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State of New York Public Employment Relations Board Decisions from March 23, 2006

New York State Public Employment Relations Board

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**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**NEW YORK CITY TRANSIT AUTHORITY AND
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,**

Employer,

CASE NO. TIA2005-045

- and -

**TRANSPORT WORKERS UNION OF AMERICA,
AFL-CIO AND LOCAL 100 OF TRANSPORT
WORKERS UNION OF AMERICA, AFL-CIO,**

Employee Organizations.

**PROSKAUER ROSE LLP (M. DAVID ZURNDORFER of counsel), for
Employer**

**GLADSTEIN, REIF & MEGINNISS, LLP (KENT Y. HIROZAWA of counsel), for
Employee Organizations**

BOARD DECISION AND ORDER

This matter comes to us on objections filed by the Transport Workers Union of America and the Transport Workers Union, Local 100 (TWU) to a report and recommendation of the Director of Conciliation (Director) relating to a petition for interest arbitration filed by the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority (Authorities) under §209.5 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules). The TWU objects to the Director's determination that a voluntary resolution to the contract negotiations between the parties cannot be had and to his recommendation that the matter be referred to a public arbitration panel.

In reaching his determination that a voluntary resolution of the contract negotiations cannot be effected and in recommending that this impasse be referred to a public arbitration panel, the Director reviewed the petition for interest arbitration submitted by the Authorities on January 25, 2006; TWU's response to the petition, dated February 9, 2006; a letter from TWU's attorneys, dated March 15, 2006; and a letter from the Authorities' attorney, dated March 16, 2006. In addition, the Director's investigation included "numerous" telephone conversations with representatives of both parties and a meeting with both parties on March 6, 2005.¹

In addition to the letter-objections of the TWU, dated March 20, 2006, the Board has also received a letter-response from the Authorities, dated March 22, 2006 and a letter-reply from the TWU, dated March 22, 2006, both of which it will consider as part of the Board's additional investigation of this matter.

On December 20, 2005, after the TWU announced a strike against the Authorities, the Authorities filed a Declaration of Impasse with the Director pursuant to §205.12 of the Rules. Anticipating the potential for an impasse, the Board had assembled a team of three mediators in New York City where the parties' contract negotiations were taking place. Immediately upon receipt of the Authorities' declaration of impasse, the Board assigned the Director to lead the mediation team pursuant to §205.13 of the Rules.

As noted by the Director in his memorandum to the Board, the mediation team was able to assist the parties in securing an agreement that led to the return to work of the TWU members, and then a memorandum of understanding (MOU) as to terms and conditions of employment which could form the basis of a successor collective

¹ It should be noted that the Director also served as the lead mediator of a mediation team that helped the parties reach the tentative agreement of December 27, 2005 and also led that same mediation team on March 14, 2006 in a further effort to reach a mediated settlement.

bargaining agreement. The MOU provided that it was “subject to ratification by the MTA Board and by the Executive Board and members of the Union”.²

On December 27, 2005, the MOU was ratified by the TWU Local 100 Executive Board. In a membership vote conducted from January 10, 2006 to January 20, 2006, the MOU was rejected by the TWU membership. By a letter to TWU Local 100 President Roger Toussaint, dated January 20, 2006, the Authorities’ Director of Labor Relations referred to the fact that the MOU “was contingent upon ratification by the members of the TWU and approval by the MTA Board”. The letter went on to state, “In light of today’s rejection of that agreement by your membership, please be advised that I will not be advancing that agreement to the MTA Board for its approval”. The second paragraph of the letter recited the MTA’s intention to seek the appointment of an arbitration panel as in the writer’s opinion it was “the most appropriate course”, and invited “any additional ideas you wish to discuss”.

On January 25, 2006, the Authorities filed a Petition for Interest Arbitration with the Director. Annexed to the petition as “Exhibit B” was a document labeled “Proposals of New York City Transit Authority and MaBSTOA”. With the consent of the Authorities, the TWU’s time to respond to the petition was extended to February 23, 2006. On that date, the TWU filed a response in which it, at paragraph 12, admitted “that the terms of a successor agreement have not been agreed to...”. At paragraph 15, the TWU stated, “Disputes concerning terms and conditions of employment that have yet to be resolved include all those contained in the demands asserted by Local 100 in the course of negotiations. Attached is a statement of the Union’s position on those terms and conditions of employment which have not been agreed upon.”

² Memorandum of Understanding between NYCTA and MaBSTOA and TWU and TWU Local 100, section 1, “TERM”.

Following the receipt of the TWU's response to the interest arbitration petition, the Director conducted his investigation in the manner summarized above. In a letter to the Director, dated March 15, 2006, TWU's attorney concluded that it would be premature for the Director "to decide that a voluntary resolution of this bargaining dispute could not be achieved", arguing that both parties signed the MOU, that neither rescinded it, that no time limit for ratification was stated, that Local 100 will continue to seek ratification and that it will insist that MTA/NYCTA do the same. In a letter from its attorney to the Director, dated March 16, 2006, the Authorities argued that it had notified the TWU on January 20, 2006 that the tentative agreement was no longer available and that a new TWU membership ratification vote would be of no legal effect.

The TWU alleges in its objections to the Director's report and recommendation that, until March 16, 2006, the Authorities never expressed an intention to withdraw from or repudiate the tentative contract terms reached by the parties on December 27, 2005, that the provision making the tentative agreement subject to ratification contained no expiration date, that the Authorities are not relieved from their obligation to support the tentative agreement, and that TWU's announced intention to submit the December 27, 2005 tentative agreement to its membership for a second vote makes sending this matter to arbitration "inappropriate". The TWU also alleges that in the alternative, the Board should hold its decision in abeyance until the TWU can complete its second ratification vote. The Authorities, in a letter from its attorney to the Board, dated March 22, 2006, supports the Director's report and recommendation.

DISCUSSION

The Act was amended in 1986 to add a new subdivision 5 to section 209. The purpose of the amendment was to provide binding arbitration where management and

labor are unable to reach a voluntary accord on a collective bargaining agreement.³ The actual text of §209.5 of the Act provides, with respect to the parties to this dispute, that “In the event that the board certifies that a voluntary resolution of the contract negotiations... cannot be effected... such board shall refer the dispute to a public arbitration panel...”. Our Rules of Procedure (Rules)⁴ were amended in 1988 to add §§205.10 through 205.20, which provide a procedure for dealing with the resolution of impasses under §209.5 of the Act. This case presents our first opportunity to interpret §209.5 of the Act and to review the application of §§205.10 through 205.20 of the Rules.

In §205.15 of our Rules, we delegated to the Director the initial duty to conduct or cause to conduct an investigation into whether a voluntary resolution of the contract negotiations cannot be effected. The Rules also allow the Director to direct the parties to conduct further negotiations, with or without mediation assistance.

In the instant case, the Director conducted an exhaustive investigation over the course of seven weeks. In addition to numerous telephone conversations, the Director met with the parties before directing the parties to attempt further negotiations with the assistance of the three-member mediation team that had previously helped the parties come to a tentative MOU. It was only after the mediation effort of March 14, 2006 failed to produce an agreement and the review of the parties’ letter submissions, that the Director recommended to the Board that the matter be referred to a public arbitration panel. We find that the Director and the mediation team explored every possible avenue through which a voluntary agreement could be reached.

³ Governor Mario M. Cuomo’s Memorandum on approving L.1986 cs. 929 and 930, at 3218.

⁴ 22 NYCRR §200, et seq.

Our Rules⁵ provide that either party to an impasse can file a petition for interest arbitration after 15 days have elapsed following the appointment of a mediator to the dispute. Here, a mediator was assigned to the dispute on December 22, 2005. Clearly, more than 15 days had elapsed at the time the Authorities petitioned for arbitration of the dispute on January 25, 2006. The 15 day time period allowed for mediation in this Rule provision is the same as that contained in §209.4(b) of the Act which contains the procedures applicable to other interest arbitration eligible impasses. In fact, in nearly all respects, our Rules regarding the filing and processing of an interest arbitration petition are nearly identical for impasses under §209.5 of the Act as they are for those under §209.4 of the Act.

One significant difference in the two arbitration sections of the Act is that while §209.4(c)(i), like §209.5, directs that the Board *shall* refer the dispute to an arbitration panel; it does not contain the requirement that the Board certify that the dispute cannot be voluntarily resolved. As a matter of practice, our test in impasses under §209.4 has been whether further mediation with the parties would likely resolve the impasse. That test resulted from the fact that mediation is a clearly defined step in the impasse resolution process required by §209.4 of the Act.

Section 209.5 of the Act does not require that the parties participate in mediation before their impasse can be referred to arbitration. That the Legislature did not require mediation as a separate, required step in the impasse resolution process could have been the result of an examination of the bargaining history of the parties covered by §209.5 and the perceived need for additional speed in the resolution of their impasses in light of the frequency with which these parties' negotiations have been resolved only at the last possible moment, causing concern to the residents of New York City and the

⁵ Rules §205.14.

riding public. Unfortunately, the available legislative history on the amendment provides no guidance in this regard.⁶

However, the requirement for mediation is contained in §205.13 of our Rules. The Board's experience with mediation has been overwhelmingly positive. In our recent experience, over 70% of impasses have been resolved through mediation. In any event, the absence of any reference to mediation in the language of §209.5 requires that we employ a slightly different test in determining whether impasses under this section should proceed to arbitration. The statutory standard is reiterated in our Rules.⁷ We interpret this language to mean that we must ascertain not just whether further mediation could prove successful, but whether any further negotiations between the parties, even without mediation, could reasonably be expected to be successful. We do not read the statute or our Rules to require that we find a voluntary resolution impossible, just that a voluntary agreement is improbable under the existing circumstances. The Director concluded that the parties' current positions, particularly as to the legal status of the MOU, are so different that it evidences an inability to come to a voluntary agreement. We agree. We are not required to judge the prospect of an involuntary agreement.

The Director also concluded that the issue of the status of the MOU is outside of his authority to decide. We also agree with this conclusion. The TWU's objections are in the nature of objections to arbitrability. Our Rules⁸ anticipate that objections to arbitrability may only be raised by the filing of an improper practice charge or a petition for a declaratory ruling. Specifically, §205.17(a)(3) requires that an objection to

⁶ The only document in the legislative bill jacket for Chapter 929 of the Laws of 1986 that refers to the interest arbitration provisions is the Governor's approval memo cited earlier at footnote 3.

⁷ See Rules §§205.15(a) and (c).

⁸ Rule §205.17.

arbitrability alleging that an issue has been resolved during the course of negotiations be filed pursuant to that Rule. Those charges and petitions are filed with the Office of Public Employment Practices and Representation and are governed by Parts 204 and 210, respectively, of our Rules. In fact, the TWU filed an improper practice charge raising objections to arbitrability with our Office of Public Employment Practices and Representation on February 9, 2006. That proceeding is still pending. Any discussion here as to the legal status of the MOU could potentially affect that charge and is, therefore, inappropriate.

The Director of Conciliation is the head of the Office of Conciliation, an office that provides mediation, fact-finding and arbitration services. The Office of Conciliation does not adjudicate legal disputes. The Rules require that the Director examine the facts and circumstances of the dispute and apply the judgment he has gained through experience in such matters to those facts and circumstances. In such instances, we choose to defer to the judgment of the Director, unless the objections of a party are compelling.

Here, the objective criteria that we typically consider, such as the bargaining history of the parties, the relationship between the parties, the number and nature of the issues in dispute, the number of negotiation or mediation sessions the parties have participated in, and the number and nature of terms on which they currently agree, all suggest that these parties, at this particular point in time, cannot successfully negotiate a new agreement.

It is clear from the Authorities' current bargaining position, as formally stated in its Petition for Interest Arbitration, and the TWU's current bargaining position, as formally stated in its Response to the Petition, that there is no agreement as to what terms and conditions of employment should be afforded the members of this bargaining unit. It is those stated positions that we must judge, as the investigation commences with the

filing of the petition for interest arbitration and should end within a reasonable time after the response to the petition is filed. The Act and the Rules anticipate that we judge a snapshot depicting the parties bargaining status at a fixed point in time, not a moving picture. If it were the latter, we would never be able to make a judgment. As of the date of the TWU's response, there was no movement towards a re-vote on the MOU. Even were we to consider the position the TWU now asserts, that it is seeking a second membership vote on the terms of the MOU, the parties disagree as to the legal status of that MOU. This supports the Director's determination that a *voluntary* resolution of this dispute cannot be had. That the TWU would have us continue to view a constantly changing scene is further evidenced by its submission this morning of statements attributed to the Authorities' lead negotiator in yesterday's newspapers. These reports are outside the scope of our inquiry.

