L.3, IBT v. NYFD, 37 OCB 45 (BCB 1986) [Decision No. B-45-86 (IP)]

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

LOCAL 3, INTERNATIONAL BROTHER-
HOOD OF ELECTRICAL WORKERS,
AFL-CIO,
Petitioner,

DECISION NO. B-45-86

-and-

DOCKET NO. BCB-889-86

NEW YORK CITY FIRE DEPARTMENT

Respondent.
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DECISION AND ORDER

Petitioner Local 3, International Brotherhood of Electrical Workers, AFL-CIO (herein "Local 3" or "Petitioner") filed a verified improper practice petition on July 24, 1986, in which it alleged that respondent New York City Fire Department (herein "City" or "Fire Department") committed an improper practice in violation of Section 1173-4.2a (1) and (4) of the New York City Collective Bargaining Law (herein "NYCCBL") by failing to bargain in good faith concerning changes in the formula for determining terminal leave payments. On August 21, 1986, the City filed a verified answer. On August 29, 1986, Local 3 filed a reply. On September 2, 1986, the office of Collective Bargaining requested that both parties submit additional information. On September 8, 1986, the petitioner complied with this request, and on September 15, 1986, the City filed a surreply.

The employees involved herein are covered by Section 220 of the New York State Labor Law, and the petitioner is certified as their representative.[1]

The improper practice petition alleges that the City has unilaterally changed the method of calculating terminal leave payments of communications electricians employed by the Fire Department. The petitioner alleges that these employees are required to work six days every other week, and that terminal leave payments are now being calculated on the basis of 80 hours worked in a two-week period rather than on the 88 hours used as the basis in the past. The petitioner cites Comptroller's Leave Regulations issued April 30, 1961 as the basis for its claim that this benefit cannot be unilaterally withdrawn.

The City admits that, prior to December 1985, it included "the additional Saturday" in calculating terminal leave payments, but at that time discovered that inclusion of the Saturday overtime day was a gift prohibited by Article 7, Section 8 of the New York State Constitution.

The City also takes the position that the change in calculation of benefits was mandated by the terms of a

[1] Certification #15-71.

December 2, 1985 Comptroller's Determination settling complaints brought under Section 220 by communications electricians represented by Local 3, and that under this Comptroller's Determination the employees waived any supplemental benefits not specified therein. Further, the City asserts that it has a management right under the NYCCBL to "direct its employees ... to work a regular week of 40 hours" and "to work a Saturday every other week in addition," and that, under the December 1985 Comptroller's Determination, overtime, by definition, is not part of the "regular work week."

The parties agree that actual payments for terminal leave based on the new formula were not scheduled to begin until October 1, 1986. For this reason, the City maintains that the petition is premature. According to the City, the delay in implementation has been caused by the processing of a grievance raising the same issues, filed by a Senior Supervising Communications Electrician Murasso, the employee whose terminal leave payments are also the subject of the instant petition. (A Step III determination denying the grievance was issued on or about September 26, 1986.) However, the October 1 date has now passed, and it is clear from the City's papers that absent an adverse finding of this or another tribunal, the terminal leave formula will be changed. Under these circumstances, we find that

the issue has been timely raised.

Clearly, the resolution of this dispute rests on the interpretation and applicability of the different comptroller's documents relied upon by the parties, including whether either contains a formula for terminal leave payments or a definition of a "regular" work week eave pay that clearly and unequivocally includes or excludes an extra day that employees are required to work in a regular basis. Of course, these questions must be answered before it can be determined whether there has been a gift within the meaning of the state constitution,

Under Section 5b of Executive Order #83 (July 26, 1973), which applies to the employees herein, the term "grievance" includes:

> (A) a dispute concerning the application or interpretation of the terms of... (ii) a determination under Section 220 of the Labor Law....

Under the circumstances herein, where a grievance has been filed concerning an issue which is specifically included within the definition of a grievance under the procedure applicable to the parties, and where the grievance concerns the same issues raised by the petition herein, we deem it appropriate to defer to that procedure. Accordingly, we hold that the instant matter should be referred to the grievance-arbitration procedure without prejudice to re-

sumption of the grievance which was in progress during the pendency of the proceeding before this. Board, provided that the petitioner takes appropriate action, as prescribed by Executive Order #83, within ten (10) days. We retain Jurisdiction to insure that any subsequent arbitration award is consistent with, and not repugnant to, the policies and provisions of the NYCCBL.[2]

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

DETERMINED, that the dispute concerning whether the City has changed the formula for calculation of terminal leave. benefits - in a manner inconsistent with a determination under Section 220 of the New York State Labor Law should be submitted to the grievance-arbitration procedure set forth in Executive order #83, and the Board of Collective Bargaining shall retain jurisdiction in all such matters for the purposes of hearing and determining whether the disposition of such matters is consistent with, and not repugnant to, the policies and provisions of the New York City Collective Bargaining Law; and it is further

[2] This board has previously found that, where determination of a refusal to bargain charge depends on interpretation of the contract, it may be appropriate to defer to the grievance - arbitration procedure. Decision No. B-10-80.

ORDERED, that the petition filed herein by Local 3, International Brotherhood of Electricians, AFL-CIO be, and the same hereby is, dismissed, except to the extent that the Board has retained jurisdiction as stated in the preceding paragraph.

DATED: New York, N.Y.
October 23, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER