Vermont Labor Relations Board

VERMONT STATE EMPLOYEES' ASSOCIATION, INC.	)	VERMONT LABOR RELATIONS BOARD
and	)	Docket No. 77-52S
STATE OF VERMONT, HONORABLE RICHARD A. SNELLING, RALPH C. PETERS, JACQUEL-ANNE CHOUINARD	)	

OPINION AND ORDER

Statement of Case.

On June 17, 1977, this Board issued "Findings of Fact, Opinion and Order" holding that the State of Vermont had committed an unfair labor practice. On June 21, 1977, the State of Vermont filed a "Motion to Set Aside Order and Dismissal." A hearing on the State's Motion was heard on July 1, 1977. The State was represented by Louis P. Peck, Chief Assistant Attorney General, and Paul F. Hudson, Assistant Attorney General, and the Vermont State Employees' Association, Inc. was represented by Alan S. Rome, Esq.

Opinion.

The State's Motion is based upon the contention that

> "[T]he Board erred in concluding that 3 V.S.A. §904, as it presently exists and will continue in effect until July 3, 1977, imposes 'a current duty to bargain' implementation of the 40-hour work week."

If the State did not have a duty to bargain implementation of the 40-hour work week, then it would not have committed an unfair labor practice.

The issue in this case is whether the State had a duty to bargain the implementation of the 40-hour work week which was promulgated by the Legislature (No. 109, Acts of 1977). The Act was effective July 3, 1977. The Act further specified that all employees shall work 40 hours per week through June 1979, after which date minimum hours per week shall be subject to collective bargaining. At the time of the filing of the unfair labor practice complaint and this Board's decision, that law was not in effect. However, the State was planning to implement the 40-hour work week as of July 3, 1977, and the VSEA contended that the State had a duty to bargain the implementation. Work schedules were, at the time of the charge and hearing, a mandatory duty for collective bargaining. 3 V.S.A. §904(a)(2) The contract between the State and the VSEA is silent as to the required work week. Article XIII provides that an employee's basic salary and overtime shall be based on a 40-hour work schedule. The contract does not say that all employees must work 40 hours. Certain special agreements in the contract refer to work weeks ranging from 37-1/2 hours to 42 hours for particular groups of employees. The evidence is clear and uncontradicted that many employees worked only 37-1/2 hours

even though the basic salary and eligibility for overtime were based on a 40-hour work schedule. With the exception of certain groups of employees covered by the collective bargaining agreement, the work schedules, that is, number of work days and working hours per day, are not covered by the collective bargaining agreement. With the exception of those few employees specifically covered in the agreement, the contract does not require employees to work a certain number of hours.

By virtue of No. 109, Acts of 1977, the Legislature has in effect amended or superseded the collective bargaining agreement by requiring all employees to work 40 hours per week. The Legislature could, if it wished, have mandated the specific work hours. In lieu thereof, the Legislature provided

> "Classified employees scheduled to work additional hours as provided for in this sub-section may work those additional hours during their lunch period, or other time, as arranged with their appointing authority." (Section 1(d) of No. 109, Acts of 1977)

At the time of the filing of the unfair labor practice the Act was not in effect. Therefore, the employer could not "arrange" additional hours with the employees. To do so would have been an unfair labor practice.

Working hours are too important an item to be omitted from a collective bargaining agreement. The Board has observed in the evidence of this case and other cases before

it, that the parties, through their conduct, certainly expected that the work week for many State employees was 37-1/2 hours. In entering into the collective bargaining agreement both the State and the employees expected the work week and work schedule to remain the same. The State would contend that because the work schedule was not reduced to writing and included in the collective bargaining agreement, it is not subject to collective bargaining as specified in 3 V.S.A. §982. The Board disagrees with this analysis. The work schedule and work days of State employees had been established for such a long time that it was unnecessary to include them in the contract, except for those employees whose schedules were being changed from the past practice.

Unfortunately, the collective bargaining agreement does not have a "zipper clause" providing that management shall have the right to change all conditions of employment not specifically covered by the collective bargaining agreement or that all conditions of employment not covered by the collective bargaining agreement will be subject to future negotiation if the need should arise. The language of Article II, which sets forth certain employer's rights, is taken almost verbatim from 3 V.S.A. §905(b). Article II does not give the State greater rights with regard to its labor relations than those permitted by law. The law specifically provides

> "Subject to rights guaranteed by this chapter and subject to all other applicable laws, 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, or of the colleges, and to utilize personnel, methods and means in the most appropriate manner possible.
>
> (2) with the approval of the governor, take whatever action may be necessary to carry out the mission of the agency in an emergency situation."

The law specifically requires that work schedules shall be a subject for bargaining. 3 V.S.A. §904(a)(2). The law does not require the parties to agree; the law merely requires them to bargain. 3 V.S.A. §925 and §981 The State does not have the right to unilaterally change working conditions, except through acts of Legislature. The State has relied upon the hours of work as though they were included in the collective bargaining agreement. In fact, the overall performance evaluations of some employees have been downgraded because of their refusal to work the customary working hours. There was no question that the employees worked as long or longer than other employees; however, they did not work the particular hours that the State agency required (see Grievance of Sandra S. Dooley, Docket No. 73-10; Grievance of Susan LaGasse, Docket No. 73-7). The parties, through their past conduct, clearly established certain hours of work in each agency and relied upon such conduct in

entering into the present collective bargaining agreement.

Although this Board is not bound by decisions of the National Labor Relations Board, it certainly believes that they have significant value as precedent. In Williamette Industries, Inc., et al., 1975-1976 CCH NLRB No. 16283, the National Labor Relations Board held that the change of working schedules without negotiations with the Union representing the employees is an unfair labor practice. The Board recognized that the change was based upon economic circumstances.

The State contends that because the law was not in effect at the time of the hearing, the State had no obligation to bargain over the implementation of the law. This argument flies in the face of the fact that the State, prior to the effective date of the law, was actually making plans for its implementation and the VSEA was requesting that the State bargain. The State was preparing to implement the 40-hour week and it should have been doing so only after proceeding through the collective bargaining process. The State claims that the contracts between the State and the VSEA are in full force and effect and are not by their own terms subject to renegotiations, at least not before July 3, 1977. However, the working hours were clearly a part of an understanding between the parties based upon past practice. To unilaterally attempt to change those schedules during the

life of the contract is to snatch from the employees one of the assumptions on which the collective bargaining agreement between the parties was based. The Board does not believe that the State entered into collective bargaining with the VSEA with the intent of deluding them into false security. The Board believes that the terms of the contract probably should be reformed to match the intent of the parties or that there was mutual mistake of fact so that there was no meeting of the mind. In any event, the State had a duty to bargain the implementation of the new 40-hour work week.

Order.

NOW, THEREFORE, the Motion to Set Aside Order and for a Dismissal is hereby DENIED. This Order affirms the notice of decision given orally to the parties on July 1, 1977, immediately following the hearing. The vote by members of the Board on the motion was two to one, Chairman John S. Burgess and Member William G. Kemsley voting to deny the motion and Member H. James Wallace to grant the motion.

Dated this 23rd day of September, 1977.

John S. Burgess
JOHN S. BURGESS, CHAIRMAN

Wm Kemsley Sr
WILLIAM G. KEMSLEY, SR.

H. James Wallace
H. JAMES WALLACE