CITY OF EVERETT AND IAFF, LOCAL 1656, MUP-2126 (5/5/76)

(50 Duty to Bargain)
54.8 mandatory subjects
(60 Prohibited Practices by Employer)
67.8 unilateral change by employer
(90 Commission Practices and Procedure)
92.45 motion to re-open

Commissioners participating: James S. Cooper, Chairman; Hadeline H. Miceli; Henry C. Alarie

Appearances:

Kathryn Noonan, Esq. - Counsel for the Commission
Warren H. Pyle, Esq. - Counsel for the Union
Edward Schneider, Esq. - Counsel for the Employer

DECISION AND ORDER

Statement of the Case

On December 13, 1974, the International Association of Firefighters, ALF-CIO, Local 1656 (the Association) filed a Complaint of Prohibited Practice with the Massachusetts Labor Relations Commission (the Commission) against the City of Everett, (the Employer) its Mayor, its Fire Commissioners and its Fire Chief, alleging a violation of Massachusetts General Laws, Chapter 150E (the Law).

The Commission, pursuant to the power vested in it by Section 11 of the Law, investigated the aforesaid Complaint. On April 1, 1975, the Commission issued its own Complaint of Prohibited Practice, alleging that the Employer had violated Section 10 (a) (5) and (1) of the Law. Said Complaint alleged that the City of Everett, through its agents, the Mayor, Fire Commissioners and the Fire Chief, refused to bargain and restrained, coerced and intimidated its employees in the exercise of their rights under Section 2 of the Law, by unilaterally altering terms and conditions of employment wijhout affording the Association notice and an opportunity to negotiate. Specifically, the Employer was alleged to have failed to bargain concerning a change in the hours that firefighters were to perform floor patrol, i.e. man a desk on the first floor of the fire station.

Copies of the Complaint were served on all parties pursuant to the Rules and Regulations of the Commission.

A timely answer was filed by the City of Everett placing at issue all of the material allegations of the Complaint.

Pursuant to Notice, a Formal Hearing was held at the offices of the Commission in Boston on April 30, 1975 before Hearing Officer Kathryn Noonan. All parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues.

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On May 29, 1975, the Employer filed a Motion to Dismiss. Said Motion, opposed by the Association, was withdrawn by the Employer on July 31, 1975. On August 28, 1975, the Employer filed a Motion to Reopen the Record in the instant case, which motion has been considered and is hereby denied. The Commission will exercise its discretion to reopen the record only under extraordinary circumstances. In the present case, the evidence offered in the Motion to Reopen the Record concerns a working condition allegedly in effect prior to the issuance of the Special Order whereby firefighters were required to be "on deck" after 10 p.m. when fire apparatus left the station. This information, according to the motion, first came to the City's attention on May 9, 1975. However, we conclude that the existence of a working condition is clearly the type of evidence which was available to the Employer at the time of the hearing. We therefore decline to allow the reopening of the record for the admission of evidence that could have been presented at the time of the hearing. See Limestone Mfg. Co. and Textile Workers Union, 117 NLRB 1689 (1957); Skaggs Pay Less Drug Stores and Local 856, Teamsters, 190 NLRB 538 (1971).

Briefs filed by the parties have been carefully considered. Having reviewed all of the evidence presented, the Commission makes the following Findings of Fact, Opinion and Order:

Findings of Fact

The City of Everett is an Employe and the Mayor is its "chief executive officer" within the meaning of Section 1 of the Law. Local 1656 of the International Association of Firefighters, AFL-CIO is an "employee organization" within the meaning of Section 1 of the Law, and is the exclusive bargaining representative of the firefighters employed by the Employer.

The Association and the Employer have entered into successive collective bargaining agreements since 1969. The most recent agreement between the parties expired according to its terms on June 30, 1974. During 1974 the Association and the Employer entered negotiations for a new agreement. The uncontradicted testimony of the Association's president, who was on the negotiating team, was that the contract was extended during negotiations and remained in effect at all times relevant herein. In the Fall of 1974 the parties participated in unsuccessful mediation in an attempt to reach an agreement. As of the date of the hearing, the parties were involved in fact-finding proceedings.

Article IV of the collective bargaining agreement states:

City Rights

> The City reserves and retains all rithts not expressly abridged by the specific provisions of this agreement.

The agreement was silent on the issue of floor patrols.[1] Rules and Regulations

[1] While on "floor patrol" a firefighter must remain at a desk located on the first floor of the fire station.

adopted by the Fire Commissioners in 1949 provided that:

> There shall be continuous floor patrol from 7 a.m. to 10 p.m. (Respondent's Exhibit 2, p.4, Rule 18)

These Rules are apparently still in effect, although the Association's president testified that the Rules were promulgated when the Department was on a 48-hour week, and the Department has been on a 42-hour week for 13 years.

On November 22, 1974, the Chief of the Fire Department issued the following Special Order:

> Effective 8:00 A.M., December 1, 1974, Floor Patrols will be performed 24 hours a day at all stations.

This Special Order, hereafter referred to as the "order", was read at roll call to the firefighters on duty on November 22, 1974 and was posted. The previous practice of requiring no floor patrol after 10 o'clock p.m. was a long standing one. After 10 p.m., firefighters had been free to relax as they chose when not responding to alarms. The Employer provided beds, pool tables, and televisions for such purposes. The Association received no prior notice of the order; the president of the Association first learned of the order when he was contacted by telephone at home by one of the firefighters who was on duty at the November 22nd roll call when the order was read aloud. Within approximately one day of the issuance of the order, the Association's president and two members of its negotiating committee approached the Fire Chief to discuss the matter. They were informed that the Fire Chief and the Fire Commissioners were opposed to the issuance of the order. They were informed that the order had been given at the Mayor's insistance. The Fire Chief indicated that he had tried unsuccessfully to dissuade the Mayor from instituting the change. Shortly after this conversation, the Complaint in the present case was filed.

The Mayor testified that he personally initiated the change with respect to night floor patrol, giving as reasons two incidents that had occurred several months earlier. One incident, in February, 1974, occurred when a ladder truck left the station in response to an alarm. The firefighter who was responsible for manning the rear position on the equipment slept through the alarm. As a result of his absence, the engine could not negotiate a turn and struck a parked automobile. This incident occurred at about 7:30 p.m. The Mayor admitted that the absence of an all-night floor patrol was therefore not a factor in causing the accident.

The second reason advanced by the Mayor to justify his insistence on an all-night patrol related to an incident that occurred in July of 1974. A man was yelling outside the door of a fire station for several minutes without obtaining a response from the department. The testimony concerning this incident was vague and inconclusive. There is some evidence on the record that the man

may have been drunk, and that a firefighter who heard him ignored him for that reason. The Mayor did not investigate the matter. However, shortly after this incident, he told the Chairman of the Fire Commissioners to substitute a 24-hour watch in each of the fire stations. Both the Fire Commissioners and the Fire Chief were reluctant to issue this order. According to the Mayor, he discovered that the order had not been issued in late October or early November when he was driving through the community at 4 a.m., and observed that there were no lights on in any of the fire stations. At about the same time, the Mayor had a conversation with the Chairman of the Fire Commissioners who indicated there was a question as to who would issue the order. The Mayor stated that he would direct the Chairman or the Chief to sign the order if necessary. The Chief issued the order as directed by the Mayor.

The Mayor authorizes the Employer's negotiator to make proposals during collective bargaining with the Association. In the present case, the Mayor declined to instruct his negotiator to negotiate the issue of floor patrols because the change did not extend the regular work hours of the firefighters. His view was that the change was merely a "working condition" and that as such it required no bargaining.

Opinion

In NLRB v. Katz, 369 U.S. 736 (1962) the Supreme Court held that when an employer takes unilateral action regarding conditions of employment during negotiations, the employer is engaging in a refusal to bargain in violation of the National Labor Relations Act (hereinafter "NLRA"). Making such changes without prior discussion with the union constitutes an unfair labor practice within the meaning of the NLRA, regardless of the employer's good faith. Such unilateral changes will rarely be justified. NLRB v. Katz, supra, at 742 to 743.

The Employer's duty to refrain from unilateral changes in working conditions is equally applicable in the public sector. Town of North Andover, 1 MLC 1140 (1974); City of Chicopee, 2 MLC 1071 (1975); Town of Natick, 2 MLC 1086 (1975). The maintenance of the status quo applies not only to contractual provisions, but also to long-standing customs and practices. Granite City Steel and Chemical Workers, 167 NLRB 310 (1967); Matter of BOCES and Rockland County, 8 PERB 3025 (1975); Matter of Milford and AFSCME, Local 1566, 3 CCH St. Laws 61,817 (Conn., 1973). The statutory duty to bargain requires that the employer notify the union of proposed changes before they are announced, so that the bargaining representative has an opportunity to present arguments and proposals concerning the effect of the proposed alterations on its members. NLRB v. Katz, supra; New Orleans Board of Trade and Brewery Workers, 152 NLRB 1258 (1965); Bralco Metals and Sherry Reed, 214 NLRB No. 20 (1974); Town of Natick, supra; City of Chicopee, supra.

