such

[5] As has been stated above, one such limitation on the City's right to act unilaterally already exists in its contract with UFOA limiting to ten the number of Attack Units which may be created. This provision in the UFOA contract has no effect on the bargainability of the subject in the City's negotiations with UFA.

allegation of practical impact has been made to date with regard to the Attack Units Program. Other allegations concerning exercise of managerial prerogative during the status quo period are discussed below.

Interchange - W.R.I. Program

The Board of Collective Bargaining has exclusive jurisdiction to determine the arbitrability of grievances as well as the scope of bargaining, the matters which are mandatory, permissive and prohibited subjects of bargaining. The Board also has exclusive jurisdiction to determine whether a practical impact exists as the result of the unilateral exercise of a management prerogative, and, if so, whether or not the City has made effective efforts to eliminate or ameliorate the impact and, finally, to determine the applicability of the impasse panel procedures of the NYCCBL. In the instant case, the Board has been called unon to exercise all of these responsibilities because the Interchange - W.R.I. Program raises novel questions in connection with alleged contract violation, the scope of bargaining, management rights, practical impact of unilateral

decisions, and the applicability of the impasse provisions of the NYCCBL. Because of the complexity of the issues stemming from the implementation of the Interchange - W.R.I. Program, the Board considers it important to respond as fully as possible to the several issues raised by the parties in order that their contractual and statutory rights be clearly defined.

As to the issue of alleged contract violation, both the expired UFA and UFOA contracts contained provisions regarding the City's right to take unilateral action in connection with the W.R.I. However, a determination as to whether the installation of the Interchange - W.R.I. Program constitutes a contract violation is a matter of contract interpretation which we reserve for the Impartial Chairman. In deferring to the arbitrator on this issue, we do not pass on the arbitrability of any alleged contract violation.

Having determined that the issue of the implementation of the Interchange - W.R.I. Program may be submittable as a matter of contractual right

to arbitration, we turn now to the question of whether or not the unilateral implementation of the Interchange - W.R.I. Program is a violation of the status quo provision of the NYCCBL. That determination depends, first, on whether the program, itself, is a mandatory subject of bargaining or a management prerogative, and, second, if it is determined to be a management prerogative, whether the Fire Department's exercise of that right during the status quo period was prohibited by the law. Section 1173-4.3 b of the NYCCBL, quoted above, gives the City the rights, among others, to determine standards of services; to direct its employees; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which government operations are to be conducted; and to exercise complete control and discretion over its organization and the technology of performing its work. Clearly, the assignment of fire companies in such a way as to reduce or equalize the workload of fire companies

is a proper exercise of management rights, and need not be bargained absent a showing of practical impact and a failure of management to alleviate it. (Decision Nos. B-9-68, B-7-69, and B-4-71.)

The Unions argue, nevertheless, that even if the interchange - W.R.I. Program entails an exercise of a management right, §1173-7.0 d prohibits all unilateral changes by the employer during the status quo period, whether these changes are mandatory or permissive subjects. Counsel for the UFOA, at the oral argument on June 26, 1974, maintained that the statute mandated on the employer a greater duty to refrain from unilateral action during the status quo period than during the term of a contract and that although the exercise of a management right during the contract term was permissible, it was barred during the status quo period. We do not agree that the preservation-of-status-quo provision was intended to negate the City's right to act unilaterally on non-mandatory subjects during the period of negotiation for a new contract.

Subdivision "a" of §1173-4.3 (Scope of Bargaining; management rights) specifically makes the employer's duty to bargain "subject to the provisions

of subdivision "b," which defines the City's management rights. The status quo provision prohibits unilateral changes by management in mandatory subjects of bargaining during the period of negotiations. In Decision No. B-7-72, the Board extended the applicability of the status quo provision to include permissive subjects of bargaining for which contract terms existed in the expired contract. Such contract terms, the Board asserted, covering voluntary subjects of bargaining continue by operation of law in full force and effect during the status quo period. This, nevertheless, leaves the City free to act unilaterally on subjects which are managerial prerogatives and upon which there has been no bargaining and, with respect to which, no contract provision exists.

The framers of the NYCCBL, recognizing that employees in the public sector are denied self-help rights, including the right to strike, which are normally enjoyed by employees in the private sector, declared that the resultant imbalance created a greater need to ensure that collective bargaining takes place, and that provision be made for effective procedures for the peaceful resolution of differences when bargaining results in

an impasse:

> The procedures set forth herein are designed to meet this greater need. These procedures offer positive assurance: (a) that employees will he treated-fairly;(b) that the City will be able faithfully to discharge its obligations as employer, without interruption to public services it fur nishes; and (c) that the people cf the City will te protected, as they have a legal and moral right to be, in their access to essential public services ("Statement of Public Members of Tripartite Panel to Improve Municipal Bargaining Procedures, March 31, 1966, approved and signed by representatives of the City and of the city employee organization")

In balancing the denial of the right to strike by the maintenance of the status quo, the framers did not, in our view, intend to deny to the City the right to take action during the status quo period on subjects outside the scope of mandatory collective bargaining or on permissive subjects which had not actually been incorporated into the expired contract. To prohibit the City from acting during the status quo period on subjects which it could normally decide unilaterally, would have the practical effect of completely immobilizing the City in its labor or personnel decisions during what is frequent1y a long-extended period. The foregoing interpretation is reinforced by the following words of the status quo section:

> - - the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes . . .
> (our emphasis added)

Our view that the City is not barred from exercising the particular management rights in question here during the status quo period thus finds sufficient support in the statute and in our prior interpretations thereof. We find and conclude, therefore, that the City did not violate the status quo provision.'of the NYCCBL in unilaterally moving to implement the Interchange - W.R.I. Program. The Interchange Program is an exercise of management prerogatives, which, we hold, continue during the period of negotiation and are not suspended by the status quo provision of NYCCBL.

We turn, finally, to the associated issue of practical impact which, though not specifically raised by the Union's pleadings, nevertheless, is involved herein. The Interchange - W.R.I. Program represents the City's attempt to alleviate a practical impact. it remains to be seen from future experience whether the Interchange Program will be made more effective in relieving practical impact by more direct coordination with the W.R.I. system. Contract issues covered by the Interchange - W.R.I. Program may be

submitted to the Impartial Chairman. However if issues arise from the interchange - W.R.I. Program that involve statutory matters which are not within the authority of the arbitrator to rule upon, the Union has the right to bring such issues before this Board (Decision No. B-9-68)

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the charge in the petition of the Uniformed Firefighters Asociation alleging that the City violated the status quo provision, S1173-7.0 d of the NYCCBL, by unilaterally implementing the Attack Units Program, be, and the same hereby is, dismissed without prejudice to the Petitioner's right to seek arbitration of the dispute. Should any issues develop from the Attack Units Program involving statutory matters not within the authority of the arbitrator to rule upon, the Union shall have the right to bring such matters before the Board; and it is further

ORDERED, that the charge of the Uniformed Firefighters Association and Uniformed Fire Officers Association that the City violated the status quo provision of the NYCCBL by unilaterally implementing the Interchange - W.R.I. Program, be, and the same hereby is, dismissed.

DATED: New York, N. Y.
August 20 , 1974.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

EDWARD SILVER
M e m b e r

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