MEBA v. City & Dept' of Marine & Aviation, 9 OCB 1 (BCB 1972)
[Decision No. B-1-72 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

DISTRICT NO.1-PACIFIC COAST DISTRICT MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO — DECISION NO. B-1-72

DOCKET NO. BCB-91-71

-and-

THE CITY OF NEW YORK AND THE DEPARTMENT OF MARINE AND AVIATION

DECISION AND ORDER

By petition filed with the Office of Collective Bargaining on May 10, 1971, District No.1-Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO (hereinafter referred to as "the union") seeks a finding that the city has violated §1173-7.0c(3)(d) by eliminating certain permanent civil service lines resulting in the dismissal of ten Ferry Boat Officers represented by petitioner at a time when an impasse panel was holding hearings in connection with contract negotiations between the parties.

In substance the petition makes the following allegations:

1. The union had a contract with the City which covered the period July 1,1967 to June 30, 1970.
2. On May 1, 1970 the union filed a bargaining notice demanding the commencement of bargaining for a new contract to take effect July 1, 1970.
3. Negotiations for a new contract commenced August 26, 1970.

4. On January 11, 1971 the union filed a request with this office for the appointment of an impasse panel and the city having consented, a panel was appointed and commenced hearings in the matter on April 23 1971. A second hearing was held on April 30, 1971, subsequent to the filing of the petition herein.

5. On May 4, 1971 the employer advised the union that it proposed to reduce ferry service in connection with budget cutbacks and that certain civil service lines would be eliminated resulting in the layoff of some Ferry Boat Officers represented by the union.

The answer of the city concedes all of the facts set forth above except those stated in item 5 which the city maintains are ill-pleaded and not susceptible to any response which would fairly and fully state the position of the city. However, in doing so the city's pleading consists, in effect, of a general denial of item 5 of the union's petition.

The union, by its reply, denies the foregoing allegation of the Answer affirmatively setting forth the existence of a job security clause in the collective agreement; the city's action to implement its decision to curtail ferryboat service and laying off union members in violation of the status quo provision of the NYCCBL; and the institution of Court action in the New York County Supreme Court to enjoin the City from laying off union members.

The union's motion for an injunction was denied by Justice Lane in a decision dated June 14, 1971. In the Article 78 proceeding Mr. Justice Lane determined solely that the status quo

provision did not, per se, enlarge any rights with respect to the City's authority to terminate employment. The factual issue of good faith in terminating employment, which is our responsibility under the New York City Collective Bargaining Law, was not involved.

On June 80, 1971, the city filed with this office a Motion to dismiss the Petition and the Reply of the-union. The Motion is based on technical grounds relating to the sufficiency of the pleadings to which it is addressed. Read together, however, the pleadings, the city's Motion to Dismiss and the union's Answering Affidavit clearly present a justiciable issue; we will therefore deny the Motion to Dismiss and consider the substantive issues presented.

The city's motion argues: 1. that, if the Reply is dismissed, leaving the record void of any detailed pleading of specific language of the contract dealing with job security and layoffs, then the Petition must be dismissed because it complains of unilateral action by the city in an area where the city has an absolute right to act unilaterally under the management prerogative provisions of Section 5c of Executive Order 52; and 2. that if the Reply is not dismissed and if the contract between the parties is thus pleaded in detail, then all provisions of the contract apply, including Article XIV thereof which reads as follows.

> "All disputes relating to the interpretation or application of any of the provisions of this contract which may arise between the parties hereto, shall be governed and controlled by, and in accordance with,

> the grievance procedures set forth in Mayoral Executive Order No.52, dated September 29, 1967, Section 8, Grievance Procedures, Subsections a,c,d, and el or any amendment thereto."

The city contends, therefore, that the appropriate manner of dealing with the controversy between the parties is to submit it to arbitration and that the instant proceeding should be dismissed.

In its Answering Affidavit the union argues with regard to item I above that the matter of layoffs may initially have been within the exclusive control of the city but that the city bargained away that exclusive control when it entered into the last contract with the union which included, in Article II, a job security provision which reads as follows:

> "Article II - Job Security
>
> During the term of this Agreement the Employer will attempt to retain all Licensed officers who hold positions by permanent appointment. If curtailment, because of a reduced number of runs becomes necessary the Employer will make every effort to reemploy such officers in vacancies or to replace persons who have provisional appointments to positions for which such licensed officers are eligible at the rates and working conditions prevailing in the department in which such licensed officers are reemployed. However, no such curtailment shall become effective without prior discussions with the Association."

