VERMONT LABOR RELATIONS BOARD

LOCAL 881, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO-CLC	)	
v.	)	DOCKET NO. 78-108R
CITY OF BARRE, VERMONT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On December 6, 1978 Local 881, International Association of Firefighters, AFL-CIO-CLC (hereinafter "Firefighters") filed an unfair labor practice charge against the City of Barre. The charge alleged that the City had unilaterally implemented changes in working conditions during the term of the contract between the City of Barre and the Firefighters. The charge further alleged that the City by its actions had attempted to chill and penalize the rights of the union and its members. The City of Barre filed an answer to the charge on December 8, 1978.

A hearing was held in the matter in Montpelier on January 25, 1979. All members of the Board were present. The Firefighters was represented by Thomas L. Heilmann, Esquire. The City was represented by John F. Nicholls, Attorney for the City of Barre. At the commencement of the hearing the parties stipulated and agreed to treat the charge filed by the union as a complaint issued in the name of the Board pursuant to the requirements of 21 V.S.A. §1727(a).

FINDINGS OF FACT

1. The Barre City Firefighters, Local 881, International Association of Firefighters, AFL-CIO-CLC is an employee association duly constituted and organized within the meaning of the Vermont State Municipal Labor Relations Act.

2. The City of Barre, Vermont is an employer within the meaning of the Act.

3. The City of Barre recognized the Firefighters Association as the sole and exclusive representative for all employees of the Fire Department

with the exception of the Chief for the purpose of bargaining with respect to wages, hours, working conditions and benefits.

4. On October 3, 1977 the City of Barre entered into a work agreement with the Firefighters effective July 1, 1977 through June 30, 1979. (Complaint's B).

5. On or about September 29, 1978 the City of Barre entered into a written agreement with the Vermont Transportation Department to provide crash fire rescue service at the Knapp Airport at Berlin, Vermont.

6. The execution of the airport agreement was authorized by the City Council on or about September 26, 1978.

7. On September 15, 1978 the City Manager, Arthur Ristau, met with four officers of the Fire Department, specifically Peduzzi, Setien, Dessureau and Dodge, all of whom were members of the union but none of whom were union officials. The purpose of the meeting was to discuss technical problems in implementing the proposed airport agreement, such as the shift overlap problem and the apparatus available at the airport. The work agreement between the Firefighters and the City was not discussed at the meeting, nor was the purpose of the meeting to notify the union of the existence of the proposed airport agreement.

8. Sometime between September 15 and September 29, 1978 an orientation program was held for members of the Fire Department by airport officials. The program briefly described the crash fire rescue procedures at the airport. Mr. Vassilios Pamboukes, the president of the union, was present at the orientation session. He believed that the purpose of the training program was to provide the firefighters with training in the event of an emergency fire at the airport.

9. On September 28, 1978 the City Manager sent a memorandum to the Chief of the Fire Department indicating that the City Council on September 26 had authorized the execution of a contract which would require services of the firefighters of the City of Barre to man the fire rescue truck at the airport, conduct daily airfield inspections, and become familiar with airport operations. (Exhibit A).

10. Prior to September 28, 1978 no one on the firefighters bargaining team was made aware by the City of the implementation of the crash fire rescue service and there was no bargaining concerning the matter prior to the actual commencement of services on October 1, 1978.

11. The consideration to be paid to the City of Barre for the airport agreement with the Department of Transportation is $25,000.

12. After the program was implemented on October 1, 1978, Thomas Heilmann, attorney for the union, met with the City Manager to discuss additional recompence for the firefighters in consideration for the additional services required of them by the crash fire rescue service program. When the City Manager recommended such a settlement to the City Council, he received instructions not to negotiate any further with the Firefighters. He described their attitude concerning the matter as "intransigent".

13. The implementation of the crash fire rescue service requires the presence of a firefighter for the arrivals and departures of all Air New England flights. Approximately five and one-half hours are spent by a firefighter at the airport during different intervals of the day. The program also entails five hours a week of mandatory overtime at overtime rates for the firefighter who meets the 7:00 a.m. flight.

14. Aircraft fires are characterized as being substantially different in nature from other fires because of the high amount of volatile gases involved and because so many people are confined in a small space from which extrication is very difficult.

15. If a fire occurs in an aircraft, the firefighter on duty has sole responsibility for deciding the most effective means of rescuing the people on board the plane and putting the fire out until additional trucks and men arrive from the fire station which is approximately four miles from the airport. The fire fighting chemical in the fire truck at the airport lasts for approximately one minute and there is no backup water protection at the airport.

16. Aside from the initial orientation program, the Barre firefighters have received no further training with regard to fighting aircraft fires or rescuing people who are trapped inside the burning plane.

17. Because of the dangerous nature of fires caused by aircraft fuel, special protective suits are provided for the firefighters at the airport; however, the range of sizes which are available is not adequate to provide a suit which will fit every firefighter. Accordingly, some firefighters will be on duty for whom protective clothing is unavailable.

18. The duties imposed on the firefighters by the crash rescue service program results in exposure to dangers to the firefighter on duty which are greater than those which he would experience at a fire that could be expected to occur within the City of Barre.

19. At the scene of a fire which could be expected to occur within the City of Barre, a firefighter would be under the supervision of an officer. In the event of an aircraft fire, the firefighter on duty at the airport would be unsupervised until additional trucks arrived from the fire station.

20. After the Work Agreement between the Firefighters and the City became effective in 1977, the union and the City bargained over a new policy which would require two firefighters to ride with an ambulance. The bargaining resulted in an amendment to the Work Agreement which covered these additional ambulance duties.

21. Evidence was introduced at the hearing that pursuant to Article XV of the Work Agreement, the Firefighters had filed a grievance with reference to the implementation of the crash rescue service at the airport. The grievance had been processed to the final step of arbitration but at the time of the hearing the arbitrator had not yet made an award. The brief filed by the Firefighters subsequent to the hearing indicates that the arbitrator, Milton Nadworny, has subsequently issued a decision. According to the Firefighters' brief the issue before the arbitrator was: "Does the contract preclude the City from requiring crash rescue fire service job duties at the Berlin airport." The award by the arbitrator was: "The contract does not preclude the City from requiring crash fire service job duties at the Berlin airport."

22. Neither party has filed a copy of the arbitrator's decision with the Board.

23. The former President of the Firefighters Association, Mr. Pamboukes, stated that among the matters the union would like to negotiate with the City concerning the crash rescue service were: additional training; equipment; and additional compensation.

24. Article IX, Section 2 of the Work Agreement between the City of Barre and the Firefighters Association defines the workday of the firefighters as follows:

> "Workday shall consist of house cleaning, drilling, maintenance of equipment, maintenance of fire station and grounds, inspection duties for fire prevention, promotion of fire prevention and other public relations pertaining to fire prevention and public safety inspection of public buildings, fighting fires, and other related duties."

25. Article XV of the Work Agreement between the parties provides for a grievance procedure culminating in final and binding arbitration. Article XV, Section 1 defines a grievance as:

"Any condition arising out of employee-employer relationship, including a claim of unjust discrimination or any matter or condition effecting health and safety beyond those normally encountered in all stages of firefighting."

MOTION TO DISMISS

At the commencement of the hearing, the employer moved that the case be dismissed because the dispute is a matter of contractual interpretation which had been submitted to, and should be resolved by, an arbitrator through the grievance procedure. Since we are informed through the employees' brief that the matter has now been arbitrated, we treat respondent's motion as a request that the Board defer to the arbitrator's decision.

In Burlington Education Association and Burlington Board of School Commissioners, (#78-48R, 1978), we addressed the issue of deferral to an arbitrator's award in matters which are both an unfair labor practice and a grievance under the collective bargaining agreement. We stated in our opinion:

> "This Board will follow N.L.R.B. precedent with regard to the review of and setting aside of an arbitrator's award." id, page 10.

Since many grievances which are cognizable under the terms of an arbitration clause can also be framed as an unfair labor practice, the N.L.R.B. has frequently faced the decision of whether to defer to an arbitrator's decision in an unfair labor practice. In the belief that disputes arising out of the interpretation of a contract are best settled by a method agreed upon by the parties, the N.L.R.B. has adopted a policy of deferring to arbitration awards in disputes which involve unfair labor practice if certain criteria are met. (See Morris, The Developing Labor Law, pp 488-496; and 18 E Kheel, Labor Law §25.02) The first three criteria as set forth in Spielberg Manufacturing Company 112 N.L.R.B. 1080 (1955) are as follows:

1. Fair and regular arbitration proceedings;
2. Agreement by all parties to be bound; and
3. The decision is not repugnant to the purposes and policies of the Act.

(id at 1082)

Since the Spielberg decision, federal courts have recognized these criteria and added two additional ones:

4. The arbitrator clearly decided the unfair labor practice dispute;
5. The arbitrator decided issues within its competency.

Banyard v. N.L.R.B. 505 F.2d 342, 347 (D.C. Circuit, 1974)

[See also: Stephenson v. N.L.R.B. 550 F.2d 535 (9th Cir. 1977)]

It is obvious that the application of any of the foregoing criteria would require hearing evidence and making findings of fact. In this case we have no evidence upon which we can base a determination as to whether any of the criteria were met. Although we were notified through oral commentary of counsel at the hearing that the matter had been submitted to an arbitrator, we have no evidence aside from unrebutted statements in complainant's brief as to the issues considered by the arbitrator or the substance of his decision.

If we assume that the issue before the arbitrator was as stated in complainant's brief, it is clear the statutory issue raised by the unfair labor practice charge was never considered by the arbitrator. We must, therefore, deny employer's motion to dismiss. While it is not our intent to promote forum shopping or piecemeal litigation by encouraging parties to bring grievances and unfair labor practices on the same issue, we cannot base a deferral decision upon presumption in the absence of any evidence. As was stated by the Ninth Circuit Federal Court in Stephenson, supra:

> "A priori, when it is impossible to determine what issues the arbitration panel considered, or if the arbitration panel has not considered the statutory issue fairly and consistently with the precepts and the purposes of the Act, the Board should not defer." id, at 537.

OPINION

The statutory issue in this case is whether the City of Barre committed an unfair labor practice by refusing to bargain with the Firefighters prior to unilaterally changing conditions of employment during the term of the contract. In order to resolve this issue, it is necessary to determine whether the new duties imposed on the firefighters by the crash rescue service at the airport represent a change in conditions of employment about which there is a duty to bargain which has not been waived by prior negotiation or the terms of the contract.

"Conditions of employment" is a mandatory bargaining subject under the Municipal Labor Relations Act, 21 V.S.A. §1725(a). It is defined in 21 V.S.A. §1722(17) as follows:

> "any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial perogative."

"Managerial perogative" is defined in §1722(11) as: "Any nonbargainable matters of inherent managerial policy."

The new duties imposed on the firefighters required the presence of a firefighter at the arrivals and departures of all Air New England flights at the Knapp Airport. In the event of an aircraft fire, the firefighter on duty would be responsible for extinguishing a fire caused by volatile and explosive fuel. He is supplied with only one minute of firefighting chemical to accomplish this duty. He is also expected to extricate passengers from a potential inferno inside the aircraft. Unlike the scene at a normal fire where firefighting is a team effort and a firefighter can rely on the supervision of his superiors, the firefighter at the airport has sole responsibility for making critical decisions within the first minutes of the fire. In preparation for these new duties, the firefighters have received only one brief training session and have not even been provided with protective suits at the airport in sizes which will fit all of them.

Applying the statutory definition of "conditions of employment" to the nature of these duties, we conclude that the new duties expose the firefighters to a substantially higher degree of danger than ordinary firefighting duties, thereby affecting their "safety". The additional requirement of five hours per week of mandatory overtime would also have an effect on the convenience of the firefighters, particularly in view of a 59 hour work week.

In our view this case is similar to a recent case decided by this Board, V.S.E.A. v. State of Vermont (#78-106S, 1979), which involved the unilateral implementation of changes in the Monday through Friday work schedules of the unit nurses at Waterbury State Hospital. While the collective bargaining agreement made no reference to the complainants' daily work schedules, the complainants had relied on its continuance based on the past practices of the employer. We found that daily work schedules is a "working condition" defined by statute as a mandatory bargaining subject. We ruled that absent a waiver either by the terms of the contract or by actual negotiation, the employer had a duty to bargain changes in conditions of employment during the term of the contract.

The Respondent argues that the new duties in this case are encompassed within the definition of the firefighters' duties in the Work Agreement between the parties and thus, by implication, the Complainant has waived its

right to bargain the issue. We do not agree. While the Work Agreement broadly defines the work duties of the Firefighters as "firefighting and other related duties", we do not view this language as a waiver of the duty to bargain new duties which are substantially different from normal firefighting duties, and which were not within the contemplation of the parties at the time the agreement was signed. We, therefore, find that for the reasons given in our opinion in V.S.E.A. v. State of Vermont, id, the City of Barre has committed an unfair labor practice by unilaterally implementing the crash rescue service duties during the term of the contract.

We are also concerned with the Respondent's failure to officially notify union officials of the proposed new airport duties until two days prior to the implementation of the service. While the evidence of a chilling effect on the union is not conclusive, anti-union animus could be inferred from the City's actions in conferring with nonofficial union members over the implementation of the program and the imposition of a training program without informing union officials of its purpose. The anti-union animus here is not of the usual sort, but rather appears to be an oversight. Still, by ignoring the union's concern in this matter we believe an anti-union animus is shown. We do not view these practices as being consistent with the purposes and policies of the Act.

We do not contest an employer's "managerial perogative" to enter into contracts with third parties. The contract entered into between the City of Barre and the Department of Transportation, however, requires the firefighters to perform duties which for the reasons given above are more dangerous and essentially different from normal firefighting duties. In view of the firefighters' expressed concern over the danger of fires caused by volatile aircraft fuel and the lack of adequate training and equipment, we are inclined to agree that these are serious subjects which affect their safety as well as that of the public. Such considerations should not escape discussion under the rubric of "managerial perogative".

Based on our finding that the Respondent has committed an unfair labor practice, we order the City of Barre to bargain in good faith with the Firefighters concerning the crash rescue service at the Knapp Airport. We are not inclined, however, to interfere with the contractual rights of third parties especially where rights of the air travelling public are involved. In this case an order to cease and desist from the imposition of the new duties would seriously affect the safety and convenience of the public and might even result in the closing of the airport for noncompliance with federal regulations.

We will not therefore, at this time, order the City to cease and desist from requiring the firefighters to work at the airport. We are confident, however, that this will not affect the City's compliance with our order to bargain in good faith with the firefighters, and to move swiftly to resolve any impasse which may occur. If our confidence is misplaced, a new proceeding may be brought at any time.

ORDER

In view of our authority to prevent unfair labor practices, under 21 V.S.A. §1727(d), it is hereby ORDERED that the Respondent, the City of Barre, bargain collectively in good faith with Local 881, International Association of Firefighters, AFL-CIO-CLC, concerning the crash rescue service duties at the Knapp Airport.

Dated this 29 day of March, 1979.

Appeal to S.C. withdrawn by Stip 5/2/79

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown