L.237 v. NYCHA, L.237, IBT, 45 OCB 2 (BCB 1990) [Decision No. B-2-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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.

Decision No. B-2-90
Docket No. BCB-1110-88

DECISION AND ORDER

The petitioners filed a verified improper practice petition against the New York City Housing Authority and Local 237 of the International Brotherhood of Teamsters ("the Union") on November 17, 1988.[1] 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

[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.

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.

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

On September, 13, 1989, the Board of Collective Bargaining issued an Interim Decision and Order (Decision No. B-53-89) wherein it granted the Housing Authority's motion to dismiss, and denied the Union's motion to dismiss without prejudice to the resubmission of another motion to dismiss together with a proper supporting affidavit. Thereafter, on October 6, 1989, after receiving an extension of time, the Union filed an affirmation in support of its motion to dismiss. on October 31, 1989, after receiving an extension of time, the petitioners filed an affirmation in opposition to the Union's motion to dismiss. On November 16, 1989, the Union filed a reply affirmation.

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 Housing Authority and the Union nevertheless negotiated an agreement whereby the program was implemented 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 a mandatory rotational work schedule.

In a meeting with the Union which took place on or about August 2, 1988, the Housing Authority expressed its interest in

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[2] The agreement pursuant to which the experimental three month program was implemented provides in relevant part as follows:

> 0. The Authority and the Union will implement a rotating work schedule for Elevator Mechanics as a test program. The test program shall be developed by a committee of four representatives from the Union and representatives from the Authority. Neither side shall unreasonably withhold its consent. Any issues that have not been resolved by the committee shall be discussed between the Union President and the General Manager of the Authority. Any issues that have not been resolved shall be submitted to expedited arbitration before the New York City Office of Collective Bargaining. The test program shall be conducted in a borough for a three month period commencing April 1, 1988, to be followed by a one month period for evaluation. . . .
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> p. [I]n the event that an agreement is made to implement a rotating work schedule city-wide, there shall be an initial seniority pick . . . . The Authority and the Union shall discuss future seniority picks.

implementing permanent rotational work shifts. The Union rejected this proposition, maintaining that a vast majority of Elevator Mechanics were opposed to mandatory rotational work shifts.

At another meeting, held on or about September 20, 1988, 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 maintained that it would not support such an assignment system for health reasons.

The petitioners allege that the Housing Authority and the Union subsequently agreed to the implementation of a mandatory rotational work shift schedule, commencing on or about January 1989.[3]

POSITIONS OF THE PARTIES

Petitioners' Position[4]

The petitioners assert that the Union has engaged in malicious conduct which is designed to have an adverse impact on their working conditions and wage rate. They initially argue that the Union breached the collective bargaining agreement negotiated with the Housing Authority by agreeing to the

[3] The Union denies this assertion.

[4] The petitioners' position is stated in the affidavit of their attorney, Steven A. Morelli, Esq. of Leeds and Morelli.

implementation of a permanent rotational work schedule. Moreover, they contend that since a permanent rotational work schedule will cause them to work sixteen hour days at a wage rate which is lower than that of similarly situated employees in their locality, the implementation of such a schedule will violate Section 220 of the Labor Law.[5]

The petitioners also argue that the Union has breached its duty of fair representation by acquiescing to the Housing Authority's intention to implement a permanent rotational work shift schedule, and by failing, over a five year period, to renegotiate their current wage rate in accordance with the specifications of Section 220 of the Labor Law. They allege that the Union is thereby engaged in retaliatory activity against Elevator Mechanics because many individuals in that job title advocate leaving Local 237 and returning to Local 1 of the International Union of Elevator Constructors, their previous

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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 . . .
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> 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 . . . .

bargaining representative.[6]

The petitioners further assert that the Board of Collective Bargaining, in reviewing the Union's motion to dismiss, must deem the allegations asserted in the petition to be true. They contend that they have stated a substantive claim against the Union which is not appropriately resolved by a determination on a motion to dismiss, and that the Union's motion to dismiss is without merit.

As a remedy, the petitioners seek an award of back pay, and an Order directing the Union to bargain in good faith for a suitable wage agreement for their job titles. They also seek an Order prohibiting the Union from agreeing to the implementation of a mandatory rotational work shift schedule, and directing the Union to oppose the imposition of such a work schedule.

Union's Position[7]

The Union asserts that the Board of Collective Bargaining has not adopted CPLR 3211 which mandates that all factual allegations be construed in the light most favorable to the petitioner for the purpose of deciding a motion to dismiss.