In response to item 2 above, however, the union maintains that the arbitration provisions of the contract do not apply because the contract terminated on June 30 1970 and its provisions are no longer in effect. This latter argument is offered by the union with direct reference to the city's citation of Matter of Allied Building Inspectors Local 211, Decision No. B-6-70. In that case the expired contract between the parties provided for discussion prior to changes in work schedules. The union there maintained that the city hid violated the status quo provisions of NYCBBL Section 1173-7.0c(3)(d) by making unilateral changes in work schedules during the period of negotiation for a new contract. The Board held that since the contract contained not only the provisions cited by the union with regard to changes in work schedules
but also an arbitration clause which provided for the arbitration of disputes relating to the terms and conditions of the contract, the matter should have been submitted to arbitration and that the Petition for a finding that the city had violated the status quo provisions of Section 1173-7.0c(3)(d) was inappropriate. The decision in that case, the union here points out included the following language which distinguishes it from the instant matter:

> "Both parties concede and allege that their contract is still in full force and effect ...
>
> Although negotiations for a new contract have been conducted, and an impasse panel appointed, the contract between the parties concededly still is in effect and governs the present rights and obligations of the parties."

The union thus seeks to invoke the issue of job security on the basis that by its inclusion in the prior contract, job security has come within the area of wages, hours and working conditions contemplated by Section 1173-7.Oc (3)(d); and to reject the contention that controversies relating to the terms and conditions of the contract must be submitted to arbitration on the basis that the contract terminated on June 30, 1970 and is no longer in force or effect.

Clearly the matter pivots upon the interpretation of the scope and effect of the status quo provisions of Section 1173-7.Oc (3)(d) which reads, in pertinent part, as follows:

> "(d) 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 employer shall refrain from unilateral changes in wages, hours, or working conditions ... 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."

A labor relations statute and the policy with which it is implemented are intended to promote collective bargaining and provide appropriate means of dispute resolution. All labor relations acts have certain characteristics in common but each such act has

unique qualities which relate to the particular needs which it is intended to serve. Thus the National Labor Relations Act creates certain restraining upon the actions of both labor and management which are specifically aimed at fostering and protecting negotiations during the period between the expiration of contracts and the execution of new ones. In Carpenters Council v. Rocky Mountain Prestress, Inc., 68 LRRM 1325 the Board discussed at length the rationale and legislative history of Section 8(d) of the National Labor Relations Act which provides for the 60 day notice to terminate or modify a labor contract.

The NLRA deals with a milieu in which it is contemplated that all forms of self-help, including the strike, may ultimately be resorted to. An employer, in the private sector, is guilty of an unfair labor practice in violation of Section 8(a)5 of the NLRA where it unilaterally changes wages or other conditions of employment which are mandatory subjects of bargaining (NLRB v. American National Insurance Co.,U.S. Sup. Ct. 30 LRRM 2147); but this limitation does not apply after impasse has been reached (NLRB v. Katz, U.S. Sup. Ct.. SO. LRRM 2177).

The Railway Labor Act deals with a sensitive and vital area of the economy; the Act is consequently more far reaching than the NLRA in the matter of delaying, if not preventing, resort to self-help. In Shore Line R.R. v. Transportation Union, U.S. Sup. Ct., 72 LRRM 2840, the court analyzed not only the Act, itself but its underlying purposes.

That decision makes clear that even the RLA is not intended to prevent ultimate resorts to various forms of self-help, but only

to delay them for the purpose of advancing the prospects of peaceful settlement. It contemplates the fact that in certain circumstances strikes may occur despite all the procedures and waiting periods which must be gone through first. in short, the Railway Labor Act goes even further than the National Labor Relations Act in the effort to prevent strikes but does not prohibit the strike as a force in labor management relations.

In the public sector, in most jurisdictions including our own, there is in operation an additional factor which does not exist in the private sector generally nor in the railroad industry. This unique factor is that public employees are not given the right to strike. The law under which we operate specifically prohibits strikes (Section 210 Subds. 1 & 2 of the Taylor Law, which, under the provisions of Section 212, is applicable to the City of New York as well as all other jurisdictions of the State, forbids any kind of work stoppage by public employees). The framers of the New York City Collective Bargaining Law recognized that a law intended to maintain a bargaining relationship in a system in which the respective pressures and strengths of the parties were so extensively realigned, as would be the case where labor was denied the power of the strike, would have to seek to redress the resultant imbalance. They acknowledged this fact in the Statement of Public Members of Tripartite Panel to Improve Municipal Bargaining Procedures, dated March 31, 1966 and approved and signed by representative! of the city and of the city employee organizations. This document which outlines the New York City Collective Bargaining Law, including the status quo provision, states, at page 3:

> "Because the rights normally enjoyed by employees in private employment are not available by law to employees in public employment, there is the 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 be treated fairly; (b) that the City will be able faithfully to discharge its obligations as employer, without interruption to the public services it furnishes; and (c) that the people of the City will be protected, as they have a legal and moral right to be, in their access to essential public services."

We are of the opinion that the meaning and purpose of the status quo provision of the NYCCBL is to maintain the respective positions of the parties and the relationship between them essentially unchanged during periods of negotiation, during impasse panel proceedings and for thirty days after issuance of panel reports. This end is obtained, in part, by prohibiting the change of any condition created by a prior contract during the period prescribed by the status quo provision. This interpretation of the status quo provision is consistent with the policy enunciated in the Report of the Tripartite Committee of March 31, 1966. The "rights normally enjoyed by employees in private employment (but) not available by law to employees in public employment" are, in our view, intended to be replaced by the assurance that upon

termination of a prior contract the terms and conditions of their employment Cannot be reduced or otherwise changed except by negotiation during the statutory period. The denial of the power to strike is balanced by the maintenance of the status quo.

A similar concept is read into the Railway Labor Act I the Supreme Court in Shore Line R.R. v. Transportation Union, supra, where it says:

> "... when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement ..."

Even in the private sector and in areas not covered by the Railway Labor Act there are circumstances in which the right to strike though not entirely eliminated, may be suspended; when this happens the very type of readjustment of the balance of power between the parties which we are making here is found in the applicable law. Thus, where a strike in the private sector imperils the national health or safety it may be enjoined, under Section 208 of the Labor Management Relations Act, for a period of 80 days. Where this emergency measure is employed, however, managements powers are also curtailed in order to maintain balance in the relationship between the parties. In U.S. v. Longshoreman (ILA), 50 L.C. 19, 278 the U.S. District Court, Southern District of New York held that its injunction against a strike by the union therein

should include a provision continuing in full force and effect the provisions of the expired collective bargaining Agreement between the parties. Reasoning that such a provision served to maintain the status quo and to preserve the relationship between the parties, the Court said, in pertinent part:

> "Equity requires that if union members are to be restrained from striking during the 80 day cooling-off period, employers be prevented also from reducing work gangs or taking any of the steps they had sought to persuade the unions to accept in pre-strike negotiations. The prior collective bargaining agreement provides ready reference to the respective rights and duties of the parties."

We hold, therefore, that in this case, the status quo includes[1] 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. In our view, the collective bargaining agreement including the grievance and arbitration procedure, is the best guide as to the "wages, hours or working conditions" which are not to be unilaterally changed during the status quo period. The rights and duties of the parties during the status quo period are statutory in nature.

In the instant matter the parties have raised the issue as to whether or not the underlying controversy should be dealt with in accordance with the grievance and arbitration provisions

[1] We reserve the right to determine in future cases, based upon the clear intent of the parties and the special nature of the circumstance involved, that a particular term or condition of employment expired with the term of the contract.

of the prior contract between them or treated as an alleged failure of full faith compliance with the statute. In this and in all cases such 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 employee in dealing with the specific controversies presented. Since each such case arises out of an alleged violation of the 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 arbitrator 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 provision of Executive Order No.52. We find that in a case such as this, where the underlying controversy derives solely from the statutory extension of the provisions of a prior contract, the arbitration provisions - either contractual or statutory - which applied during the term of the contract provide the most appropriate means of dealing with such a controversy arising during the period covered by the status quo provisions of the New York City Collective Bargaining Law.

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 City Is motion to dismiss herein be, and the same hereby is, denied;

ORDERED, that in accordance with the decision herein, the union's petition herein be, and the same hereby is denied without prejudice to the union's right to request arbitration of the controversy presented herein in accordance with this decision.

DATED: New York, N.Y.
January 7, 1972.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
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HARRY VAN ARSDALE
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N.B. Member Silver did not participate in the decision and order herein.