VERMONT LABOR RELATIONS BOARD

RUTLAND SCHOOL CHAPTER, AFSCME LOCAL 1201, COUNCIL 93	)	
v.	)	DOCKET NO. 94-44
BOARD OF EDUCATION OF THE CITY OF RUTLAND	)	

MEMORANDUM AND ORDER

At issue is whether the Vermont Labor Relations Board should issue an unfair labor practice complaint in this matter. On August 29, 1994, Rutland School Chapter, AFSCME Local 1201, Council 93 ("Union"), filed an unfair labor practice charge against the Board of Education of the City of Rutland ("Employer"). Therein, the Union alleged that the Employer refused to bargain in good faith in violation of 21 V.S.A. Section 1726(a)(5) because the Employer "unilaterally implemented a new job that is part of current negotiations" between the Union and the Employer. The Union requests as a remedy that the Employer "be required to discontinue the new position until the issue is resolved during negotiations". The Employer filed a response to the charge on September 14, 1994.

Timothy Noonan, Executive Director of the Labor Relations Board, met with the parties on November 8, 1994, in furtherance of the Board's investigation of the charge and to informally attempt to resolve the issue in dispute. The issue in dispute was not resolved.

The pertinent factual background, based on pleadings of the parties and the investigation of the charge, is as follows: Article 1, Recognition, of the collective bargaining agreement between the parties, effective for the period July 1, 1991 to June 30, 1994, provided as follows: "The Board of Education hereby recognizes that

the Union is the sole and exclusive representative of all members of the bargaining unit who are engaged in the performance of janitorial or maintenance services in the public schools . . . excluded are the Chief of Maintenance and the Assistant Chief of Maintenance, and four (4) Working Supervisors - Custodians and Maintenance." For at least several years preceding the summer of 1994, there had been no Assistant Chief of Maintenance and only three of the four Working Supervisor positions were filled. On March 30, 1994, during negotiations for a successor agreement to the 1991-1994 agreement, the Employer presented a bargaining proposal to have excluded from the list of positions in the bargaining unit the position of "Head Custodian Rutland Education Center". The Rutland Education Center is a new high school attached to the existing vocational center. The Employer subsequently withdrew this proposal. On June 27, 1994, the Employer posted a vacancy for the position "Working Supervisor - Custodian Maintenance". The position was summarized as follows: "Ability to master the technical knowledge requirement to operate all building systems, with primary focus on the new high school building". The job description for this position is different than the job description for the three existing Working Supervisors. Subsequently, the Employer hired a person to fill this vacancy; to date, the person has primarily worked at the new Rutland Education Center. The parties have completed negotiations for a successor agreement to the 1991-1994 agreement; the Recognition article of the agreement is unchanged from the 1991-1994 agreement.

We consider this factual background in deciding whether to issue an unfair labor practice complaint. The Union charges that the

"Working Supervisor - Custodian and Maintenance" position at the Rutland Education Center recently filled by the Employer is in fact the same position, with a different title, proposed by the Employer during negotiations to be excluded from the bargaining unit. The Union contends that the Employer action is an unfair labor practice because it constitutes improper circumvention of the bargaining process. The Employer contends that the position filled at the Rutland Education Center is not the same one as proposed during negotiations, but rather is one of the Working Supervisor positions as specifically provided for in the collective bargaining agreement.

The Union responds that the position is not one of the Working Supervisor positions provided for in the agreement since the job description for this position differs from the Working Supervisor positions. The Employer contends that the difference between job descriptions is not significant because the Employer has the right to unilaterally promulgate or revise the job description of employees excluded from the bargaining unit.

We conclude that the Employer did not commit a violation of the duty to bargain in good faith through its actions in this matter. First, the Union's charge presupposes that the Employer is prohibited from establishing and filling a position until the unit status of that position is agreed upon by the Employer and the Union. We disagree. Management is able to create positions, and hire individuals to fill those positions, which management believes to be excluded from the bargaining unit in the face of union disagreement concerning appropriate unit placement. Otherwise, management may be hindered in having work performed which is necessary to the conduct

of its operations. This management right is subject to a determination ultimately being made on the appropriate unit placement of the position, but management is not precluded in the first instance from filling a position pending such determination.

Second, the Employer had no obligation to bargain with the Union over the unit placement of the disputed position. An issue concerning the construction of an appropriate bargaining unit so as to exclude certain members from that unit is not a mandatory subject of bargaining. AFSCME Local 490 v. Town of Bennington, 6 VLRB 88, 97 (1983); citing Hess Oil and Chemical Corporation v. NLRB, 415 F.2d 440, 445 (5th Cir. 1969). The composition of a bargaining unit is for the Labor Relations Board to decide if the parties are in disagreement. Bennington, 6 VLRB at 97; citing Douds v. International Longshoremen's Association, 241 F.2d 278, 282-83 (2d Cir. 1957). The Board has ultimate control of the bargaining unit, and to insist on a change in the composition of the bargaining unit improperly disrupts the bargaining process. Id.

Since the Employer had no obligation to bargain over the unit placement of a disputed position, we cannot conclude that the Employer improperly circumvented the bargaining process in proceeding as it did here. The Employer properly withdrew a bargaining unit issue from the bargaining process, and appropriately acted outside the process to fill a position which the Employer claims is excluded from the bargaining unit. Thus, we conclude that the Employer did not violate its obligation to bargain in good faith pursuant to 21 V.S.A. Section 1726(a)(5).

By filing an unfair labor practice charge here, the Union proceeded down the wrong avenue to have the Board decide this bargaining unit issue. Section 34.1 of the Board Rules of Practice provides:

> A petition for clarification of an existing bargaining unit may be filed by a collective bargaining representative or an employer where no question concerning the majority status of the exclusive bargaining representative is pending at the time the unit clarification petition is filed. Such a petition may be filed where 1) there is a dispute over the unit inclusion or exclusion of employee(s), or 2) there has been an accretion to or reorganization of the workforce, or 3) the collective bargaining representative or employer seeks a reorganization of the existing structure of a bargaining unit or units.

A unit clarification petition is the appropriate mechanism to invoke the Board's jurisdiction to decide a unit composition question such as is involved in this matter, not an unfair labor practice charge.

NOW THEREFORE, based on the foregoing reasons, the Labor Relations Board declines to issue an unfair labor practice complaint in this matter and the unfair labor practice charge filed herein is ORDERED DISMISSED.

Dated this 8th day of December, 1994, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Louis A. Toepfer

Leslie G. Seaver