L.237, et. al v. L.237, IBT, NYCHA, 43 OCB 53 (BCB 1989) [Decision No. B-53-89 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE IMPROPER
PRACTICE PROCEEDING

-between-

A MAJORITY OF THE CIVIL SERVICE
ELEVATOR MECHANICS AND ELEVATOR
MECHANICS HELPERS IN LOCAL 237,
Petitioners,
-and-

THE NEW YORK CITY HOUSING AUTHORITY
AND INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 237,
Respondents.
---------- X

Decision No. B-53-89
Docket No. BCB 1110-88

INTERIM DECISION AND ORDER

The petitioners filed a verified improper practice petition on November 17, 1988.[1] In the petition they allege that the New York City Housing Authority improperly implemented a mandatory rotating shift work schedule and that their current wage rate is not in compliance with §220 of the Labor Law. They also allege that Local 237 of the International Brotherhood of Teamsters ("the Union"), by agreeing to the implementation of the mandatory rotational work shift schedule, and failing to negotiate a new agreement as to wages, breached its duty of fair representation.

[1]The Petitioners are 209 employees in the titles of "Elevator Mechanic" and "Elevator Mechanics Helper." Their titles are merged into a larger bargaining unit which consists of approximately 3,500 employees.

The Union filed an answer accompanied by a motion to dismiss on December 27, 1988. The petitioners did not submit a reply.

On December 9, 1988, both the office of Municipal Labor Relations and the New York City Housing Authority filed affirmations in support of their motions to dismiss. After being informed that only one party could represent the New York City Housing Authority in this matter, both entities (collectively referred to hereinafter as "the Housing Authority") withdrew their original affirmations and jointly filed an amended affirmation on may 30, 1989. The petitioners filed an affirmation in opposition to the motion to dismiss on June 29, 1989. The Housing Authority did not submit a reply.

BACKGROUND

For approximately 18 years prior to the occurrence of the acts which constitute the basis of the improper practice charges herein, Elevator Mechanics employed by the Housing Authority were assigned to work either steady day or night shifts. Such assignments were determined on a voluntary seniority basis and individuals assigned to the night shift received a night shift differential.

In 1987, the Housing Authority proposed an experimental program whereby work shift assignments would be determined on a mandatory rotational basis. The petitioners allege that a majority of Elevator Mechanics were polled to determine whether

there was support for this program, and that it was voted down. The petitioners state that the Housing Authority and the Union nevertheless agreed to implement the program for a three month trial period commencing on or about April 1, 1988.[2] After the three month period ended, the Union announced that it would strongly oppose any further plans to continue the program.

In a meeting with the Union which took place on or about August 2, 1988, the Housing Authority expressed its interest in implementing permanent rotational work shifts. It is undisputed that the Union rejected this proposal, maintaining that a vast majority of the Elevator Mechanics were opposed to it.

At another meeting, held on or about September 20, the Housing Authority stated that it was determined to institute a mandatory rotational work shift schedule if it could not get volunteers for such a program. In response to this assertion, the Union argued that the institution of rotational work shifts had been unsuccessful during the trial period, and that it could not support such an assignment system for health reasons. However, the Union indicated that it might agree to such a system "if an acceptable work schedule could be worked out."

The petitioners allege that the Housing Authority and the Union subsequently agreed to the implementation of a mandatory

[2]The Union generally denies Petitioners' statement with regard to the experimental program, and denies that a clear majority of Elevator Mechanics voted against it, and/or that it (the Union) ultimately agreed to the implementation of the program.

rotational work shift schedule, commencing on or about January 1989. [3]

POSITIONS OF THE PARTIES

Petitioners' Position

A. Allegations against the Housing Authority

The petitioners allege that the Housing Authority failed to bargain in good faith, and violated §12-306a(l) and (2), of the New York City Collective Bargaining Law ("the NYCCBL")[4] when it reached an agreement with the Union to implement a mandatory rotational work shift schedule. They assert that the Housing Authority was aware that the vast majority of the Elevator Mechanics

[3] The Union generally denies this assertion

[4] Section 12-306 of the NYCCBL provides in relevant part as follows:

a. **Improper public employer practices**. It shall be an improper practice for a public employer or its agents:

> (1) to interfere with restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 (renumbered as 12-305] of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> ...
> (4) 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.
> .

and Elevator Mechanics Helpers opposed the institution of such aschedule. Therefore, they contend that the Housing Authority committed an improper practice by negotiating over a mandatory rotational work shift schedule.

Moreover, the petitioners argue that the existence of steady work shifts which are assigned on a volunteer seniority basis is a "longterm implied term and condition of their employment." They argue that a mandatory rotational schedule constitutes a "detrimental new term and condition of employment" which was not anticipated in, or provided for in their collective bargaining agreement ("the Agreement"). Thus, they maintain that such a work schedule can only be implemented by amending the Agreement or obtaining the consent of a majority of members in their bargaining unit, and that the Housing Authority, in attempting to implement it without doing so, has violated the Agreement.

Finally, the petitioners assert that their wages are currently lower than the prevailing wage rate in their locality. They also contend that a mandatory rotational schedule will force Elevator Mechanics to regularly work sixteen hour days, more than five days in a given week, and argue that if the new assignment system is implemented, they will be working worse schedules while receiving lower pay than similarly situated employees in their locality. They allege that their current wage rate is not in compliance with the requisites of Section 220 of the Labor Law, and that the implementation of a mandatory rotational work

schedule further violates that provision.[5]

The petitioners disagree with the Housing Authority's argument that they do not have standing to assert the instant claims. They contend that collective bargaining representatives are designated for the benefit of their respective memberships, and argue that under these unique circumstances where they comprise a majority of the individuals in the titles "Elevator Mechanic" and "Elevator Mechanic's Helper", they have the requisite standing to bring this action.

The petitioners also oppose the Housing Authority's contention that the claims involving violations of the Agreement and Section 220 of the Labor Law should be dismissed due to the lack of jurisdiction of the Board. They note that subsequent to the filing of the instant improper practice petition, the Union and the Housing Authority requested that the alleged violation of the Agreement be submitted to arbitration, and that the Union has

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[5]Section 220 of the Labor Law provides in relevant part as follows:

> 2. Each contract to which . . . a municipal corporation . .. is a party and which may involve laborers, workmen or mechanics shall contain a stipulation that no laborer workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week except in cases of extraordinary emergency . . .
>
> 3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon . . . public works, shall not be less than the prevailing rate of wages as hereinafter defined . . . .

initiated Comptroller's hearings to review their wage rate under Section 220. Therefore, they suggest that the Board hold its consideration of these claims in abeyance pending the outcome of the arbitration and the Comptroller's hearings.

However, the petitioners vehemently dispute the Housing Authority's contention that the Board should decline jurisdiction over their improper practice allegations because those claims have been raised in the judicial forum. They note that the judicial action to which the Housing Authority refers was brought on behalf of approximately 36 Elevator Mechanics and Elevator Mechanics Helpers who worked solely on the night shift and were contesting the 3 month experimental program. The instant improper practice petition, they assert, is brought on behalf of over 200 Elevator Mechanics and Elevator Mechanics Helpers who oppose the implementation of a permanent rotational work shift schedule. Thus, they contend that the outcome of the action being decided in the judicial forum is not dispositive of the issues currently before the Board, and that "under these circumstances where the vast majority of the petitioners herein have no interest or involvement in the State Action, and where such action could potentially continue for several years, . . . it would be a gross travesty of justice to hold the over two hundred petitioners herein hostage to the said State Action". [emphasis in original].

As a result of being forced to work on a mandatory rotational work shift schedule, the petitioners contend that they will suffer adverse health effects, pain and mental anguish, and that many Elevator Mechanics will suffer a loss of income. They seek an order granting Elevator Mechanics back pay, and prohibiting the Housing Authority from going forward with the imposition of a mandatory rotating schedule absent a proper vote of the affected members of the bargaining unit.

B. Allegations against the Union

With respect to the Union, the petitioners argue that it breached its duty of fair representation by agreeing to the implementation of the new schedule against the wishes of a clear majority of employees in their job titles, and by failing to renegotiate their wage rate in accordance with the prevailing industry rate. They specifically maintain that Local 237 is acting with "malice" towards them because of its awareness that many Elevator Mechanics have advocated leaving Local 237 and returning to Local 1 of the International Union of Elevator Constructors, AFL-CIO, their previous bargaining representative.

The petitioners point out that they have been operating without an agreement on wages since October 1987 and receive wages at a substantially lower rate than similarly situated employees in Local 1. They maintain that although they asked the Union to negotiate a new agreement which would set their wages at rates comparable to those of employees in Local 1, it refused to

do so prior to the filing of the instant petition.

As a remedy against the Union, the petitioners seek an order prohibiting it from agreeing to the imposition of the mandatory rotational program, and directing it to oppose its implementation. They also seek an order directing the Union to bargain in good faith in order to obtain a suitable wage agreement for their job titles and an award of back pay.

Housing Authority's Position

The Housing Authority argues that the petitioners have not alleged any facts which constitute a violation of §§12-305[6] or 12-306[7] of the NYCCBL. It contends that the duty to bargain runs only to the certified bargaining representative and not to individual employees. Since the Housing Authority asserts that the petitioners have made no claim that it refused to bargain collectively with their certified bargaining representative, and maintains that it has at all times recognized the Union as the exclusive bargaining agent for employees in the titles "Elevator

[6]Section 12-305 of the NYCCBL provides in relevant part as follows:

> Public employees shall have the right to self organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

[7]Supra at 4.

Mechanic" and "Elevator Mechanic's Helper", it alleges that the petitioners have failed to state a cause of action.

The Housing Authority also notes that the Board lacks jurisdiction to resolve disputes over the interpretation and application of contractual provisions in an improper practice proceeding. Moreover, it points out that the Union's claims under Section 220 of the Labor Law are remediable pursuant to the mechanism provided in that section.

Finally, the Housing Authority contends that the instant petition should be dismissed because another action for substantially the same relief is currently pending in New York State Supreme Court. It states that the petitioners commenced an action on March 30, 1988 for a temporary restraining order and preliminary injunction restraining and enjoining the Housing Authority from implementing the disputed rotating shift work schedule. The motion was denied on June 29, 1988, but the action itself is still pending. The Housing Authority maintains that in the past the Board has declined to exercise its jurisdiction over improper practice claims where the same issue is being litigated in the judicial forum, and contends that the Board should do so in the instant case as well.[8]

[8]The Housing Authority cites Decision No. B-8-84 in support of its position.

Union's Position

The Union maintains that the petitioners have no standing to commence the instant proceeding with respect to the alleged violations of the Agreement. It also argues that none of their claims constitute improper public employee practices under the NYCCBL. Finally, the Union states in a covering letter, that it joins in the motion to dismiss filed by the Housing Authority to the extent that the motion is not inconsistent with the Union's answer.

DISCUSSION

Allegations against the Housing Authority

At the outset, we dismiss the petitioners' allegations that the Housing Authority violated the Agreement in accordance with the clear mandate of Section 205.5(d) of the Taylor Law which expressly provides that this Board "shall not have authority to enforce an agreement . . . and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper . . . practice".[9] Insofar as the petition is based on allegations of the violation of Section 220 of the Labor Law, it is dismissed because the Board has no authority to interpret, administer or enforce provisions of the

[9]See also, Decision Nos. B-60-88, B-55-88, B-53-871 B-17-86.

Labor Law[10]. Although the petitioners have suggested that we defer our consideration of these matters pending the outcome of an arbitration and ongoing Comptroller's hearings, we decline to do so as there is little to be gained from deferring the resolution of issues over which we do not have jurisdiction.

We now address the improper practice claims asserted against the Housing Authority. The Housing Authority refers to Decision No. B-8-84 as support for its contention that we should decline to exercise jurisdiction over the instant improper practice petition. In that case we held our decision in abeyance due to the possibility that the issues presented might be resolved in court[11]. However, it is well established that we have exclusive, non-delegable jurisdiction over the resolution of improper practices.[12] We are clearly not bound by any statutory or other legal requirement to defer our jurisdiction over an improper practice petition merely because it raises issues which have been presented concurrently in a judicial forum. In this regard, it is well established that the petitioners must exhaust their administrative remedies before the agency which possesses exclusive, original jurisdiction over the subject matter of their

[10]Decision No. B-1-83.

[11]We note that in Decision No. B-8-84 we preserved the right of the parties to raise any issues which remained 6 unresolved judicially before the Board. See also, Decision No. B-57-87.

[12]Taylor Law, §205.5(d); Caruso v. Ward, Index No. 4030/87 (Sup. Ct., N.Y. Co. 1987); Decision No. B-57-87.

claim before they may submit the same matter for determination by a court.[13]

Unlike the circumstances with which we dealt in Decision B-8-84, the parties to the instant improper practice proceeding and the issues presented therein are substantially different from those presented in the action currently before the court. The parties to the court action are 36 Elevator Mechanics and Elevator Mechanics Helpers who worked solely on the night shift, and who contest the implementation by the Housing Authority of an experimental three month mandatory rotational work shift schedule on or about April 1988. The petitioners herein are over 200 Elevator Mechanics and Elevator Mechanics Helpers who have worked on both the night and day shifts, and who oppose the implementation of a permanent rotational work shift schedule. Clearly, the court's determination in the action brought by 36 Elevator Mechanics and Elevator Mechanics Helpers will not resolve the improper practice issues raised in the instant proceeding. Consequently, we will not defer our consideration of the petitioners' contentions that the Housing Authority has violated the NYCCBL.

[13] Parisi v. Davidson, 405 U.S.34, 92 S.Ct. 815, 3 . 1 L.Ed.2d 17 (1972), Vandoros v. Hatzimichalis, 517 N.Y.S.2d 51, 131 A.D.2d 752 (2nd Dept. 1987); Steinberg v. Seagate Association, 498 N.Y.S.2d 969 (2nd Dept. 1986); Board of Education of the Monroe Woodbury School District v. Wieder, 512 N.Y.S.2d 305, 135 Misc.2d 658 (Sup. Ct. 1987).

We find that the petitioners lack standing to raise issues of alleged refusal to bargain in good faith against the Housing Authority. We have long held that the duty to bargain runs only between the public employer and the certified bargaining representative.[14] The Union herein has that status and thus retains the exclusive authority to negotiate on behalf of Elevator Mechanics and Elevator Mechanics Helpers. The Housing Authority is obligated, pursuant to NYCCBL §12 306a(4), to conduct all its collective bargaining negotiations as to those titles solely with the Union.[15]

Contrary to the petitioners' assertion, dissension within the bargaining unit does not vitiate the authority of the certified bargaining representative to negotiate on behalf of all unit employees. In the interest of maintaining stability throughout the collective bargaining process, management cannot be expected to halt its negotiations with a certified bargaining representative whenever a dissident group arises within a unit. Rather, management must negotiate with the certified bargaining representative until such time as that representative is decertified through appropriate action of the unit membership pursuant to the relevant statutory provisions and procedure

[14] Decision Nos. B-22-87, B-9-86, B-5-86, B-29-84, B-15-83, B-1-83, B-13-81.

[15] We note that we have in the past held that negotiating with individual unit members may arguably constitute a violation of a contractual union recognition clause. Decision No. B-65-88.

before this agency.

We also find that the petitioners have failed to state a claim with respect to any alleged violations of NYCCBL §12-306a(l) and (2). Since the Housing Authority has an obligation to negotiate with the certified bargaining representative, it cannot be said to have "interfered with, restrained, or coerced, public employees in the exercise of their rights . . .[16] in doing so. Moreover, there are no factual allegations in the instant case which support the petitioners, claims that the Housing Authority committed an improper practice by "dominat[ing], or interfer[ing] with the formation of a public employee organization".[17]

Therefore, we dismiss the petitioners' allegations against the Housing Authority in their entirety.

Allegations against the Union

The petitioners' have alleged two violations of the Union's duty of fair representation. They contend that the Union breached its duty by acquiescing in the Housing Authority's decision to implement a mandatory rotational work schedule against the wishes of a clear majority of Elevator Mechanics, and by failing to negotiate a wage agreement to succeed one which expired in October 1987.

Clearly the petitioners have standing to assert these

[16]NYCCBL §12-306a(l).

[17]NYCCBL §12-306a(2).

claims, as the duty of fair representation runs between the Union and its members. To the extent that a union's status as collective bargaining representative extinguishes its members' access to available remedies, such as direct negotiation with the employer, the union is compelled to represent their interests fairly.[18] Thus, it is well established that the duty of fair representation is an obligation coextensive with the exclusive power of representation, to refrain from arbitrary, discriminatory, or bad faith conduct in the negotiation, administration and enforcement of collective bargaining agreements.[19]

The Union's attempt, expressed in a covering letter attached to its answer, to join in the motion to dismiss filed by the Housing Authority, fails to comply with Section 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining. That section provides that "all motions . . . shall be made in writing, shall briefly state the relief sought and shall be accompanied by affidavits setting forth the grounds for such motions." Inasmuch as the petitioners' claims against the Housing Authority and the Union are different, the mere reference to the motion of the Housing Authority does not provide any basis for determining whether the claim against the Union should be

[18] Vaca v. Sipes, 386 U.S. 171, 64 LRRM,2369 (1967).

[19] See, Decision Nos. B-51-88, B-42-87, B-32-86, B-9-86, B-5-86, B-23-84, B-15-84, B-16-83, B-15-83, B-13-81.

dismissed. In this context, the Union's failure to file an affidavit setting forth the grounds for its motion to dismiss, as required by Section 13.11, compels us to deny its request to join in the Housing Authority's motion.

We therefore dismiss the Union's motion in its entirety, without prejudice to its resubmission together with a proper supporting affidavit.

0 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 improper practice petition of a Majority of the Civil Service Elevator Mechanics and Elevator Mechanics Helpers in Local 237 be, and the same hereby is dismissed to the extent it alleges that the Housing Authority violated the Agreement, §220 of the Labor Law and §12-306 of the NYCCBL; and it is further

ORDERED, that the motion to dismiss filed by the Housing Authority be, and the same hereby, is granted; and it is further

ORDERED, that the motion to dismiss by the Union be, and the same hereby, is denied without prejudice; and it is further

ORDERED that any further motion papers be served and filed by the Union within 10 days of its receipt of this decision. Further consideration of the issues presented by these pleadings is suspended during this period.

Dated: New York, N.Y.
September, 13 1989

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Dean L. Silverberg
MEMBER

Edward F. Gray
MEMBER