Appeal to NH Supreme Court withdrawn on March 15, 1999, NH Supreme Court Case No. 89-266.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MANCHESTER TRANSIT AUTHORITY Petitioner v. AMALGAMATED TRANSIT AUTHORITY UNION, LOCAL 717 Respondent	CASE NO. M-0596:1 DECISION NO. 88-87

APPEARANCES

Representing Manchester Transit Authority:

Thomas J. Tessier, Esq., Counsel
Robert Christy, Esq., Counsel
Richard Pollock, General Manager

Representing Amalgamated Transit Authority Union, Local 717:

Thomas F. Birmingham, Esq., Counsel
Donald Gosselin, President
Suzanne Tsoumbanos, ATU
Dick Branson, ATU

BACKGROUND

This case comes before the Public Employee Labor Relations Board arising out of the newly-recognized jurisdiction of the Public Employee Labor Relations Board over the activities of the Manchester Transit Authority and its employees. Notwithstanding the fact that the legislature passed RSA 273-A in 1975 and the PELRB was established in 1976, the Manchester Transit Authority and its employees never submitted to the jurisdiction of the PELRB, operating instead under a so-called 13(c) agreement. This agreement, executed pursuant to the Urban Mass Transportation Act of 1964, §13(c) as amended, 49USCA §1609(c), arose from the requirements of the federal law when the City of Manchester assumed control and ownership of its bus system. The agreement, originally signed by the parties on September 18, 1973, is a collective bargaining agreement which contains, among its provisions, a clause requiring "binding interest arbitration". This provision requires that, in the event of an impasse as to the terms of successor agreements, an independent arbitrator will decide the issues, terms and conditions of employment and that such an award will be the next contract between the parties.

At the conclusion of the original 13(c) agreement, and after each successor collective bargaining agreement, the binding interest arbitration process was used and the language concerning that process included in each successor agreement without modification or negotiation.

In 1988, a group of part-time employees, the school bus drivers, petitioned this Board to establish an additional collective bargaining agreement unit comprised of those drivers only. This was the first activity concerning the Manchester Transit Authority before the PELRB, and the PELRB determined that these employees were public employees and were subject to the jurisdiction of the Board and RSA 273-A. (See Case Number 88-44).

Also in 1988, the parties, negotiating for a new agreement, reached impasse and the union attempted to implement the provisions of the binding interest arbitration provision of the contract. To this, the Transit Authority objected. When the union continued the request for binding interest arbitration, the Authority petitioned this Board to issue a cease and desist order pursuant to §273-A:6 III, ordering the union to cease and desist from seeking interest arbitration. The Board issued such an order on October 13, 1988. As stated, this was the result of the continuing request of the union to have binding interest arbitration take place, first asserted in early 1988.

In its cease and desist order, the Board requested the parties submit legal memoranda concerning the applicability of the Urban Mass Transit Act, its relation to RSA 273-A and the enforceability of the 13(c) agreement. The parties submitted extensive briefs and a hearing was held at the offices of the PELRB in Concord, New Hampshire on Thursday, December 1, 1988.

FINDINGS OF FACT AND RULINGS OF LAW

The facts of this matter are not in dispute. After negotiations for a new agreement, the parties have several issues on which they have failed to reach agreement. It was stipulated at the hearing that these matters are still in dispute. For the purposes of this decision, and notwithstanding mention in the briefs and in argument about the nature of those items, no distinction will be made by the Board between permissive and mandatory subjects of bargaining, this distinction not being determinative of the Board's decision in this matter. Likewise, the parties concede that the 13(c) agreement, as it pertains to binding interest arbitration, has not been the subject of negotiation or change since its initial adoption. Finally, the Board finds that the union has requested binding interest arbitration continuously since early 1988 and that continuing request is alleged by the employer to violate RSA 273-A:5 II (d) and (g) which make it an unfair labor practice for an employee organization to refuse to negotiate in good faith with the public employer or to fail to comply with RSA 273-A or any rule adopted thereunder.

The Urban Mass Transit Act was adopted by Congress to fund the operations of local transit organizations operated by local governments. As a provision of the Act and to protect employees, Congress adopted §13(c) to require, as a condition of assistance under the Act, that "fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interest of employees affected by such assistance." The Act goes on to define what rights of employees must be protected by such

agreements. It is clear that the Congress of the United States in enacting the law did not seek to deprive state statutes of jurisdiction or application. Indeed, this matter has been decided by the U.S. Supreme Court and various circuit courts of appeal. (See Jackson Transit Authority et al v. Local Division 1285 Amalgamated Transit Union AFL CIO-CLC 457 U.S. 15 (1982); Local Division 589, Amalgamated Transit Union v. Commonwealth of Massachusetts, 666 F.2d 618 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982). The courts have found, and the Transit Authority contends and the union concedes, that state law is applicable. In this particular case, the parties also concede that RSA 273-A provides a system and mechanism by which the rights of employees of the Manchester Transit Authority may be protected, consistent with the requirements of §13(c). The Authority further argues that the enforcement of the binding interest arbitration provision is illegal because it is inconsistent with the dispute resolution provisions of RSA 273-A:12 namely, the requirement for mediation, factfinding, vote by the board of the public employer and, if the factfinder's recommendations are rejected by that board, or by the union, submission of the issue to the legislative body of the public employer, in this case conceded to be the Board of Mayor and Alderman of the City of Manchester. The Transit Authority argues that binding interest arbitration would bind the city and be contrary to statutory requirements. In addition, the Transit Authority argues that such delegation of authority, reserved to the public employer, would violate the Constitution of the State of New Hampshire.

The union responds that it does not consider the interest arbitration clause, by its terms, to govern any party other than the Authority and the union. In other words, the union does not contend that a binding interest arbitration award is binding on the Board of Mayor and Alderman who could fund or refuse to fund cost items submitted to them as a result of the binding interest arbitration award. Further, the union argues that the 13(c) agreement was negotiated in good faith and comprises an alternate dispute resolution mechanism, permitted by RSA 273-A:12 V which states "nothing in this chapter shall be construed to prohibit the parties from providing for such lawful procedures for resolving impasses as the parties may agree upon; providing that no such procedure shall bind the legislative body on matters regarding cost items..." The union cites the PELRB decision in the Portsmouth School Department case, decision number 86-65 which upheld a binding interest arbitration provision negotiated between the Portsmouth School Department and its employees.

Because the union has conceded that the binding interest arbitration provision of the 13(c) agreement would not be binding on the legislative body, and because this Board has no jurisdiction to consider constitutional arguments, the issue before the Board is limited. Briefly stated, the issue is whether the 13(c) agreement, negotiated between the parties long prior to any recognition that the provisions of RSA 273-A applied to their negotiations or relations (indeed, adoption of that provision preceded the enactment of RSA 273-A), and carried through to subsequent agreements without further negotiation or consideration, should be enforced by this Board? In considering this question, the Board must consider that the Legislature of the State of New Hampshire, in enacting the State statute, felt that the mechanism for resolving disputes set forth in the statute was the valid and preferable one, absent thoughtful, informed negotiations between the parties to arrive at an alternate. The 13(c) agreement in question before the Board could not have been negotiated as an alternative to RSA 273-A:12 procedures for the simple reason that such provisions did not exist and were not known to apply to the parties when the 13(c)

agreement was negotiated. This is not to say that those provisions would not be valid if negotiated anew after recognition of the applicability of RSA 273-A and its provisions. Such a situation would be the same as the one presented to the Board in the Portsmouth School Department case, supra. Absent such knowing agreement to agree upon such an alternate dispute resolution mechanism, however, this Board does not believe it can and will not order the enforcement of the 13(c) agreement. The requirements of state statute are clear and must be followed. There being no disagreement between the parties that there remain unresolved issues, the Board finds that the parties should return to the bargaining table to attempt to resolve them and, failing such resolution, should proceed to mediation and factfinding as required by RSA 273-A:12. Should the parties agree upon an alternate dispute resolution mechanism in their discussions, such an agreement could be followed. However, neither party is required to agree upon such a mechanism.

ORDER

Consistent with the findings of fact and rulings of law above, the Board issues the following Order:

1. The 13(c) agreement, to the extent that it contains binding interest arbitration, is not enforceable under the facts of this case.

2. The parties are ordered to proceed to attempt to resolve the outstanding issues between them in negotiations within ten (10) days of the date of this order.

3. In the event such negotiations are unsuccessful, the parties are directed to report the results of negotiations to the Board and seek mediation and factfinding as set forth in RSA 273-A:12 and the Rules of the Board.

Signed this 19th day of January, 1989.

EDWARD J. HASELTINE
Chairman

Also present members Seymour Osman, Richard Roulx and Richard E. Molan. Members Roulx and Osman join in the decision of the Board. Member Molan dissents (see Dissent). Also present, Board Counsel, Bradford E. Cook and Executive Director, Evelyn C. LeBrun.

RICHARD E. MOLAN DISSENTING:

The matter before us presents a number of different, if not novel, issues for the Board's consideration, not the least of which is whether or not this matter should have been heard at all. This case probably could have, and should have been dismissed for having exceeded the statutory limitation for the filing of prohibitive practice charges. RSA 273-A:6 VII provides that "the board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint." This language varies greatly with traditional statutes of limitations and appears to place the responsibility for dismissal of the charges upon the Board. In fact the language is mandatory. (Compare RSA 273-A:6 VII with RSA 507 et seq and 508.)

Traditionally, the statute of limitations is an affirmative defense which must be plead to be adjudicated otherwise it is waived. Yeaton v. Skillings, 100 NH 316; 125 A2d 923 (156). 54 CJS §276. However, in this case the legislature appears to have placed the responsibility clearly upon the shoulders of the Board to dismiss such late actions. In the matter before us, the act complained of occurred on February 25, 1988 when the ATU filed its demand for arbitration with the American Arbitration Association. Although the Complainant and the Board feel that this is a continuing grievance, in fact is, it is not. It is a singular, definable act wherein a party to negotiations made a demand. The fact thay they did not withdraw their demand at any time does not detract from the fact that it was but a singular act. Continuing grievances are those which can be raised at a time later than the initial breach whenever another breach or incidence occurs regarding the same matter. To read that contingency into the current circumstances, greatly exaggerates the circumstance and does not bode well for enforcement of the six month statute of limitation in the future.

This entire matter could have been easily dealt with had the Respondent plead the statute of limitations in its original answer as the complaint that was filed some eight months after the occurrence of the incident. Nevertheless, I would do so at this point.

Secondly, my view varies from the majority in that they find that that Section 13C, so-called, arbitration clause has no vitality, seemingly because of the lack of intensive negotiation over the continuation of such a clause. The history of the arbitration clause is well stated in the majority opinion but fails to note that, in fact, Section 13C of the Act did not require the parties to enter into an agreement for final and binding arbitration but rather to establish a procedure to resolve impasses. This is quite clearly pointed out in the Petitioner's Brief. It would appear at some point, evidentally in the initial agreement that was reached, the parties freely entered into negotiation and presumably in good faith executed this agreement. Thereafter, the majority seems to put great weight on the fact that the parties agreed to continue to keep that provision in the bargaining agreement. The fact that little or no discussion surrounded the inclusion of that section, each and every negotiation is hardly proof that the parties did not intend to be bound by it. It is not outside the common practice of negotiations to repeat sections of contract successively without so much as a reference to them at the bargaining table. They are nonetheless vital and a recorded matter of agreement between the parties.

To so cavalierly declare a section to be without vitality has great impact on the veracity of multitudes of contractual provisions which exist throughout the State today.

The majority also appears to put great weight on the fact that the arbitration provision could not have been conceived as an alternative dispute resolution process as may be contemplated by Section 12 of the Act because the 13C agreement predated our own statute. However, the Board recognizes that succeeding negotiations have taken place and certainly within the period of time in which the statute did coexist. The fact that the parties agreed to continue the incorporation of that 13C arbitration agreement during this period of time is no less important. That the parties did not formally give recognition to the application of RSA 273-A during that period of time does not make it any less true. The Petitioner has gone to great lengths to demonstrate that at all times since 1975, the parties' relationship was subject to applicable state law. We must presume that they acted within the aegis of that law. Therefore, I can find no legal ground or precedent to declare a portion of an agreement entered into in good faith by two parties to be null and void on such a nebulous basis.

The opinion of the Board should have taken into consideration these elements and the case should be resolved in favor of the Union's demand, given their understanding that the arbitration agreement can only be applied to the extent permitted by law, that being defined in the Portsmouth decision cited in the majority opinion. The Petitioner's reliance on an illegal delegation of authority is misplaced in that the findings of courts throughout the country have not been unanimous or consistent in finding for or against the viability of arbitration. Certainly one must question the authority's good faith in erecting this defense in that they entered into this agreement and continued to accept the terms of the arbitration agreement for many years. If the arbitration clause is unconstitutional in 1988, certainly it was in 1976, yet the parties continued to include this Section in their agreements and presumably intended to carry them out. To reward a party for entering into agreements it had no intention of keeping would hardly be a proper motivation or method of operation for this Board.

For all the reasons set forth above, I respectfully dissent.

Signed this 19th day of January, 1989.

RICHARD E. MOLAN
Board Member