Applying these concepts to the present case, it is clear that the Employer instituted a unilateral change in the long-standing practice of utilizing floor patrols only from 7 a.m. to 10 p.m. when the Fire Chief at the Mayor's

insistence issued an order requiring twenty-four hour patrol without notifying or consulting with the Association.[2] In order for this unilateral action to constitute a prohibited practice, however, it must be a change affecting a mandatory subject of bargaining. Town of North Andover, supra. We find that the changes in the hours of floor patrols is a mandatory subject of bargaining. Prior to the institution of all-night patrol, firefighters were free to spend time in the station after 10 o'clock p.m. as they pleased when they were not responding to calls. Once the order was put into effect, the firefighters in rotation had to spend their previously "free" time stationed at a desk on the first floor. Thus, the Employer altered the way in which firefighters could spend what had been non-active working time. The National Labor Relations Board (NLRB) has found unlawful changes in working conditions when the employer has instituted such minor changes in working conditions as restricting telephone calls and the use of radios, Advanced Business Forms and Printing Workers, 194 NLRB 341 (1971); formalizing, shortening or eliminating coffee breaks or rest periods, Bralco Metals and Sherry Reed, 214 NLRB No. 20 (1974); Oil City Brass Works and Boilermakers, 141 NLRB 131 (1963); Webel and Grain Millers, Local 217, 217 NLRB No. 121 (1975); and preventing employees from sitting down during working hours when they are not required to be performing specific duties, Little Rock Downtowner and Restaurant Employees, 145 NLRB 1286 (1964).

The above-mentioned cases generally involved a less serious change in working conditions than the condition imposed upon the firefighters in the present case, and are persuasive in supporting our conclusion that instituting all night floor patrols affects a condition of employment. Therefore, the Employer's alteration of the long-standing practice of not maintaining such patrols after 10 p.m., without prior notification or consultation, constituted a refusal to bargain in violation of Section 10 (a) (5). Because such unilateral action undermines the representative status of the employee organization, we also find that the Employer engaged in activity that interfered, restrained and coerced employees in the exercise of their rights to bargain collectively through their chosen representative in violation of Section 10 (a) (1).

The Employer has raised several defenses to the charges in this case which merit discussion. The first defense rests upon the argument that the Employer had a right to institute such changes in working conditions under Article IV of the contract between the Employer and the Association. The Employer maintains that the Association waived its right to bargain about such matters as floor patrols because the contract was silent on the subject and Article IV, the City Rights clause, left to the Employer's discretion all topics not specifically covered by the contract.

It is well established that a union's waiver of its statutory right to bargain over a subject will not be readily inferred. Rather, there must be a "clear and unmistakable" showing that a waiver occurred. NLRB v. Perkins Machine Co., 326 F.2d 488, 55 LRRM 2204 (CA 1, 1964); Beacon Piece Dyeing and Finishing and Textile Workers, 121 NLRB 953 (1958); Town of Natick, supra. The matter allegedly waived must have been fully explored and consciously yielded before a waiver will be found. The Press Co. and Newspaper Guild, 121 NLRB 976 (1958). Compare Ador Corp. and Shopmen's Local 509, 150 NLRB

1658, (1965). Thus, a waiver is not implied merely because of the presence of a broad "City Rights" clause in the contract negotiated by the parties. Tide Water Associated Oil and Employees Association, 85 NLRB 1096 (1949); New Orleans Board of Trade and Brewery Workers, supra; Leeds and Northrup v. NLRB, 391 F.2d 874, 67 LRRM 2793 (CA3, 1968).

Secondly, the Employer defends its action on the ground that the Association waived its rights to bargain on the issue of floor patrols by failing to request bargaining during the period between the announcement of the order on November 22, 1974 and its effective date on December 1, 1974. Contrary to the contention of the Employer, we conclude that there was no silence on the part of the Association, and, therefore, no waiver, acceptance or acquiescence by the Association. The facts indicate that the Association president, along with two other members of the negotiating committee, protested the issuance of the order immediately after its announcement. Further insistence on formal bargaining would obviously have been futile, in view of the fact that they were told that the Fire Chief and the Commissioners themselves were unable to persuade the Mayor to reconsider. The Association's immediate objection to the order was followed by its prompt filing of the Complaint in this case. Faced with this response on the part of the Association, the burden is on the Employer to bargain with the Association on this issue prior to implementing the proposed change, which it failed to do.

Even if one were to regard the reading and posting of the notice as an offer to bargain, which we do not, the short period of time between the notification of the change and its effective date would be insufficient to afford the union a meaningful opportunity to bargain.[3] Clevenger Logging and Woodworkers, 220 NLRB No. 115 (1975).

The Employer in this case further attempts to excuse its violation claiming that it offered to bargain over the issue on or about April 3, 1975, and that it remains willing to do so. However, this defense must fail inasmuch as an offer to bargain after a prohibited unilateral change has been made does not cure the violation. Clearly, negotiating about a change in working conditions after it has occurred does not fulfill the same purpose as prior negotiations. Granite City Steel and Chemical Workers, 167 NLRB 310 (1967). The Employer's approach negates the purpose behind requiring prior consultation over changes affecting mandatory subjects of bargaining: to enable the union to present arguments to dissuade the employer from taking the proposed action, or to suggest modifications in the planned action. Presenting the union with what was essentially a fait accompli did not allow this negotiation process to take place, and constitutes a refusal to bargain within the meaning of the Law.

The Remedy

The NLRB has traditionally remedied unlawful changes in working conditions by ordering the restoration of the status quo ante. Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964); Leeds and Northrup Co. v. NLRB, supra. This Commission has also ordered restoration of a previous practice in order to correct the effects of a unilateral change. Town of Marblehead, 1 MLC 1140 (1974).

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In the present case, the Commission has determined that it is necessary, in order to effectuate the purposes of the Law, to order the reinstatement of the policy in effect prior to the issuance of the Special Order. Thus, the Employer is ordered to rescind its order requiring all night floor patrol, and to restore the previous practice of having floor patrol only between the hours of 7 o'clock a.m. and 10 o'clock p.m.

The Supreme Court has held that the NLRB's remedies should be designed so as to prevent parties from enjoying the benefits of their unlawful practices. National Licorice v. NLRB 309 U.S. 350 (1940). Thus, the Board has regularly ordered compensation for lost earnings and lost benefits resulting from the employer's unilateral reduction in working hours or benefits. American Fire Apparatus and UAW, 160 NLRB 1318, enforced 380 F.2d 1005 (CA8, 1967); Denham Co. and Teamsters, Local 517, 206 NLRB 659 (1973); Paramount Plastic Fabricators and Sheet Metal Workers, 190 NLRB 170 (1971). Leeds and Northrup v. NLRB, 391 F.2d 874 (CA 3, 1968).

The Commission has likewise ordered employers to compensate employees who lost earnings as a result of the employer's unlawful refusal to bargain. City of Chicopee, 2 MLC 1071 (1975). The Commission has a strong interest in preventing parties from gaining an advantage by committing prohibited practices. Thus, the Commission concludes that it would be insufficient to merely order restoration of the previous practice in this case. To do so would be to allow the Employer to have reaped the benefits of its unilateral change, at the expense of its employees who were wrongfully required to participate in all night floor patrols.

The Commission recognizes the difficulty in placing a monetary value on the additional work performed by the employees in this case. However, the mere difficulty in determining the precise amount of compensation due to an employee is not a legitimate reason for denying employees all compensation. American Fire Apparatus and UAW, supra. In fact, denying compensation would in effect reward the employer and penalize the wronged employees. Thus, the Commission orders that the Employer make whole those employees who were required to perform floor patrol pursuant to its Special Order. The exact method of compensation may be determined by the parties, utilizing a formula agreed upon by the Employer and the Association. Compensation may take the form of monetary payments, paid time off, sick leave or vacation credits, reduced floor patrol duty in the future, or any comparable method agreed upon by the parties. If the parties are unable to reach agreement concerning this portion of the Commission's Order, upon notification the Commission will conduct a hearing on the matter and will issue a revised Order based upon its findings.

The Supreme Court has recognized the value in allowing the NLRB to exercise wide discretion in fashioning remedies that will effectuate the purposes of the Act. Phelps Dodge v. NLRB, 313 U.S. 177 (1941). The General Court has given the Commission similar broad discretion. Section 11 of the Law states that the Commission may issue cease and desist orders, and may order parties to "take such further affirmative action as will comply with the provisions of this section." The Commission finds that the remedy provided herein will effectuate the purposes of the Law.

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Order

On the basis of the foregoing Findings and Conclusions, IT IS HEREBY ORDERED that the Employer, City of Everett shall:

1. Cease and desist from:

   (a) Failing or refusing to bargain collectively in good faith with Local 1656 of the International Association of Firefighters, AFL-CIO as the exclusive representatives of the firefighters employed by the City by unilaterally changing preexisting wages, hours, or terms and conditions of employment without prior consultation with the Association; and

   (b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Law.

2. Take the following affirmative actions which will effectuate the policies of the Law:

   (a) Immediately rescind the Special Order of November 22, 1974, and restore the previous practice of requiring floor patrol between the hours of 7 o'clock a.m. and 10 o'clock p.m. only.

   (b) Make whole those firefighters who were required to perform floor patrol between 10 o'clock p.m. and 7 o'clock a.m., by compensating them in wages, paid time off, or other comparable manner, said compensation to be agreed upon by the Employer and the Association. The Commission hereby retains jurisdiction of this matter for the purposes of approving or - in the absence of mutual agreement between the parties, determining the relief to be provided hereunder.

   (c) Post in conspicuous places, including all places where notices are normally posted, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice To Employees.

   (d) Notify the Commission in writing within ten (10) days of the service of this Decision and Order of the steps taken to comply therewith.

James S. Cooper, Chairman

Madeline H. Miceli, Commissioner

Henry C. Alarie, Commissioner