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[6] The petitioners note that after the commencement of the instant proceeding, the Union initiated a Comptroller's hearing to set the proper wage rate for the Elevator Mechanics job title, and an arbitration to review implementation of the mandatory rotational work schedule.

[7] The Union's position is set forth in the affidavit of Barry Feinstein, President of Local 237, International Brotherhood of Teamsters.

Consequently, it argues that the attorney's affirmation submitted by the petitioners should not be given any weight in opposition to the affidavit of Barry Feinstein, who as President of the Union, has personal knowledge of the facts of the instant dispute.

Contrary to the petitioners' contention, the Union maintains that it has at all times zealously represented the petitioners' interests. It states that it is not threatened by the expressed desire of many Elevator Mechanics to be represented by Local 1, since both Local 1 and Local 273 are members of the AFL-CIO, and "such a move would not be permitted". Moreover, the Union notes that as the certified bargaining representative of the petitioners' bargaining unit, it has discretion to "make impartial, reasoned judgments" on behalf of the entire unit.

The Union maintains that it never agreed to the imposition of a permanent mandatory rotational work shift schedule, and that such a schedule has not been implemented. Although the Union admits that it agreed to the implementation of the experimental three month program, it notes that this program was instituted pursuant to an agreement which currently protects the petitioners against a managerial determination to permanently impose such a schedule without obtaining the Union's consent or an arbitral ruling allowing it to do so. Thus, the Union contends that in negotiating an agreement pursuant to which the three month experimental program was implemented, it succeeding in severely

restricting the Housing Authority's ability to unilaterally implement a permanent rotational work shift schedule.

The Union also argues that although it has no intention of agreeing to the imposition of a mandatory rotational work schedule, the petitioners' allegation that the implementation of such a schedule will violate Section 220 of the Labor Law is beyond the jurisdiction of the Board of Collective Bargaining. The Union asserts that it has communicated its opposition to the implementation of such a schedule to the Housing Authority, and that expedited arbitration to resolve this dispute has commenced.

With respect to the issue of wages, the union maintains that the delay experienced in renegotiating the petitioners' wage rate is not attributable to its own negligence. It notes that pursuant to Section 220 of the Labor Law, wages for the instant titles are negotiated on the basis of an annual Comptroller's survey of the prevailing wage rate in comparable titles, and that if disputed, such prevailing wage rate may be established on demand in a hearing before the Comptroller. The Union asserts that the wage negotiations for the Elevator Mechanics job title have been complicated by a dispute as to which group is the most appropriate group upon which the prevailing wage rate for Elevator Mechanics should be based, and points out that it has previously litigated this issue all the way to the Court of Appeals.

The Union contends that in order to have access to the most accurate financial information upon which to base its wage negotiations with the Housing Authority, it intentionally delayed demanding a Comptroller's hearing until after the Comptroller's Office had completed its annual survey of prevailing wage rates. Moreover, the Union notes that it retained the services of Program Planners, Inc. to analyze the economic data essential to determining the requisites of an equitable economic package for Elevator Mechanics and Elevator Mechanics Helpers.

The Union maintains that it demanded a Comptroller's hearing in April 1988, upon the completion of its analysis of the economic factors relevant to the wage negotiations for Elevator Mechanics. It contends however, that the Comptroller's hearing could not be scheduled until March 7, 1989, due to the heavy agenda at the Comptroller's Office and that at the present time, the Comptroller's hearing has been continued in order to allow the City additional time to present its case. The Union asserts that the petitioners will not be harmed by the delay experienced in obtaining a prevailing wage determination for their job titles since they will receive a retroactive wage increase after such determination is made.

DISCUSSION

Initially, pursuant to Section 205.5(d) of the Taylor Law, we dismiss the petitioners' allegations that the Union violated

the collective bargaining agreement by agreeing to the implementation of a rotational work schedule. That provision expressly states 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".[8]

We also dismiss the petitioners' claim that the implementation of a permanent rotational work schedule will violate Section 220 of the Labor Law, because we do not have the authority to interpret, administer or enforce provisions of the Labor Law.[9]

With respect to the petitioners' allegation that the Union breached its duty to provide fair representation, we note that the pivotal issue in determining the existence of a breach of the duty of fair representation is whether the Union acted arbitrarily, discriminatorily or in bad faith in the negotiation, administration or enforcement of a collective bargaining agreement.[10] We further observe that in cases such as this one, in which the petitioners allege that the Union's actions were motivated by malice, it is well established that absent a showing of intentional and hostile discrimination, a union does not

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[8] See also, Decision Nos. B-60-88, B-55-88, B-53-87, B-17-86.

