

DC37, et. Al v. City, 32 OCB 10 (BOC 1983) [10-83 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO

-and-

LOCAL 300, THE CIVIL SERVICE FORUM,
SEIU, AFL-CIO

DECISION NO. 10-83

-and-

PAVERS AND ROADBUILDERS DISTRICT
COUNCIL, LABORERS' INTERNATIONAL
UNION, AFL-CIO

DOCKET NO. RU-815-81

-and-

THE CITY OF NEW YORK

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APPEARANCES:

Richard Ferreri, Esq.
For: District Council 37, AFSCME, AFL-CIO

Richard Biaggi, Esq.
For: Local 300, The Civil Service Forum, SEIU, AFL-CIO

Anthony Mordente, Esq.
For: Pavers and Roadbuilders, District Council,
Laborers' International Union, AFL-CIO

Bernard Holmes, Esq.
For: The City of New York

DECISION AND ORDER

On May 21, 1981, District Council 37, AFSCME, AFL-CIO (hereinafter "D.C. 37"), filed a petition for an order amending certificate number 38B-78 to reflect the deletion of the title Highway Repairer Trainee (hereinafter "HRT"), from the classified service and the establishment of a new title Assistant Highway Repairer (hereinafter "AHR"). In its petition D.C. 37 alleged that there was no change in the duties of the titles involved, so that the certificate should be amended to substitute this new title.

On June 14, 1981, Local 300, The Civil Service Forum, SEIU, AFL-CIO (hereinafter "Local 300"), filed a request to intervene, and on July 28, 1981, Pavers and Roadbuilders, District Council, Laborers' International Union, AFL-CIO (hereinafter "PRDC"), filed a request to intervene.

In a letter dated September 24, 1981, the City declined to take a position as to which union should represent this title, provided that the number of units is not increased.

The Board of Certification (hereinafter "the Board"), at a meeting on October 1, 1981, ordered that this case be held in abeyance, for a reasonable period of time, until

employees were appointed in the requested title.

On October 18, 1982, the Board, upon being advised that appointments had been made to this title in September, assigned this matter for a hearing on the issue of unit placement.

Hearings were held on November 24, 1982, January 6 and February 16, 1983, at which the parties were given full opportunity to present evidence and arguments relating to unit placement. Time for submission of briefs, originally scheduled for March 23, 1983, was extended, with the consent of the parties, to April 6, 1983, at the request of D.C. 37. A further extension, with the consent of the parties, to April 13, 1983, was granted at the request of Local 300. Briefs were submitted by the three unions, and the record in this case was closed on April 13, 1983.

BACKGROUND

In February 1978, D.C. 37, Local 300 and PRDC entered into a written stipulation to the effect that the titles of Highway Repairer (hereinafter "HR") and Foreman Highway Repairer (hereinafter "FHR")¹ constituted an appropriate

¹ Recently reclassified to Supervisor Highway Repairer. See Decision No. 50-82.

unit for the purposes of collective bargaining and requested a joint certification as representatives of this unit. The Board being satisfied that the proposed unit was appropriate, certified these three unions as joint representatives for the purposes of collective bargaining for these titles.²

Later that same month, the three unions agreed that the employees in the title of HRT constituted an appropriate unit for the purposes of collective bargaining; however, each of the unions indicated that it wished to be the exclusive representative of that unit. It appeared to the Board's satisfaction that the proposed unit was appropriate and that each of the unions had demonstrated a sufficient showing of interest for inclusion on a ballot. It therefore directed an election of the employees in the title of HRT to determine their desire for representation.³ At the election, the majority of HRT's voted for representation by D.C. 37, and the title was certified to that union.⁴

On January 14, 1981, the City Personnel Director deleted the HRT title from the classified service and added a new title of AHR.

The job specification for AHR is as follows:

² Decision No. 2-78.

³ Decision No. 3-78.

⁴ Decision No. 18-78 added HRT to Certification No. 46I-75 (as amended), the pertinent part of which was later consolidated to form Certification No. 38B-78.

General Statement of Duties and Responsibilities

Under close supervision, assists in highway repair work; performs related work.

Examples of Typical Tasks

Performs general laboring tasks while assisting in the repair of curbs, sidewalks, manhole edges and in the replacement of defective patches.

Performs such tasks as carrying of cement bags, shoveling of sand and/or stone, and the mixing of materials while assisting in the laying of concrete, sheet asphalt and other kinds of asphaltic pavement.

Cleans the construction or repair site by the sweeping and removal of debris.

Performs general laboring tasks while assisting in foundation laying, shores and sheets excavations, road depressions and excavations.

Assists in the operation of portable or towed power equipment and attachments required for maintenance operations.

Lays out tools required for maintenance operations and assists in the cleaning and use as required.

Assists in the loading and unloading of materials, equipment and other items transported by assigned vehicles.

Assists in the performance of general laboring work, such as snow removal, when weather conditions do not permit paving operations.

Assists in general vehicle maintenance which includes checks of oil and fuel levels, lights, horns and brakes; cleans interior and exterior of vehicles when required.

Performs general laboring tasks as directed by the supervisor.

May assist in masonry work by the placing of forms during sidewalk and other concrete construction and repair work.

May use picks and/or other equipment in the cleaning and preparing of defective areas for patching.

May operate a motorized vehicle in maintenance operations.

May be required to safely direct traffic around large construction projects.

Qualification Requirements:

1. A class 3 Motor Vehicle Driver's license valid in the State of New York.
2. There are certain physical requirements.

Direct Lines of Promotion:

From: None To: Highway Repairer

The job specification for HRT is as follows:

General Statement of Duties and Responsibilities

Under close supervision, receives training in and performs beginning level work in the tasks performed by a Highway Repairer; performs related work.

Examples of Typical Tasks

Receives training in, and under close supervision, assists in performing the following or related tasks:

Lays sheet asphalt, asphaltic concrete and other types of asphaltic pavement by raking, tamping, smoothing, top shoveling or laboring.

Paints edges of cuts, curbs and manholes with hot asphaltic cement.

Using portland cement, epoxies, etc., performs sidewalk and other concrete construction and repair work.

Cuts out defective areas for patching, utilizes hand or power driven tools to break surfaces, lays foundations shores and sheets excavations, performs mud-lack operations, and fills or refills road depressions and excavations with tar, oils, and performs other related work.

Performs general laboring work unrelated to paving operations, such as snow removal, when weather conditions do not permit such operations.

Operates one or more types of motorized vehicles and various types of portable or towed power equipment and attachments as required in the above mentioned maintenance operations.

Performs routine, general maintenance of vehicles. Cleans interior and exterior of vehicles, changes wheels and tires, and checks oil and fuel levels, lights, horn and brakes. Reports mechanical defects and accidents in which vehicles may have been involved.

Responsible for all tools, supplies, materials and equipment transported by assigned vehicles. Loads and unloads all transported items.

May prepare trip reports. Keeps job records.

Performs incidental laboring tasks as directed by the supervisor.

Performs such other general laboring tasks as required by the Commissioner of Highways.

Qualification Requirements

1. A class 3 Motor Vehicle Driver's license valid in the State of New York.
2. There are certain physical requirements.

Direct Lines of Promotion

This is a trainee class of positions with a two year term. At the end of two years of satisfactory service, employees in this class of positions will receive appointment to the title of Highway Repairer.

POSITIONS OF THE PARTIES

D.C. 37

D.C. 37 argues that the sole question to be determined is to which existing bargaining unit the title AHR is to be accreted. D.C. 37 contends that AHR should be accreted to its blue-collar, non-supervisory bargaining unit (Certification No. 38B-78). D.C. 37 claims that there is the greatest community of interest with the titles in that unit, especially Associate Park Service Worker (hereinafter "APSW"), and that the salaries of the AHR's are commensurate with those of the titles in this unit.

D.C. 37 alleges that the history of the creation of the AHR title is a further indication that this title should be accreted to their unit. It pointed out that it represented HRT's until its replacement by a "virtually identical" title of AHR. D.C. 37 noted that the three unions stipulated that the duties and responsibilities of HRT, AHR and APSW as testified to during the hearing stand as an accurate description. D.C. 37 relies on the uncontroverted testimony that the only difference between HRT and AHR is a "maturation period" of two years for HRT, while AHR has no such privilege.

In response to the opening arguments of the other two unions that the AHR title should be accreted to the tripartite bargaining certificate because of the community of interest

with the titles therein or in the alternative an election be held to determine the outcome, D.C. 37 alleges that the strongest community of interest is with the titles in the blue-collar, non-supervisory unit and that the salary of AHR is more similar to those of the titles in that unit than to those of the titles of HR and FHR in the tripartite unit.

With regard to the proposal for an election, D.C. 37 noted the Board's policy that an election is a proper procedure only where two or more units are equally appropriate but neither is more appropriate. D.C. 37 contends this is not the case in this matter, that the uncontroverted evidence leads to the conclusion the blue-collar, non-supervisory unit is the only bargaining unit to which AHR's can be accreted.

Local 300

Local 300 argues that the performance of the duties of AHR and HR are integrally related, and that there is a common thread running through these two titles. The AHR under close supervision assists in highway repair work; the HR lay the asphalt while the AHR assists.

Local 300 noted that it is certified for joint representation of all HR's and FHR's and that in order not to subvert the basis for the original joint certification it would be imperative to allow joint representation for the title AHR,

whose functions and duties are similar to, if not the same as, those of HR.

Local 300 contends that there is a clear distinction between the duties of APSW and AHR. APSW's perform only in park areas and do not lay asphalt, resurface or repair highways.

Local 300 requests that it be allowed to participate in a joint certification for the employees in the title of AHR and that Local 300 be allowed the opportunity to represent these employees.

