Vermont Labor Relations Board

VERMONT STATE EMPLOYEES' ASSOCIATION, INC., Petitioner	]	
- and -	]	DOCKET #77-32S-1 and 77-32S-2
STATE OF VERMONT, DEPARTMENT OF LIQUOR CONTROL and DEPARTMENT OF PERSONNEL, Employers	]	

FINDINGS OF FACT, OPINION AND ORDER

These matters were brought before the Vermont Labor Relations Board as two separate cases. The first (Docket #77-32S-1) was a grievance brought by Vermont State Employees' Association, Inc. (hereinafter called VSEA) based on the same facts as the second case (Docket #77-32S-2), which was an unfair labor practice charge brought under the provisions of 3 V.S.A., Sections 961-966 against the State of Vermont, Departments of Liquor Control and Personnel (hereinafter referred to as STATE). The charges and the grievance were dated 26 January 1977. On 12 February 1977 notice of hearing was issued for 18 March 1977 indicating that both the grievance and the unfair labor practice charges would be heard at the same time, since both involved the same issues. A request for production of certain documents under the Board Rules was filed 25 February 1977 and the unfair labor practice Complaint was issued by Evan C. Archer, Jr., Esquire, attorney for the

Board, on 9 March 1977 and filed 10 March 1977. STATE filed its Motion to Dismiss and Answer dated 14 March 1977 on 15 March 1977. A hearing on the merits of both cases was held 18 March 1977, in Montpelier, Vermont, Highway Board Conference Room, VSEA being represented by Alan S. Rome, Esquire and STATE by the Honorable Louis Peck, Chief Assistant Attorney General, the Honorable Francis Esposito, Commissioner of Liquor Control, the Honorable Joseph G. Keckemethy, Director of Employee Relations, and the Honorable Jean Hickey.

Discussion of Evidence and Credibility of Witnesses.

The evidence is uncontradictory except for the conclusions which the parties draw from the facts, and the interpretation of the collective bargaining agreement between the parties, and the questions of law involved.

Findings of Fact.

1. The Vermont State Employees' Association is the duly certified collective bargaining representative for the Non-Management Bargaining Unit of the Vermont state employees, including those in the Department of Liquor Control.

2. VSEA and STATE executed a collective bargaining agreement for the Non-Management Unit effective for the period 5 July 1976-30 June 1979.

3. Grievances brought by VSEA against STATE and the unfair labor practice charges were both dated 26 January 1977 and filed the next day.

4. The Board, through its attorney, issued an unfair labor practice Complaint dated 9 March 1977, filed the next day.

5. The Department of Liquor Control has made a determination to close a number of State Liquor Stores which have been operating unprofitably, and has made a further determination to replace such stores with private entrepreneurs or agency stores, so-called, which would operate under private management as agents of STATE but in accordance with the Rules and Regulations of the Department of Liquor Control.

6. On 2 December 1976 the Vermont Liquor Control Board met at 1:30 P.M. in regular meeting assembled and considered, among other matters, the conversion of certain State Liquor Stores to "liquor agencies". The minutes of the meeting read as follows:

> "2. Conversion of state liquor stores at White River Junction, Vergennes and St. Johnsbury to liquor agencies.
>
> "Mr. Esposito advised the Board that these three stores could be quite readily converted, due to early expiration of lease for White River Junction, lease expiration of St. Johnsbury and the fact that lessor has other use for store premises, and the present month-to-month lease in effect at Vergennes. Mr. Esposito stated that he was requesting permission from the Board to initiate these changes, and to advertise for agencies at the above three locations. He stated that he and Miss Hickey would converse with the present State employees in these stores, the State Personnel Department, and the VSEA prior to any publication of changes. Some discussion was held as to advertising that the Board was interested in liquor store agency locations in these areas but the matter of termination of employees and a lessor being uncertain as to the type of operation he should propose to the Board resulted in a unanimous vote by the Board, upon motion by Mr. Moore, to convert the White River Junction, Vergennes, and St. Johnsbury stores to agencies in the above-described manner." [Petitioner's Ex. C]

7. Parker W. Brown, Employee Relations Specialist for the Department of Personnel, first notified Robert S. Babcock, Jr., Executive Director of VSEA by letter dated 17 January 1977 that reduction in force was expected to occur within the Liquor Control Department [Petitoner's Ex. A]. This notice was limited to employees at White River Junction, Vergennes and St. Johnsbury, and indicated that employees at White River Junction had been all ready notified by the Commissioner.

8. Commissioner Francis J. Esposito notified "all liquor store employees" on 20 January 1977 as follows:

> "For many months the Board has had under review its Store and Agency operations. Because of the deficit operation in the following Stores the Board is considering closing these Stores and then establishing a Liquor Agency in the area ... Bellows Falls, North Avenue, Burlington, Ludlow, St. Johnsbury, Springfield, Shelburne, Vergennes, Windsor, Winooski, White River Junction." [Petitoner's Ex. B]

9. The White River Junction, St. Johnsbury and Vergennes liquor stores were each operating at a financial loss or deficit.

10. Representatives of VSEA met with Commissioner Esposito on 20 January 1977 to dicuss the situation.

11. At the meeting held on 20 January 1977 the Commissioner advised VSEA that STATE had already advertised in the White River Junction newspapers to obtain a suitable private agency for the White River Junction store.

12. The first occasion on which VSEA had been involved in the decision process leading to the closing of the stores, the layoff of the employees, and the operation of the stores

as agency stores was on 20 January 1977. No collective bargaining had been entered into prior to that date, which occurred after the decison had already been made by the Liquor Control Board to make the changes.

13. Three employees at the White River Junction liquor store will be discharged as a result of the closing of that store.

14. The closing of the remaining stores will result in State employees, covered by the collective bargaining agreement between STATE and VSEA, losing their employment.

15. VSEA was not asked or permitted to bargain any of these matters with STATE prior to the implementation of the change.

16. The exhibits and transcript are made a part of these Findings for purposes of review by the Supreme Court.

Conclusions of Law and Opinion

MOTION TO DISMISS

The State of Vermont filed a Motion to Dismiss alleging that the decision to close the State Liquor Stores is a management determination vested in the Liquor Control Board, citing 3 V.S.A., Section 905 (b) which provides as follows:

> "Subject to the rights guaranteed by this chapter and subject to all other applicable laws, rules and regulations, nothing in this chapter shall be construed to interfere with the right of the employer to:
>
> > (1) carry out the statutory mandate and goals of the agency, ... and to utilize personnel, methods and means in the most appropriate manner possible ... ."

3 V.S.A., Section 904 establishes some of the rights referred to in Section 905 (b). All matters relating to the relationship between employer and employee are subject to collective bargaining, except those specifically controlled by statute. The opening and closing of liquor stores are not specifically controlled by statute, nor are matters arising out of such closings, such as the discharge of employees.

Article II of the Collective Bargaining Agreement provides:

> "Subject to laws, rules and regulations, or terms set forth in this Agreement, nothing in this Agreement shall be construed to interfere with the right of the employer to
>
> > a. carry out the statutory mandate and goals of the agency, and to utilize personnel, methods and means in the most appropriate manner possible ..."

You will note that this language is almost identical to the statutory language of 3 V.S.A., Section 905 (b). The statute and the contract both clearly state that the Liquor Control Department has a duty to manage the liquor stores and regulate the sale of liquor, but that it must also bargain collectively with its employees.

The Petitioners have made out a prima facie case in their unfair labor practice charge, and the Motion to Dismiss must be, and it hereby is, DENIED.

GRIEVANCE

The grievance involves the same identical issues, and was heard on the same evidence and arguments as the unfair labor practice complaint. Since all the issues raised by the grievance are considered and decided in the following section of this Opinion, the grievance ought to be, and it hereby is, DISMISSED.

UNFAIR LABOR PRACTICE

In VSEA vs. Department of Public Safety, (Docket #76-18), the former State Employees Labor Relations Board determined that contracting out of work was an unfair labor practice unless notice was first given to the Union and provision made for the Union to bargain with the State as to the issue of contracting out or transfering the work to another operator. In the case before the Board, the issue is not whether STATE had a duty to bargain over contracting out, but whether, in fact, its conduct constituted "contracting out". The collective bargaining agreement provides in Article IX as follows:

> "The State will not contract work out to private companies, individuals or other entities, which is regularly done by members of the non-management bargaining unit, when contracting out would result in the loss of their positions or jobs."

If STATE'S conduct is contracting out, it is clearly contrary to the language of the contract, and would amount to an unfair labor practice under 3 V.S.A., Section 961 (5). As discussed supra, once VSEA has been designated as the collective bargaining representative for the employees of the Department

of Liquor Control, the employer is afterwards obligated to negotiate and bargain in good faith with the Union as to all negotiable matters. The employer must refrain from taking unilateral action with respect to matters which are the subject of negotiation, without at least offering to negotiate with the Union. The language of NLRB v. Katz, 369 U.S. 736, 82 S. Ct. 1107, 8 L Ed. 2d 230 (1962) explains the rationale of the situation as it would be construed under Section 8 (a) (5) and (d) of the National Labor Relations Act, from which much of our law was derived.

Contracting out has also been defined by the United States Supreme Court as coming within the phrase "other terms and conditions of employment", and is a mandatory subject of bargaining where such language is used in the statute. Cf. Fibreboard v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d (1964). The language contained in the Fibreboard case at Page 405, 85 S. Ct. is interesting:

> "Contracting out work, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment,' and is a mandatory subject of collective bargaining..."

The Board must first determine whether STATE'S conduct amounts to contracting out or is a simple discontinuance of the stores. The general economic plans of STATE are to close existing liquor stores which are operating at a deficit. In such action, standing alone, does not amount to a contracting out situation. However, STATE proposes to contract with individuals or corporations to sell liquor as private agency stores at these same general geographic locations. The

change amounts to something greater than a simple contracting out, and the new operators will be subject to the rules and regulations of the Liquor Control Board. The proposed changes are more analogous to the partial closing of a business. STATE has a completely proper statutory interest in regulating the sale of alcoholic beverages, and should not be required to do so at an economic loss. The sale of alcoholic beverages from a philosophic point of view is not a required service, such as maintenance of highways, police or fire.

Having determined that STATE's action is not specifically contracting out work, the Board must then determine whether STATE is nevertheless obligated to bargain the matter of the closing of the stores, keeping in mind that STATE is not discontinuing its ordinary State-owned retail liquor businesses in other sections of Vermont. The collective bargaining agreement between the parties does not appear to speak to a situation exactly parallel to the one at hand. Article XXXI contains some pertinent language in Section 2 as follows:

> "The right to determine that a reduction in force is necessary and the time when it shall occur is the employer's prerogative. Nothing in this agreement shall be construed to imply otherwise. The employer may determine that a reduction in force is necessary only when a lack of work situation exists." [Emphasis supplied]

There appears to be no situation here involving a lack of work, and therefore, the action taken by STATE is not a "reduction in force" as contemplated by the bargaining agreement. Closing of stores has an adverse impact upon all employees, and especially those who will be losing their jobs.

Contracting out work was negotiated and the subject included in the bargaining agreement, but the present situation was neither specifically negotiated nor included in the bargaining agreement. There is no "management rights" clause to the effect that all other rights are reserved to management or that they will be negotiated, which is a clause customarily found in similar agreements. Clearly the parties failed to contemplate this specific situation, being a partial cloture of the business.

Cases from other jurisdictions which deal with the situation of the partial cloture of the business are divided, but are not binding authority here in Vermont though indicative of the national trends in the area. See Royal Typewriter Co., 209 NLRB No. 174, 85 LRRM 1501 and Summit Tooling Co., 83 LRRM 204. The Board finds, however, that as a matter of law, STATE has violated the requirements of 3 V.S.A., Section 961 (5), by refusing to bargain collectively with representatives of the employees of the Liquor Control Department.

We next turn to the matter of an appropriate remedy. It is quite clear from the evidence that the store closings were not motivated by any anti-union animus. The only reason for such closings appears from the Minutes of the Liquor Control Board to be a desire to economize by closing stores apparently operating at a deficit. The most reasonable solution which comes to the Board is to require that the parties must negotiate the issue with which they are now confronted. The

parties need not agree as to the solutions, or even as to the problems with which STATE is confronted, but they must meet and negotiate in good faith under Title 3, Chapter 27.

Order.

NOW, THEREFORE, it is hereby ORDERED that STATE and VSEA shall bargain collectively over the issue of the closing of certain State Liquor Stores, pursuant to the requirements and provisions of 3 V.S.A., Section 901, et seq. It is FURTHER ORDERED that the grievance, having been mooted by the hearing and within decision on the unfair labor practice complaint, be, and it hereby is DISMISSED. In the event that STATE has not commenced to engage in collective bargaining as here ordered within a reasonable time from the date hereof, Petitioners may file a motion to have the matter brought forward on the docket for further hearing consistent with the Opinion and Order contained herein.

Dated at Brattleboro, Vermont this 17th day of June, 1977.

Appeal dismissed pursuant to Stip. Oct 1979

VERMONT LABOR RELATIONS BOARD

By John S. Burgess
JOHN S. BURGESS, CHAIRMAN

WILLIAM G. KEMSLEY, SR.

H. JAMES WALLACE