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

[10] Decision Nos. B-53-87; B-42-87, request for reconsideration denied B-42A-87; B-34-86; B-16-83.

breach its duty of fair representation simply because its members are not satisfied with a negotiated settlement or agreement.[11]

In support of their contention that the Union breached its duty of fair representation, the petitioners allege that the Union agreed to the implementation of a permanent mandatory rotational workshift schedule against the wishes of a majority of Elevator Mechanics and Elevator Mechanics Helpers, and that the Union has neglected to renegotiate their wage rates in accordance with the specifications of Section 220 of the Labor Law. The petitioners argue that the manner in which the Union has represented their job titles is clearly indicative of the Union's purposeful malicious treatment of the individuals in those titles.

In contrast, the Union contends that it never agreed to the implementation of a permanent mandatory rotational workshift schedule. The Union maintains that, on the contrary, it has filed a request to arbitrate its challenge to the implementation of such a work schedule, and that it has succeeded in negotiating an agreement which restricts the Housing Authority's managerial authority to implement rotational workshifts absent the Union's consent or an arbitral award allowing it to do so.

Moreover, although conceding that there has been a delay in the renegotiation of the petitioners' wage rate in accordance

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[11] Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953); Decision Nos. B-9-86; B-13-81.

with Section 220 of the Labor Law, the Union points out that it has been involved in extensive research to determine the basis for a new agreement as to wages for the petitioners' job titles, and has, to that end, demanded the scheduling of a Comptroller's hearing. It contends that the petitioners will not be harmed by a delay in wage negotiations for their job titles since any negotiated wage increases will be retroactive once the new rate is established.

Contrary to the Union's assertion, we have long held that on a motion to dismiss, the factual allegations of an improper practice petition will be deemed true for the purpose of determining the existence of a prima facie cause of action. Therefore, in resolving a motion to dismiss an improper practice petition, we generally limit our inquiry to the question of whether the material facts, as alleged by the petitioner, constitute the basis for a finding of an improper practice within the meaning of the NYCCBL.[12] Alternatively, "[i]t is not the function of this Board, in considering a motion to dismiss, to resolve questions as to the credibility and weight to be given to each of two or more inconsistent versions of a disputed factual incident".[13]

It is clear that in the present case the parties dispute the issue of whether the Union actually agreed to the implementation

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[12] Decision Nos. B-34-89; B-7-89; B-36-87; B-15-87.

[13] Decision No. B-9-82.

of a permanent rotational work schedule against the wishes of a majority of the individuals in the affected job titles. For the purposes of this motion, we must accept the petitioners' contention regarding this issue. However, assuming that the Union acted as alleged by the petitioners, its actions would constitute the basis for a finding of improper practice only if it is established that its conduct was motivated by malice, as petitioners claim.

We have carefully considered the petitioners' allegations of improper practice in the overall context of the implementation of a mandatory rotational work shift schedule, and the Union's strategy in negotiating the petitioners' wage rate as these matters are set forth in the undisputed allegations of the affidavit of the Union's President, Barry Feinstein. We reiterate our position that:

> a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[14]

Absent a showing of hostile discrimination, a union's failure to satisfy all the individuals it represents does not amount to a breach of the duty of fair representation.[15]

In light of the burden which the petitioners must overcome

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[14] Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 at 2557 (1953); See also, Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Decision Nos. B-9-86; B-16-83; B-15-83; B-26-81; B-13-81.

[15] Decision Nos. B-16-83; B-15-83; B-26-81; B-13-81.

in establishing a prima facie breach of the duty of fair representation, we find their contention that they have been treated maliciously to be conclusory and unsupported by the evidence presented. It is not our task to evaluate the propriety of the strategic determinations pursuant to which the Union conducted its representation of the petitioners' job titles absent the existence of any activity which would tend to support the petitioners' contention that they have been treated maliciously. In the instant case, we are persuaded by the factual allegations which are not in dispute that the petitioners were afforded fair treatment, and that the Union's actions with respect to the implementation of a rotational workshift schedule and the wage negotiations for the petitioners' job titles were not motivated by malice or hostility.

We therefore find that the Union's actions or inactions in the disputed areas do not rise to the level of being a breach of the duty of fair representation, and accordingly, we dismiss the instant improper practice petition.

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 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.

ORDERED, that the motion to dismiss filed by the International Brotherhood of Teamsters, Local 237 be, and the same hereby, is granted.

Dated: January 22, 1990
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
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