UFA & UFOA v. City, 13 OCB 7 (BCB 1974) [Decision No. B-7-74]

B0ARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING

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In the Matter of

THE UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner,

-and- DECISION NO. B-7-74

THE UNIFORMED FIRE OFFICERS ASSOCIATION

Intervenor, DOCKET NO. BCB-175-74

-and-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, and THE OFFICE OF LABOR RELATIONS, CITY OF NEW YORK

Respondents.

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DETERMINATION OF MOTION

This is a motion made by the Uniformed Fire Officers Association and the Uniformed Firefighters Association for an order restraining and staying the City from implementing and installing on July 1, 1974, certain Fire Department programs during the pendency of the within proceeding.

Background

On May 23, 1974, Uniformed Firefighters Association (UFA) filed its petition herein seeking a finding by the Board of Collective Bargaining that the City of New York had violated the "Status Quo" provision, Section 1173-7.0-d. of the New York City Collective Bargaining Law, in connection with the Institution of two Fire Department programs during the current period of negotiations between the City of New York and UFA, and for an order restraining and staying the City from implementing and installing the said programs pending final determination of the matter.

The two programs are generally referred to by the parties as the "Attack Units" program and the "Interchange Program." The Attack Units program involves a reduction in the number of officers serving in command of engine companies and oil ladder companies. The U F A alleges that this program will result in Firefighters working under less than the "immediate supervision"provided for by the Firefighter job specification which is incorporated into the current agreement between the parties by reference thereto in Article V of the agreement ("Job Description"). It is further alleged that institution of the program would necessarily increase the duties and responsibilities of Firefighters by causing them to assume some of the duties and responsibilities of officers and that this would entail performance of

out-of-title work by Firefighters. The Union also alleges other possible contract violations relating to manning, implementation of overtime provisions and the possible creation of a new title or rank which it is claimed would complicate the current bargaining between the parties.

The City in its answer responds that the petition alleges violation of contract provisions; that such controversies are subject to grievance and arbitration under the contract rather than to adjudication by this Board; and that the petition should, therefore, be dismissed.

The Interchange Program finds its earliest origins in Decision B-9-68 (Case BCB-16-68) of this Board

in which we considered allegations by the Uniformed Firefighters Association and the Uniformed Fire Officers Association that manning decisions taken by the City in the exercise of management prerogatives had resulted in a practical impact upon the working conditions of unit employees. That decision interpreted the provisions of §1173-4.3 b., which reads as follows:

> "it is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

In that decision, we set forth, inter alia, the procedures to be followed in dealing with allegations of practical impact; it reads in pertinent part, as follows:

> "1. Once this Board determines that an 'impact' exists, the City will be required expeditiously to take whatever action is necessary to relieve the 'impact.' Relieving the impact can be done by the City on its own initiative if it chooses to act through the exercise of rights reserved to it in Section 5c If it cannot relieve the 'impact in that manner, or it chooses to take action by offering changes in wages, hours and working conditions means which are riot reserved to the City specifically under Section 5c then, of course, the City cannot act unilaterally but must bargain out these matters with the Union. In that case, failure to agree will permit the Union to use the procedures of the law to the full including the use of an impasse panel.
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> "2. The Board should determine that an 'impact' exists and (1) the City does not, or cannot, act expeditiously to relieve the impact' as provided in paragraph 1 above, or, (2) if the Union alleges that the City having exercised rights under Section 5c has failed to eliminate the 'impact,' this Board will order an immediate hearing, under its rules, which shall be given priority In its schedule. If the Board should find that the 'impact' still, remains, the City shall bargain with the Union immediately over the means to be used and the stops to be taken to relieve the 'impact,' such bargaining to be

> limited to a period of time to be determined by the Board in each case, except as the parties may otherwise agree. In such bargaining, it shall not be open to the City to urge that Section 5c precludes the Union from requiring the City to bargain on areas specified in that Section, and all rights there contained and heretofore reserved to the City shall for this purpose come within the scope of collective bargaining. Thereafter, if the parties cannot agree and reach an impasse, an impasse panel shall be appointed which shall have the authority to make recommendations to alleviate the impact including, but not limited to, recommendations for additional manpower or changes in workload."

