

BURLINGTON EDUCATION ASSOCI-)	
ATION, INC.)	
)	VERMONT LABOR RELATIONS BOARD
and)	
)	Docket No. 78-48R
BURLINGTON BOARD OF SCHOOL)	
COMMISSIONERS)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case.

This matter involves an unfair labor practice alleging a refusal to bargain, during the life of an existing collective bargaining agreement, regarding a unilateral change by the employer in the working conditions of bargaining unit members when said changes involve a mandatory subject of collective bargaining. The charge was brought by the Burlington Education Association through its representative, Norman P. Bartlett, who represented it before the Board against the Burlington Board of School Commissioners, who were represented by Joseph E. McNeil and Francis X. Murray. A hearing was held on the matter on July 20, 1978.

Findings of Fact.

1. The Burlington Education Association (hereinafter referred to as "Association") is the sole and exclusive bargaining agent for the teachers employed by the Burlington School District (hereinafter referred to as "District").

2. The Association and the District entered into a collective bargaining agreement covering the period from

September 1, 1976 up to and including August 31, 1978.

3. A copy of the collective bargaining agreement is made a part of these findings and incorporated by reference rather than being set forth in detail.

4. At the beginning of the second year of the two-year agreement, the District required that each teacher keep and complete a "pupil progress record" form (PPR) for each student in each of their classes.

5. The PPR forms were developed from the "learning objectives" which had been formulated by the District's teachers and administrators over a period of years.

6. The PPR's are a list of the "objectives" for each class with space to record each student's attainment of the specific objective(s).

7. Beginning in September 1977 teachers were required to record each student's attainment of each objective. The teachers at all grade levels were affected by the PPR's which increased their work loads.

8. The implementation of the PPR's was never discussed by the District and the Association during the negotiations for the 1976-1978 collective bargaining agreement.

9. The PPR's were not required prior to September 1977.

10. After the September 1977 directive that PPR's be kept on each student in each class, the Association,

on October 27, 1977, requested that the District negotiate regarding the implementation of the PPR's.

11. The District refused to negotiate the implementation of the PPR's.

12. The completion of the PPR's required some of the teachers to spend considerably more time on paper work than they had previously.

13. Many teachers could not do their normal school work and complete the PPR's within the work day provided by Article IX, Section 9.6 of the Collective Bargaining Agreement.

14. The amount of additional work varied from teacher to teacher and some teachers may have had a slight diminution of other tasks.

15. The exhibits and transcripts are made a part of these Findings of Fact.

Conclusions of Law.

This Board has jurisdiction pursuant to 21 V.S.A. §1735. The Association has alleged that the District has refused to bargain collectively in violation of 21 V.S.A. §1726(a)(5). The District has denied the allegations that it committed an unfair labor practice. The Association urges that the Board had a duty to bargain before it could unilaterally change working conditions over which it was

allegedly required to bargain during the life of the Collective Bargaining Agreement.

The Board and the Association must "negotiate in good faith on all matters properly before them under the provisions of this chapter." 16 V.S.A. §2001. Vermont law provides that the parties shall negotiate

"on matters of salary, related economic conditions of employment, procedures for processing complaints and grievances relating to employment, and any mutually agreed upon matters not in conflict with the statutes and laws of the State of Vermont." (16 V.S.A. §2004)

(This matter might be disposed of by determining that the completion of the PPR's are not a "related economic condition(s) of employment" and the subject of mandatory bargaining. In fact, if the Association's claim is based upon negotiating the nature of the work, the District may not have had a statutory duty to bargain.)

The Association alleges that the teachers' hours of work are extended because of the time required to complete the PPR's. Article IX of the Collective Bargaining Agreement provides that the normal work day shall be seven and one-half consecutive hours, including a duty-free lunch. Article 9.5 further provides that

"each teacher has a professional responsibility to provide the best possible opportunity to each and every student, and that this responsibility carries beyond the normal school day.

This responsibility shall include, adequate and sufficient preparation for the next day's classes and adequate review of completed student work."

The Collective Bargaining Agreement contains a grievance procedure (Article XI). The Association is alleging and its members have testified that teachers must now work longer hours in order to fulfill their teaching duties and complete the PPR's. The gist of the teachers' complaint is that the completion of the PPR's has a substantial impact on their work load and for some persons has increased the work day beyond the hours provided in Article IX of the Collective Bargaining Agreement. If the additional work required for completing the PPR's caused some teachers to work more than the amount required by the contract, it would give rise to a grievance. The Board believes that the Association should have filed a grievance alleging a violation of the Collective Bargaining Agreement.

Before ruling on the merits of the unfair labor practice charge, the Board will decide whether this matter should have been disposed of through the grievance procedure. The Vermont Labor Relations Act for Teachers provides that the parties shall negotiate

"all matters of salary, related economic conditions of employment, procedures for processing complaints and grievances relating to employment, and any mutually

agreed upon matters not in conflict with the statutes and laws of the State of Vermont." (Emphasis added.) (16 V.S.A. §2004)

The statute evidences clear legislative intent to develop mechanisms to resolve labor disputes. The inclusion of grievance procedures in the definition of bargainable matters suggests that grievance procedures are an important matter in labor relations.

If this Board hears as an unfair labor practice a complaint which is a grievance without first requiring the complainant to utilize the dispute resolution procedures agreed to in the Collective Bargaining Agreement, the collective bargaining process would be undermined. This Board concludes that the legislative purpose of the Vermont Labor Relations Act for Teachers can best be effectuated by adopting an exhaustion of contract remedies doctrine in this case. This doctrine insures the integrity of the collective bargaining process by requiring the parties to collective bargaining agreements to follow the procedures they have negotiated to resolve contract disputes. This policy also encourages the parties to negotiate grievance procedures to resolve contract disputes which is sound labor relations policy. Labor relations stability depends on the parties working together to resolve disputes which directly affect them.

The purpose of grievance procedures is to resolve disputes at the lowest level of the organization and in the least expensive and most expeditious manner. (See Article 11.2 of the Collective Bargaining Agreement.) The unfair labor practice action does not meet these purposes. Unfair labor practice actions are more time consuming and are more expensive than the grievance process. In addition, the unfair labor practice, unlike the grievance process, does not bring the parties together and develop the full range of opportunities for the parties to settle, compromise and otherwise improve their on-going relationship.

Although the Board is not bound by Federal or private sector precedent, it will look to those areas for guidance. The private sector precedent supports the adoption of the exhaustion of administrative remedies doctrine. Section 301(a) of the Labor Management Relations Act provides "(s)uits for violations of contracts between an employer and a labor organization may be brought in any District Court of the United States." In actions involving interpretation of collective bargaining agreements, the Federal courts have consistently held that a complainant is required to exhaust contract remedies as a condition precedent to maintaining a court action. The United States Supreme Court adopted the exhaustion of remedies contract in Republic Steel vs. Maddox,

379 U.S. 650 (1965). The Court's rationale in support of the exhaustion doctrine was that:

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements.' Teamsters Local vs. Lucas Flower, 369 U.S. 95, 103; Republic Steel vs. Maddox, 379 U.S. 653.

The Supreme Court later affirmed the exhaustion of administrative remedies rule in Vaca vs. Sipe, 386 U.S. 171 (1967).

This Board recognizes that the National Labor Relations Board does not always defer to the grievance or arbitration procedure when confronted with an unfair labor charge which is also a grievance. In fact, the United States Supreme Court has suggested that the national labor policy favoring arbitration and requiring the Courts to defer to the arbitrator when construction and application of a labor contract is an issue does not apply with the same vigor to the National Labor Relations Board as to the Courts. NLRB vs. Acme Industrial Co., 385 U.S. 432 (1967). As promulgated in decisions

of the National Labor Relations Board there are clearly cases in which this Board should and will assume jurisdiction over matters which are both an unfair labor practice and a grievance subject to arbitration under the collective bargaining agreement. (See ALR Fed Annotation at 6 ALR Fed 272.) However, in this case, the Board believes that the purposes of labor relations will be furthered if it defers to the grievance process.

In determining whether to require the exhaustion of remedies doctrine, this Board will consider whether the action of the employer is designed or would have the effect of significantly undermining the union. The Board will examine the nature of the alleged unfair labor practice and its effect on the union and its members. The Board will defer to the arbitration procedure when it believes the dispute involves the interpretation of a contract. This dispute involves an increase in work load which extended the work day for certain teachers contrary to the Collective Bargaining Agreement. The conduct of the employer does not have an unduly chilling effect on the union or union representation. The employees have an adequate redress for the alleged wrong through the grievance procedure. In fact, the use of a less formal grievance procedure would expedite the resolution of the issue at less

cost to the parties. If the facts indicated that the employees would not have adequate redress or that the union would be unduly burdened by following the grievance procedure, the Board might not require the exhaustion of remedies; however, such is not the case.

The Board will follow NLRB criteria in determining whether the grievance procedure is fair and will protect the employee's interest. Under the doctrine of Collyer Insulated Wire, 192 NLRB 837 (1971) when the NLRB is presented with a dispute over the terms and meaning of a collective bargaining agreement provides a process such as arbitration for resolution of such dispute, the NLRB has discretion to recommend that the dispute be submitted to the agreed upon grievance or arbitration procedure subject to NLRB review.

This Board will also follow NLRB precedent with regard to the review of and setting aside of arbitrator's awards. The Board will review whether the proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Vermont Labor Relations Act for Teachers. (See Radio Television Technical School, Inc. vs. NLRB, 488 F2d 457 (CA3).)

If the employer were to take the position that the extra work required of the teachers by the PPR's was not

a grievable issue and the matter were not resolved through the grievance procedure, this Board would have to decide whether the School District had a duty to bargain collectively with the Association regarding the completion by the teachers of the PPR's.

In such a case, the Board would consider Article 1.4 of the Collective Bargaining Agreement which provides

"except as otherwise specifically provided in this Agreement or otherwise mutually agreed to in writing between both parties, the determination of educational policy, the operation and management of the schools and the control, supervision and direction of the staff are vested exclusively in the Board."

and Article 18.1 provides

"this agreement represents the final resolution of all matters in dispute between the parties, and shall not be changed or altered unless the change or alteration had been agreed to and evidenced in writing by the parties hereto."

In this case, we do not rule on the unfair labor practice because the contractual remedies should be exhausted before commencement of an unfair labor practice complaint. The union could allege that almost any grievance is an unfair labor practice and therefore subvert the purposes of collective bargaining. The purpose of collective bargaining is to bring the parties together to negotiate and resolve their differences; not to litigate them in Court or at unfair labor practice hearings.

Order.

NOW, THEREFORE, it is hereby ordered that the unfair labor practice dated January 26, 1978, is dismissed.

Dated at Montpelier, Vermont, this 5th day of October, 1978.

Kimberly B. Cheney
Kimberly B. Cheney

Robert H. Brown
Robert H. Brown

William G. Kemsley
William G. Kemsley