Inasmuch as the current proceeding is not the proper vehicle for the adjudication of any disagreement the parties may have over the legal effect of the MOU, it would be inappropriate for us to decide that issue.

Although we do not reach this issue, we must address the TWU's contention that by permitting the impasse to proceed to arbitration, we will interfere with the potential resolution of this dispute and/or permit the Authorities to avoid doing what the TWU feels they are legally bound to do. First, we are constrained by the language of the Act. The Act mandates that we refer the impasse to a public arbitration panel if we certify that the dispute cannot be resolved voluntarily. Neither the Act, nor our Rules, contemplate that we hold the matter in abeyance once it is clear from our investigation that a voluntary resolution cannot be had. Second, while the Act does not specify a timetable for our moving the dispute to arbitration, the Rules require that each step of the process be conducted within a specific time frame, save the investigation and report

of the Director and the determination of the Board. As we have stated earlier, we believe the seven-week investigation by the Director was exhaustive and neither of the parties argues otherwise.⁹ Further, at this point, there is no membership vote scheduled. Indeed, it was only at the conclusion of the Director's investigation that the TWU announced that it would seek a re-vote. We cannot speculate when, or if, this re-vote will take place. The Rules, by providing only three calendar days for the respondent to file objections, anticipate that the Board's consideration of the objections will be prompt. We find that by scheduling our review of the objections three days after the receipt of the objections, we are acting in the spirit of the Rules. Finally, nothing in our decision prevents the TWU from proceeding with another membership vote on the MOU and nothing herein relieves the Authorities from any legal obligation it may have with respect to the MOU. Any action, or any failure to Act, on our part could be criticized by one party or the other as favoring the position of its adversary. That our issuance of this decision may come at a time not preferred by the TWU is unavoidable; it comes at a time that is also objected to by the Authorities. Most important is that we issue this decision at the earliest possible date on which we are convinced that the statutory processes have been conducted and when we are as certain as we can be that a voluntary resolution of the parties' contract negotiations cannot be had.

Finally, the TWU argues that it is not in the public's interest that this impasse be referred to a public arbitration panel. TWU's reasoning is that the ratification process will quickly conclude the dispute and will best stabilize labor relations between the parties. To the extent that the TWU did not raise this issue before the Director, it is not properly before us. If we were to consider it, we cannot conclude, given the events of the last

⁹ To the contrary, the Authorities argue that the consideration of its Petition for Interest Arbitration was unduly delayed. Letters of M. David Zurndorfer, dated March 16, 2006 and March 22, 2006.

three months and the parties' current positions, that the ratification process will quickly conclude the dispute. In any event, there is nothing preventing the parties from proceeding on parallel tracks. While the arbitration process may take months to accomplish, the end result is a final and binding award. Binding interest arbitration is a statutory process that has been part of the Act for 30 years. In the past several years, binding interest arbitration has been extended by the Legislature as the final step in the impasse resolution process to additional types of bargaining units.¹⁰ In light of such, we cannot conclude that it is not in the public's interest for these parties to be referred to arbitration. Nor can we conclude that a public interest arbitration panel cannot reach a full, fair and just award in this dispute, with proper regard for the public's interest.

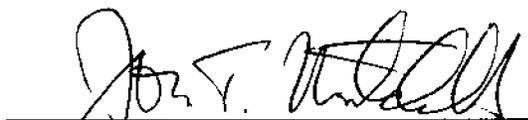
For the reasons stated above, we hereby certify that a voluntary resolution of the contract negotiations between the New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority and the Transport Workers Union of America and Local 100 of the Transport Workers Union of America cannot be effected and we, therefore, refer the impasse involving these parties to a public interest arbitration panel.

SO ORDERED.

DATED: March 23, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹⁰ See CSL §§209.4(e), (f) and (g).