As a result of that decision, Eric J. Schmertz was appointed by this Board as a hearing officer to conduct the prescribed inquiry as to other a practical impact existed in Case No. BCB-16-68. After extended hearings and through Mr. Schmertz's services as a meditor, the parties entered into a Memorandum of Understanding in September 1969, whereby it was agreed, inter alia, as follows:

> "4. Public member Eric J. Schmertz of the Office of Collective Bargaining will establish 'workload standards' and provide for review of these and other standards."

On September 23, 1971, Mr. Schmertz issued his decision pursuant to the Memorandum of Agreement, in which he held:

"I. I am persuaded that the work load to measure consists of those duties that make up the primary responsibility of firemen and fire officers - namely, responding to alarms and fighting fires. I find that under present fire fighting conditions and techniques, the best method to measure that work load is by a Weighted Response Index. The Index I have developed, based on those conditions and techniques, includes all pertinent fire fighting activities, and accords point credit to those activities. That Weighted Response Index, which is attached hereto and made a part Thereof as Exhibit 3, shall constitute the work load standards. The point scores accorded each activity shall be used in measuring the quantity of the work load. From the statements of the Fire Department in the record, I am satisfied that an accurate administration of the Weighted Response Index by the Fire Department is fully feasible.

" 2. Under the Weighted Response Index, it shall constitute a 'practical impact' within the meaning of Section 1173-5.0a(2) of the New York City Collective Bargaining Law and Decision B-9-68 of the Board of Collective Bargaining dated November 12, 1968 when, based on the work it performs, a company accumulates 300 or more points in each of a total of 27 weeks within a consecutive 52-week period.

"The first consecutive 52-week period shall commence on January 1, 1972."

Thus, the Weighted Response Index is a device for measuring workload and thereby to determine the practical impact, if any, of a given manning scheme.

Subsequent application of the W.R.I. has established. and it is conceded by all interested parties, that in six companies a practical impact existed as of July 1, 1973. The data establishing this fact became available in May 1974. Studies under the W.R.I. as presently constituted as well as consideration of possible adjustments of the W.R.I. are currently going forward.

The collective bargaining agreement between UFA and the City, dated April 8, 1974, covers the period July 1, 1973 to June 30, 1974. Article XXVIIA of the contract provides for application of the W.R.I. as follows:

> "Section 1.
>
> The Union recognizes that the provisions of this Article XXVIIA are matters concerning which the City has the right to act unilaterally. Notwithstanding the above, the parties agree to the following sections.
>
> "Section 4.
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> Weighted Response Index ("W.R.I.")
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> A. The impact of the W.R.I. decision is suspended until July 1, 1973.

"B. Between December 31, 1972 and July 1, 1973, the Impartial Chairman shall study data presented to him by the parties in order to determine:

(1) What the data shows with respect to the W.R.I.

(2) Whether the Impartial Chairman wants to make changes in the cut-off numbers in the W.R.I.

"C. If after July 1, 1973, there is an application of the W.R.I. as it is now or may be changed by the Impartial Chairman, the 52-week period of measurement referred to in the decision shall be July 1, 1972 to July 1, J.973, or such later period as the Impartial Chairman may provide.

"D. After July 1, 1972, the City may make unilateral changes and install programs unilaterally subject to the following:

(1) No less than 2 weeks notice of the change is to be given to the Union.

2) Within the two weeks the Union is, to be given an opportunity to discuss the changes with the City.

(3) If no agreement is reached as a result of such discussion, the City may install the program; and the Union reserve all rights it has to oppose the same.

Pursuant to Section 4, Subdivision D, above, the City gave notice to the Union on May 17, 1974, of its intention to base its Interchange Program upon W.R.I. points rather than on number of runs as has been the practice for some time. The Interchange Program is a

system under which companies serving in areas of heavy demand for firefighting services exchange places with companies serving in areas of low demand. The notice makes clear that the purpose of the announced change is to use the Interchange Program and the W.R.I. together to distribute the total City-wide demand for firefighter services in such a way as to keep the workload of each company below the level of 300 W.R.I. points per week, which is the level established in Mr. Schmertz's decision of September 23, 1971, as the level at which practical impact (excessive workload) exists.

On June 26, 1974, UFOA requested and was granted permission to appear before a regularly scheduled meeting of the Board to move orally for permission to intervene herein. Murray Gordon, Esq., who appeared on behalf of UFOA,, and with special authorization to represent UFA in that appearance, stated that his client proposed to join UFA insofar as the petition of the latter deals with the announced W.R.I. Interchange Program (hereafter Revised Interchange), but not with regard to UFA's complaint against the "Attack Units Program." It should be noted that the "Attack Unit" plan objected to by UFA is a matter of agreement between the City and UFOA and constitutes a part of the productivity provisions of the collective bargaining contract between them.

In oral argument before the Board on June 26, 1974, it was contended by the Unions, in additon to the allegations of the UFA petition recited above, that because the parties are currently engaged in negotiations for collective bargaining agreements for the period commencing July 1, 1974, the action of the City in announcing the establishment of Revised Interchange as of July 1, 1974, constitutes a violation of the Status Quo provisions of Section 1173-7.0d. of NYCCBL. The Unions requested a determination of the Board so finding, and a final order directing that the City suspend the implementation of the Revised Interchange Program together with an order restraining the City from such implementation during the pendency of the instant proceeding. The City appeared by Mark Grossman, Esq., and objected to the grant of any of the relief requested.

Discussion

The New York City Collective Bargaining Law deals specifically with each of the issues presented herein and vests this Board with adequate authority to provide appropriate remedies where violations of the law have been established. The complex issues in this matter, now under consideration by this Board, include questions of scope of bargaining, management rights and "practical impact,"alleged violation of the Status Quo provision (§1173-7.0d.) of the New York City Collective Bargaining Law, allegations of contract breach and

grievance arbitration, and, lastly, the applicability of the impasse provisions of the NYCCBL. Many of these complexities have been dealt with in our Decision No. B-9-68 which outlines the procedural steps and remedies, including impasse procedures, available in cases such as the matter before us. The Board is presently considering these issues and will make a final determination on all aspects of this matter in the near future.

However, addressing ourselves to the immediate issue presented by the Unions' request for temporary relief, we find that it has not even been argued that implementation of the Attack Units Program would result in any irreparable harm to the UFA or its members.

There is a dispute as to how substantial or insubstantial the contemplated Interchange Program to be implemented on July lst is when compared with the existing or current Interchange Program presently in effect. The arguments of the Unions that implementation of the Revised Interchange Program would cause irreparable harm to their respective members are unsupported by any facts presented to us. The record herein establishes that an Interchange Program has been in effect in the Fire Department for a considerable period of time. Furthermore, no allegation has been made, nor do we have any indication or knowledge, that the existence of the Interchange Program has led to any irreparable harm to any interested party. We find, therefore, that there is no basis for the temporary relief sought in this matter.

Since the parties did not fully develop the arguments with regard to the Board's jurisdiction to issue the temporary relief sought here and because it was unnecessary to decide that issue in this case, we have not discussed it nor disposed of it here.

O R D E R

Pursuant to the powers vested by the New York City Collective Bargaining Law in the Board of Collective Bargaining, it is hereby

ORDERED, that the request of the Uniformed Fire Officers Association for permission to intervene herein be and the same hereby is, granted; and it is further

ORDERED, that the application of Uniformed Firefighters Association and the Uniformed Fire Officers Association for an order restraining and staying the City and the Fire-Department from implementing and installing the Attack Units and the Interchange Programs on July 1, 1974, be, and the same hereby is, denied.

DATED: New York, N.Y.
June 28 , 1974.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

EDWARD SILVER
M e m b e r

THOMAS HERLIHY
M e m b e r

I dissent - EDWARD GRAY
M e m b e r