PRDC

PRDC's position is that a joint certification among D.C. 37, Local 300 and PRDC should be granted to represent AHR for the purposes of collective bargaining. PRDC noted it represented a substantial portion of the employees formerly in the title of Asphalt Worker and Foreman Asphalt Worker before being certified as one of the joint representatives, along with D.C. 37 and Local 300, for the successor titles of HR and FHR.

PRDC alleges that the testimony adduced at the hearing has established that AHR's work in the same physical area, under the same working conditions, and have the same hierarchy

of supervision as HR's. The duties and responsibilities of AHR are not sufficiently distant and separate from HR to justify a separate unit for representation.

PRDC argues that, there being a sufficient community of interest to warrant joint certification and there being a prior history of joint certification with respect to the employees in the title HR, a joint certification should be established for AHR.

The City

The City indicated that its primary interest is that there be no proliferation of units and that this title be added to an existing unit.

DISCUSSION

The uncontroverted testimony on the duties of AHR indicate that there has been no substantial change from those previously performed by HRT. The testimony indicated that both shoveled and raked asphalt, drove vehicles, used a jack-hammer and maintained the trucks. The unions stipulated that the testimony regarding these duties was accurate.

After careful review of the records of OCB, and the testimony and arguments presented, we find that there is a similarity in the duties and responsibilities of the AHR and HR titles.

The three unions argue for accretion based on community of interest. The doctrine of accretion has been stated in many decisions and the Board has followed a consistent policy in its application.

Accretion is the inclusion in an existing unit of a new position, or titles, which, because of similarity or close relationship to the unit titles, would have been included in the original unit if they had been in existence at that time.⁵

Each union presents arguments for a community of interest between AHR and titles within its own unit. However, Local 300 and PRDC rely on an occupational similarity rather than a community of interest. They point out that AHR's assist HR's, they both work in the same area, under the same working conditions, and have the same hierarchy of supervision.

We note that it has been the policy of the Board to include the craftsman and his helper in then same unit.⁶ However, this policy has been applied only when both titles were subject to §220 of the Labor Law.

⁵ Decisions 39-69, 23-75.

⁶ Decisions 59-68, 31-69.

In the case before us, while HR and the other title in the joint unit are subject to §220 of the Labor Law, AHR is not.

It has been the Board's general policy not to combine non-prevailing rate titles in the same unit with prevailing rate employees, whose wages are determined by the City Comptroller, under §220 of the Labor Law, on the basis of prevailing rates paid in private industry.⁷

The New York City Collective Bargaining Law provides that "with respect to those employees whose wages are determined under section two hundred and twenty of the Labor Law, there shall be no duty to bargain concerning those matters determination of which is provided for in said section."⁸ We have held in the past that "[t]his important limitation on the permissible scope of collective bargaining for prevailing rate employees clearly differentiates their interests from those of other employees. Accordingly in the absence of unusual circumstances we shall place prevailing rate employees in a separate unit or units."⁹

Under these circumstances we are persuaded that a greater community of interest has been demonstrated by the

⁷ Decision 9-74.

⁸ NYCCBL §1173-4.3(1).

⁹ Decision 98-70.

petition of D.C. 37 to add AHR to the blue-collar, non-supervisory unit. We also note, as a matter of considerable significance, that all of the AHR's have authorized check-off of dues in behalf of D.C. 37. Accordingly, we will add the AHR's to this unit covered by Certification No. 38B-78 (as amended).

Finally, we note from a careful review of the records of OCB and the testimony of the parties that the title HRT has been deleted from the classified service. Since there are no employees serving in this title, it should be deleted from Certification No. 38B-78 (as amended).

ORDER

NOW THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED that the respective applications of Local 300, The Civil Service Forum, SEIU, AFL-CIO, and of Pavers and Roadbuilders District Council, Laborers' International Union, AFL-CIO, to intervene herein be, and the same hereby are, granted, and it is further

ORDERED, that the respective requests by Local 300, The Civil Service Forum, SEIU, AFL-CIO, and by the Pavers and Roadbuilders District-Council, Laborers' International Union,

AFL-CIO, upon their intervention, that the joint Certification No. 2-78 be amended to include the title of Assistant Highway Repairer be, and the same hereby are, denied; and it is further

ORDERED that the petition of District Council 37, AFSCME, AFL-CIO, be, and the same hereby is, granted; and it is further

ORDERED that the employees in the title of Assistant Highway Repairer be, and the same hereby are, added to Certification No. 38B-78 (as amended), subject to existing contracts if any; and it is further

ORDERED that Certification No. 38B-78, (as amended) be, and the same hereby is, further amended by deleting therefrom the title Highway Repairer Trainee, subject to existing contracts, if any.

Dated: New York, N.Y.
May 6, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

The titles and title code numbers of the employees affected by this decision are as follows:

Added to Certification No. 38B-78:

Assistant Highway Repairer 92403

Deleted from Certification No. 38B-78:

Highway Repairer Trainee 92404