L.3, IBT v. Office of Mun. Labor Relations, 43 OCB 10 (BCB 1989) [Decision No. B-10-89 (IP)]

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

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

Decision No. B-10-89
Docket No. BCB-1098-88

-and-

OFFICE OF MUNICIPAL LABOR RELATIONS,

Respondent.
- - - - - - - - - - - - - - - - - - - x

DECISION AND ORDER

Local 3, International Brotherhood of Electrical Workers, AFL-CIO ("petitioner") filed an improper practice petition against the Office of Municipal Labor Relations ("respondent") on October 13, 1989. The respondent filed its answer to the petition on January 19, 1989. The petitioner filed its reply on February 21, 1989.

Background

The alleged improper practice arises out of negotiations between respondent and petitioner over the terms of a Comptroller's Determination to be promulgated pursuant to Labor

Law, §220[1] for Stationary Engineers (Electric) covering the period July 1, 1987 through June 30, 1989. Before formal negotiations began, representatives of petitioner demanded an overtime provision in the proposed determination identical to that contained in the determination for the Stationary Engineers (Steam) who are represented by Local 30 of the International Union of Operating Engineers ("Local 30").

On or about October 3, 1988, a collective bargaining session was held between the parties. Respondent, through its negotiator, Assistant Director of the Office of Municipal Labor Relations Michael McDonald, told petitioner that although respondent had considered petitioner's demand with respect to overtime, the respondent would not agree to give petitioner an overtime provision identical to that given Local 30.

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[1]Section 220 of the Labor Law provides, in relevant part:

> 3. The wages to be paid for a legal day's work .... shall be not less than the prevailing rate of wages as hereinafter defined.
>
> It shall be the duty of the fiscal officer.... to ascertain and determine the schedule of ... wages to be paid workmen, laborers and mechanics on such public work...
>
> 5. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work...

Positions of the Parties

Petitioner

Petitioner, without alleging a violation of any specific section of the New York City Collective Bargaining Law ("NYCCBL"), alleges that respondent, "while performing a Comptroller function during current negotiations, discriminated against Petitioner and undermined [petitioner's] status" as the bargaining representative by failing to incorporate the same provisions in the proposed Comptroller's Determination for Stationary Engineers (Electric) as was included in the Comptroller's Determination for employees represented by Local 30.

In support of its position, petitioner recites the bargaining history of the parties. According to petitioner, since at least 1970, the Comptroller Determinations for the two locals have had identical overtime provisions. A representative of respondent also allegedly represented to petitioner that Stationary Engineers (Steam) would not receive more than Stationary Engineers (Electric). Finally, petitioner contends that representatives of respondent represented to petitioner that "any changes in any of their proposed Comptroller's Determinations would have to be the result of a litigated hearing."

For relief, petitioner seeks an order directing that

respondent compensate Stationary Engineers (Electric) for overtime at the same rate received by Stationary Engineers (Steam) pursuant to the governing Comptroller Determination.

Respondent

Respondent rejects petitioner's characterization that it performed a "Comptroller function." Rather, respondent contends that it was engaged in collective bargaining with petitioner on an agreement which would become incorporated into a Comptroller's Determination.[2]

Respondent claims that it never agreed to calculate overtime paid to Stationary Engineers (Electric) in the same way it calculated overtime for employees represented by Local 30 and that it repeatedly conveyed this to petitioner. Respondent contends that this Board cannot conclude that it committed an improper practice within the meaning of NYCCBL §12-306a(4)[3], because it never refused to bargain; it simply refused to concede to petitioner's demands, an act which does not constitute an improper practice.

In the alternative, respondent argues that if petitioner is

[2]Respondent cites Nolan v. NYC Housing Authority, 199 Misc.2d 599, 99 N.Y.S.2d 307 (Sup. Ct. N.Y. Co. 1950).

[3]NYCCBL §12-306a(4) provides that it is an improper practice for "a public employer or its agents. . . to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees-"

alleging a violation of a Comptroller Determination, its recourse is in a proceeding brought pursuant to Labor Law, §220 not in a proceeding before this Board.

Discussion

At the outset, we note that our jurisdiction is limited in the instant matter. We do not have the authority to consider the petition insofar as it relates to the merits of a Comptroller's Determination pursuant to Labor Law, §220. [4] The Labor Law expressly provides that employer practices with respect to a Comptroller's Determination may be examined under the Labor Law by the Comptroller and reviewed under Article 78 of the Civil Practice Law and Rules. [5] We are also without authority to award

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[4] Decision No. B-9-86

[5] Labor Law, §§220.7, 220.8. Furthermore, Labor Law, §220.8-d provides, in relevant part:

> Notwithstanding any inconsistent provision of this chapter or of any other law, in a city of one million or more, where a majority of laborers, workmen or mechanics in a particular civil service title are member of an employee organization which has been certified or recognized to represent them pursuant to the provisions of article fourteen of the civil service law or a local law enacted thereunder, the public employer and such employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen or mechanics in the title. If the parties fail to achieve an agreement, only the employee organization shall be authorized to file a single verified complaint pursuant to

(continued...)

the petitioner the relief it seeks -- an increase in premium pay.[6] This would be the case even if petitioner's allegations were addressed to the terms of an agreement.[7]

Petitioner's claims with respect to alleged violations of the NYCCBL are, however, cognizable by this Board. Although petitioner does not allege the violation of a specific section of the NYCCBL, the allegations are stated in terms of a violation of NYCCBL §12-306a(2), and we will consider them as such.[8] However, petitioner has failed to establish that respondent has violated the NYCCBL for the reasons set forth herein.

Petitioner argues that the "particular circumstances" of respondent's actions in failing to agree to provide petitioner with the same overtime provisions as were granted to Local 30 constitute an improper practice. It has alleged that the respondent bargained with the bargaining representative of another unit and reached an agreement with it on a compensation issue which differed from that which it offered petitioner's unit. Such a divergence in agreements is a unique event in the

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(...continued)
subdivision seven herein, on behalf of the laborers, workmen or mechanics so represented.

[6]Decision No. B-9-86,

[7]See Decision No. B-17-86.

[8]NYCCBL §12-306a(2) provides that it is an improper practice for a public employer or its agents "to dominate or interfere with the formation or administration of any public employee organization."

recent history of both bargaining units.

As a result, petitioner alleges that respondent has "undermined" its status as exclusive bargaining representative. But the petitioner has failed to allege any facts which would suggest that respondent's failure to agree to petitioner's demand has prevented or will prevent, hinder or in any way affect petitioner in representing present or future members of the bargaining unit.[9] The pleadings are devoid of any factual allegations that the City's actions were intended to, or that they did, in fact interfere with petitioner's rights and duties under the NYCCBL. The pleadings recite only surmise and conjecture as to the effect that respondent's actions have had on its status as bargaining representative. They must recite more in order to entitle petitioner to a hearing much less a determination in its favor.[10]

We also find that respondent was not, as petitioner alleges, performing a Comptroller function. It was acting as the representative for New York City in bargaining on an issue over which the parties must negotiate, pursuant to Section 220 of the Labor Law.

To the extent the petition suggests that respondent has bargained in bad faith under the NYCCBL, it also fails to

[9]Decision No. B-23-81.

[10]See Decision Nos. B-30-81; B-38-80.

establish a violation of NYCCBL §12-306a(4).[11] In the course of collective bargaining under the NYCCBL, the parties are under no duty to agree on subjects of bargaining.[12] The failure to reach an agreement, even if the parties have agreed in the past to the terms of an agreement, does not violate the NYCCBL .[13] While the NYCCBL sanctions comparability bargaining[14], the parties are under no obligation under that statute to arrive at an agreement based on comparability with another bargaining unit. Petitioner has alleged nothing more than the respondent's failure to agree on an issue of collective bargaining and the apparent anomaly this has created in the bargaining history between the parties.

We are not empowered to address the issue of whether petitioner may or may not have any rights under any other law; this Board cannot remedy all wrongs arising out of the employment relationship.[15] We find that the instant petition fails to establish an improper practice and, accordingly, we dismiss it without prejudice to petitioner's recourse to any other remedy it may have.

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[11]See note 3, at p. 4 supra.

[12]Decision Nos. B-23-75; B-11-68.

[13]See Decision No. B-4-89.

[14]Decision No. B-14-72.

[15]Decision No. B-59-88.

ORDER

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 improper practice petition filed by Local 3, International Brotherhood of Electrical Workers, AFL-CIO be, and the same hereby is, denied.

Dated: New York, New York
March 30, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER