VERMONT LABOR RELATIONS BOARD

ENOSBURG FALLS WATER AND LIGHT DEPARTMENT EMPLOYEES ASSOCIATION	)	DOCKET NO. 87-42
and	)	
LOCAL 300, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS	)	
and	)	
ENOSBURG FALLS WATER AND LIGHT DEPARTMENT	)	

FINDINGS OF FACT OPINION AND ORDER

Statement of Case

On September 23, 1987, Attorney William Sorrell filed a Petition for Election of Collective Bargaining Representative on behalf of Lloyd Touchette and other employees of the Enosburg Falls Water and Light Department, requesting an election among the employees of the Department to determine whether they wished to be represented for collective bargaining purposes by the Enosburg Falls Water and Light Department Employees Association ("Association"). Accompanying the petition was a letter from Sorrell indicating that the petition was timely, authorization cards signed by not less than 30 percent of the employees in the bargaining unit indicating they wished to be represented by the Association, and a copy of the existing collective bargaining agreement between the existing collective bargaining representative of the employees, Local 300 of the International Brotherhood of Electrical Workers ("Union"), and the Enosburg Falls Water and Light Department ("Employer").

On October 8, 1987, the Union filed a response to the petition, and took the position that the petition should be dismissed as untimely filed. On October 13, 1987, the Employer responded to the petition. The Employer indicated that they did not oppose the petition as untimely filed and, regardless, that the Employer considered the existing collective bargaining agreement to be valid and effective through August, of 1990, when it expired.

A hearing was held on January 7, 1988, in the Labor Relations Board hearing room before Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Sorrell represented the Association. Attorney Aaron Krakow represented the Union. Attorney Richard Gadbois and Junius Calitri appeared on behalf of the Employer.

Requested Findings of Fact and Memoranda of Law were filed by the Union and Association on January 18, 1988.

Findings of Fact

1. At all times relevant, the Union has been the exclusive bargaining representative of the linemen, utility men, hydro-diesel operators and billing clerk of the Employer.

2. A collective bargaining agreement between the Union and the Employer expired on August 22, 1984.

3. From July, 1984 through April 1, 1985 there were collective bargaining negotiations between the Union and the Employer for a successor agreement to the one which expired on August 22, 1984.

4. On April 1, 1985 the bargaining unit employees went on strike. Subsequently, the Employer discharged the striking employees.

5. In response to the Employer's conduct in collective bargaining and in firing the striking employees, the Union filed charges with the Labor Relations Board alleging various unfair labor practices.

6. On July 29, 1985, the Labor Relations Board issued Findings of Fact, Opinion and Order on the unfair labor practice case. The Board determined that the Employer committed unfair labor practices by refusing to bargain in good faith, discharging the employees engaged in the strike and conditioning reinstatement of an employee upon her resignation from the Union. Included among the remedy for the unfair labor practices, the Board ordered the Employer to reinstate the striking employees and to bargain in good faith with the Union. 8 VLRB 193.

7. The Employer appealed the Board decision to the Vermont Supreme Court and on April 3, 1987, the Supreme Court affirmed the Board's decision.

8. Between April 1, 1985 and April 22, 1987, three of the original nine striking employees had returned to work (i.e. Barbara Kennison, Marcel Dragon, Patrick Gilman). In addition, the Employer had hired six replacement employees (i.e. Lloyd Touchette, Robert Gleason, Stewart Snyder, William Boucher, Donald Burns, Daren Plouf).

9. On April 22, 1987, six of the striking employees returned to employment at Enosburg. Three of the returning strikers resigned within a few days to a few weeks after being reinstated. The remaining three - Greg Clark, Frank Elkins and Jay Robtoy - remained employed as of the date of the hearing in this matter.

10. Commencing in mid-April, 1987, the Union and Employer resumed negotiations for a collective bargaining agreement. The Union

negotiating committee consisted of James Merrigan, the Union Business Agent; Ernest Robbins, the Union President; Frank Elkins, an employee; and Greg Clark, the Union Steward.

11. At the time of negotiations, the six replacement employees and the three strikers who crossed the picket line were not members of the Union. The three employees who had crossed the picket line had resigned from the Union and the six new employees had not joined the Union. (Hereinafter, these nine employees are collectively referred to as the "non-striking employees.")

12. None of the non-striking employees were spoken to by any representative of the Union concerning the composition of the Union negotiating team or the substance of the issues being negotiated during the process of negotiating the contract.

13. On May 26, 1987, the Union and Employer entered into a collective bargaining agreement with an expiration date of August 22, 1990 ("Contract"). The Contract included a retroactive wage increase to August 22, 1984, for all bargaining unit employees (Joint Exhibit 1, Article 33).

14. The non-striking employees did not have a voice in the process of ratifying the agreement reached between the Union and the Department.

15. The Contract included a 4-5% increase for the pay period beginning August 23, 1984, an additional 5% increase on August 23, 1986, an additional 4% increase on August 23, 1987, and additional increases of either 5% or the increase in the Consumer Price Index plus 1.5%, whichever is less, in August 1988 and August 1989. Non-striking employees received wage increases retroactive to August

23, 1984, pursuant to the Contract (Joint Exhibit 1, Articles 26 and 33, Schedule A).

16. As a condition of employment, the Contract requires that all members of the bargaining unit be members of the Union (Joint Exhibit 1, Article 2).

17. The first communications, oral or written, concerning the Contract received by any of the non-strikers from a representative of the Union, were letters dated May 27, 1987 to each of the non-strikers from Merrigan informing them of their obligation to join the Union (Petitioner's Exhibit 1).

18. Subsequent to receiving the May 27, 1987, letters from Merrigan, one of the non-strikers, Lloyd Touchette, requested a copy of the IBEW Constitution and By-Laws to review. Union Steward Greg Clark informed Touchette that he could not have a copy of the Constitution and By-Laws until he had joined the Union.

19. By early July, 1987, the eight non-striking employees had submitted their applications for membership and their individual $30 initiation fees to the Union.

20. The Union did not directly provide copies of the Union Constitution and By-Laws and the Contract to the non-striking employees after they joined the Union. Single copies of the Contract and Constitution and By-Laws were available for review by all employees in a desk at the workplace.

21. None of the non-striking employees notified the Union representatives of any objection to or support of the negotiated wage increases, including the retroactive wage increase, or any other aspect of the contract.

22. Since May 26, 1987, none of the non-striking employees have had any grievances with respect to the Employer's violation of the Contract. Thus, these employees make no claims that the Union has not processed or has mishandled their grievances.

23. The Union Constitution provides an applicant may only be admitted to membership after taking an oath in the presence of members of the Union. However, in practice, the normal procedure is that the new members are considered to be sworn in by signing their application for Union membership. The non-striking employees, after paying their initiation fees, were admitted to membership in the Union. They were not sworn in.

24. The Union has monthly meetings in the St. Albans/Enosburg area. Union members are normally advised of the time and place of meetings by word of mouth from the shop steward. Union Steward Greg Clark has never orally informed any of the non-striking employees of the time and place of a monthly Union meeting. On one occasion during June, 1987 and another occasion during July, 1987, a notice of a Union meeting was posted on a board at the workplace.

25. On one of the meeting notices posted during June or July, 1987, non-striker Stewart Snyder requested of the Union that any notice of a Union meeting be posted earlier than the day of the meeting since he did not have opportunity to see the notice until after the meeting had taken place. Since July, 1987, there have been no written notices posted at the Department concerning the time and place of any Union meeting. None of the non-striking employees have received oral or written notice of any of the monthly Union meetings since July, 1987.

26. During August, 1987, the Union had a picnic for its members in the St. Albans/Enosburg area. None of the non-striking employees were explicitly invited to the Union picnic. One of the non-striking employees learned of the picnic beforehand by overhearing two striking employees discuss the upcoming picnic. None of the non-striking employees attended the picnic.

27. Under the Contract, a member of the bargaining unit called in to work on a Sunday is paid for a minimum of three hours work at double time rates. It is not typical for a hydro-diesel operator to be one of the two employees sent into the field in the case of a power outage or other problem. Frank Elkins is a hydro-diesel operator. On Sunday, September 10, 1987, hydro-diesel operator Marcel Dragon observed lineman Greg Clark and hydro-diesel operator Frank Elkins, two of the three returning strikers who have remained employed by the Department, riding in a Department line truck. Marcel Dragon went to the Department and found the third returning striker, Jay Robtoy, on duty and inquired as to the nature of the problem to which Clark and Elkins had responded. Robtoy told Dragon not to worry about the situation.

28. The Union has between 900 and 1000 members in Vermont who work in approximately 50 different places of employment. When Merrigan visits these places, he generally speaks to just the Union Steward unless there is a pending grievance, in which case he meets with the aggrieved employee.

29. During the period between May 1987 and September 1987, Merrigan visited the Enosburg Department several times. He generally communicated only with Steward Greg Clark except for a few occasions

when he had conversations with Stewart Snyder which were initiated by Snyder.

30. There has been no written and/or oral communication between the Union Steward or other representatives of the Union and the non-striking employees concerning any aspect of Union affairs, or of the employees' rights under the Contract between mid-April, 1987, and the date of hearing, January 7, 1988, except the communications previously indicated herein.

31. From the date the non-striking employees joined the Union until the date of the hearing in this matter, none of them telephoned the local Union office or attended any Union meetings. Other than the one instance in which these employees requested a copy of the Union's Constitution and By-Laws, none of these employees ever called or communicated with Union representatives concerning any grievances they had, complaints about the Union's representation of them, or with respect to requesting information about Union meetings or Union business except the communications previously indicated herein.

32. There has been some tension and friction between the returning strikers and the non-striking employees since April, 1987.

33. The Employer neither supports nor opposes the granting of the petition. The Employer does not take the position that the existing Contract should bar the granting of the petition under the contract bar policy of the Board.

OPINION

At issue is whether the election petition filed herein is timely. It is the policy of the Board under the Municipal Employee Relations Act that an existing collective bargaining contract bars a petition

for decertification of the existing collective bargaining representative and election of a new representative for most of the term of the contract. A petition normally will be considered timely only if filed 90 to 60 days prior to a contract's expiration date. St. Albans Police Officers' Association, 8 VLRB 46, 52 (1985). The objective of the contract-bar policy was stated by the Board in St. Albans, supra, at 52-53:

> The objective of this contract-bar doctrine is to achieve a reasonable balance between the competing interest of stablilzing the employer-union relationship and free employee choice of a representative. The "open" period ninety (90) to sixty (60) days prior to a contract expiration date provides employees with an opportunity for a free choice of bargaining representatives at reasonable intervals. The barring of a petition for the remainder of a contract term provides a settled work environment and stabilization of the employer-union relationship necessary for productive labor relations.

The contract bar policy will not necessarily be one which the Board will apply in all situations. It is a policy which the Board may apply or waive as the facts of the given case may demand in the interest of stability and fairness in collective bargaining agreements. St. Albans, supra.

The Association contends that, because the Contract is of a greater than six year duration, the very length of the Contract weighs against applying the contract bar policy. The Board has not had occasion in the past to determine the maximum length of time a contract will bar an election. We conclude that the following rule adopted by the National Labor Relations Board is a sound one for us to apply: contracts of definite duration for terms up to three years normally will bar a petition for their entire period except for the period 90 to 60 days prior to the contract expiration date, and contracts having longer fixed terms operate as a bar to petitions for

only the first three years. General Cable Corp., 139 NLRB 1123, 51 LRRM 1444 (1962). When contracts are longer than three years, the contract bar will no longer apply as of the third year anniversary date of the effective date of the Contract and petitions will be considered timely if filed between that date and until at least the expiration date of the Contract. This achieves the desired balance between stabilizing the employer-union relationship and providing employees with an opportunity for a free choice of bargaining representative at reasonable intervals. St. Albans, supra, at 52-53.

In applying the three-year policy to the facts of this case, we conclude that the contract bar would normally apply from May 26, 1987, the effective date of the Contract, through May 25, 1990. After May 25, 1990, no contract bar would apply and the "window period" for filing a petition would be in place until at least the expiration date of the Contract, August 22, 1990.

We reject the Association's contention that the effective date of the Contract for bar purposes should be considered August 23, 1984, since wage increases are retroactive to that date. Although the Contract provided for salary increases retroactive to August 23, 1984, the Contract was not actually in effect from August 22, 1984 through May 25, 1987. Thus, no contract bar existed during that period.

Nonetheless, the Association contends that the Board should not apply the contract bar because: 1) the necessary prerequisite that the Union was representing a majority of bargaining unit employees during the negotiation of the Contract does not exist; and 2) should the Board apply the balancing test between stability and fairness in determining whether to apply the contract bar rule, the scales fall

heavily on the side of the non-striking employees.

Under the circumstances of this case, we cannot presume the Union was not the majority representative of the Employees at the time the Contract was negotiated. The Union was the certified exclusive bargaining representative at the time of negotiations. There is a presumption that it remains the majority representative until there is an election conducted by this Board which proves to the contrary. Further, the Contract was negotiated in the context of Employer unfair labor practices which necessitated a Board order, affirmed by the Supreme Court, ordering the Employer to reinstate illegally-discharged strikers; discharging, if necessary, any replacements hired; to bargain in good faith; and to cease and desist from conditioning reinstatement of employees upon resignation from the Union. Under these circumstances, we decline to question the effectiveness of the Union's majority support during the period the Contract was negotiated in terms of a contract bar.

In applying the balancing test between stability and fairness in determining whether to apply the contract bar rule, we conclude both stability and fairness considerations weigh heavily on the side of applying the contract bar. The Contract was negotiated following an extraordinarily unstable two-year period where there was a strike at least partly motivated by Employer unfair labor practices, Board and Supreme Court decisions finding Employer unfair labor practices and no Contract in effect. Under these circumstances, a period of stability is of crucial importance. Also it is eminently fair that the Union should be able to implement the contract without the disruptive influence of a pending representation petition. St. Albans, supra, at 54.

Actions of the Union since the return of the striking employees to work are a poor model for effective union representation for all bargaining unit members. However, those actions did not disrupt a stable or fair employment relationship to the extent of the Employer's actions. We believe it most promotes stability and fairness to require the Employer, Union and employees to coexist under the present relationship until May 26, 1990. This provides employees a reasonable interval to freely choose their bargaining representative. In the interim, employees have redress under the Municipal Employee Relations Act to make claims against their exclusive bargaining representative concerning alleged inappropriate actions.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Petition for Election of Collective Bargaining Representative filed on September 23, 1987, on behalf of Lloyd Touchette and other employees of the Enosburg Falls Water and Light Department is DISMISSED as untimely.

Dated the 8th day of April, 1988, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer