STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

IUOE LOCAL 12, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION), Respondent.	Case No. LA-CE-602-S PERB Decision No. 1691-S September 17, 2004

Appearance: Sol R. Allen, Business Representative, for IUOE Local 12.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (Board) on appeal by IUOE Local 12 (IUOE) of a Board agent's dismissal and deferral to arbitration (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Transportation) (State) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the workweek schedule at Shop #31 in Kearney Mesa without providing IUOE prior notice or the opportunity to bargain. IUOE alleged that this conduct constituted a violation of Dills Act sections 3516, 3516.5 and 3517.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended charge, the State's response, the warning and dismissal letters and IUOE's appeal. The Board finds the Board agent's dismissal and deferral to arbitration to be free of prejudicial error and adopts it as a decision of the Board itself.

[1]The Dills Act is codified at Government Code section 3512, et seq.

ORDER

The unfair practice charge in Case No. LA-CE-602-S is hereby DISMISSED AND DEFERRED TO ARBITRATION.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA GRAY DAVIS, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

June 9, 2003

Sol R. Allen, Business Representative
IUOE, Local No. 12
3935 Normal Street
San Diego, CA 92103

Re: IUOE Local 12 v. State of California (Department of Transportation)
Unfair Practice Charge No. LA-CE-602-S
NOTICE OF DISMISSAL AND DEFERRAL TO ARBITRATION

Dear Mr. Allen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 28, 2003. IUOE Local 12 alleges that the State of California (Department of Transportation) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the workweek schedule.

I indicated in the attached letter dated May 15, 2003, that this charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that unless the charge was amended or withdrawn prior to May 27, 2003, it would be deferred to arbitration and dismissed. Your request for an extension of time was granted and an amended charge was timely filed on June 6, 2003.

As discussed in the attached letter, the charge alleges that the Department unilaterally eliminated the 9/80 workweek schedule for employees at Shop #31 (Kearney Mesa). I indicated in the attached letter that the dispute at issue was covered by Article 22, the Entire Agreement clause, and, thus, was subject to deferral to arbitration.

The amended charge disputes the contention that the charge is subject to deferral. The charge states that Article 22 applies only when the State proposes to establish an alternate work schedule, not when the State plans to eliminate the 9/80 schedule. The charge states:

> Rather, the Respondent's decision to eliminate the "9/80" workweek schedule is controlled by language in MOU Article 7.4 -- Change of shift, work hours, workweek. Paragraph A defines a shift as "A change in the hours of work in a day and/or the days of work in a week." . . . The third paragraph of Article 7.4(a) --

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> Permanent Shift Change describes the process Respondents were required to follow to revert their employees to a 5-day, 8-hour (regular) workweek, since this change was going to be in effect for longer than thirty (30) days. [Emphasis in original.]

Article 7, section 7.4.A, of the parties' MOU states:

> A shift change is defined as a change in the hours of work in a day and/or the days of work in a week.

Section 7.4.A.3 describes a permanent shift change, stating, and relevant part:

> A permanent shift change is for a duration greater than thirty (30) calendar days. Permanent shift changes shall be made in accordance with Article 17.1 (Post and Bid) of this agreement.

Article 17.1 describes the Department's obligation to post job vacancies and the procedure for employees to apply or bid for these vacancies.

As I explained in the attached letter, Government Code section 3514.5(a) and PERB Regulation 32620(b)(5) require a Board agent to dismiss a charge where the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81; State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

Article 7 is not applicable to the subject of the charge because it does not expressly prohibit the State from making unilateral changes in the 9/80 workweek schedule. Even assuming this provision covers the dispute, this would be a further basis for deferral. Article 22 permits the State to make unilateral changes in matters within the scope of representation with 60 days notice prior to the proposed change. Any disagreement whether an issue is subject to this provision may be submitted to binding arbitration. Since the State has agreed to waive any procedural defenses, the charge must be dismissed and deferred to arbitration.[2]

The amended charge also states that deferral to the grievance and arbitration procedure would be futile. However, the charge does not explain how or in what manner the Union would be precluded from utilizing the grievance and arbitration procedure. Further, a lengthy resolution to the grievance and arbitration process does not demonstrate futility. (State of California (Department of Personnel Administration) (1986) PERB Decision No. 600-S.) Thus, this theory is dismissed.

Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los

[2] This finding does not, however, preclude the Union from citing Article 7, or any other provision of the MOU, when filing a grievance.

Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)[3]

Right to Appeal

Pursuant to PERB Regulations,[4] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a

[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

[4] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By
Robin W. Wesley
Regional Attorney

Attachment

cc: Linda Nelson

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
Telephone: (916) 327-8385
Fax: (916) 327-6377

May 15, 2003

Sol R. Allen, Business Representative
IUOE, Local No. 12
3935 Normal Street
San Diego, CA 92103

Re: IUOE Local 12 v. State of California (Department of Transportation)
Unfair Practice Charge No. LA-CE-602-S
WARNING LETTER (DEFERRAL TO ARBITRATION)

Dear Mr. Allen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 28, 2003. IUOE Local 12 alleges that the State of California (Department of Transportation) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing the workweek schedule.

The charge makes the following factual allegations. On February 7, 2003, Highway Equipment Superintendent Rob Anderson notified IUOE that the Department intended to change the work schedule at Shop #31 (Kearney Mesa). Employees working a 9/80 work schedule would be changed to a standard eight-hour day, five days per week (5/40) work schedule. Mr. Anderson explained that due to an inability to replace employees who had resigned, retired or were on leave for medical or other reasons, there was insufficient staff to accomplish the work on alternate Fridays when roughly half of the employees were off work. The 9/80 work schedule has been in effect since January 1, 2000.

The Department notified employees on February 11, 2003 of the intent to revert to a 5/40 schedule effective March 11, 2003. The Union advised the Department that the notice was insufficient under the terms of the MOU which requires a minimum of 30 days advance notification to the employees and the Union. The Department withdrew the February 11, 2003 notice and agreed to bargain with the Union.

On February 20, 2003, Union representatives met with Mr. Anderson and Labor Relations Officer Mary Blanco. During this meeting, the Union pointed out certain staffing errors in the Department's proposal. The Union also made other proposals to alleviate the Department's concerns while still retaining the 9/80 schedule. The Department promised to review each of the Union's proposals.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On February 28, 2003, the Union discovered that the Department had reissued its original notice eliminating the 9/80 work schedule effective April 1, 2003.

On March 14, 2003, Business Representative Sol Allen sent a letter to Lisa Kunzman, Chief, Division of Equipment, setting forth the Union's opposition to the work schedule change.

IUOE and the State are parties to a MOU effective July 1, 2001 through July 2, 2004. Article 14 contains a grievance procedure which ends in binding arbitration. Article 7, section 7.1, describes employee workweeks, stating in part:

> B. Alternate 4/10/40 and/or 9/8/80 workweeks may be established by the employer consistent with the provisions of section 7.3 of this agreement. The employing department shall meet with the Union prior to the implementation of such alternate shifts to discuss the impact of the change in workweek upon affected employees in accordance with the Entire Agreement section of this contract. A 4/10/40 workweek is defined as four (4) consecutive days of ten (10) hours each. A 9/8/80 workweek is defined as a combination of four (4) consecutive nine (9) hour days in each of two calendar weeks and one (1) contiguous eight (8) hour day which is divided over two defined workweeks.

Article 22 provides the Entire Agreement clause, stating in relevant part:

> B. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this Agreement. The parties recognize that during the term of this Agreement, it may be necessary for the State to make changes in areas within the scope of negotiations. When a State agency finds it necessary to make such changes, the State agency shall seek delegation from the Department of Personnel Administration and if granted shall notify IUOE of the proposed change 60 days prior to its proposed implementation. Prior to implementation, the parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 12, when all three of the following exist:
>
> 1. Where such changes would affect the working conditions of a significant number of employees in Unit 12.
>
> 2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act.
>
> 3. Where IUOE requests to negotiate with the State.

> C. To ensure that both parties fulfill their bargaining obligation within the 60-day timeframe, said requests to negotiate must be received by the State agency within 14 calendar days of the employer's notice to the union.
>
> D. If a request to negotiate is submitted as provided above, said obligation to meet and confer in good faith over the impact of the proposed change shall be fulfilled prior to implementation of the change. Both parties acknowledge that they have a total of 60 calendar days from the date of notice in which to discharge their bargaining obligation. Any impasse which arises during the course of negotiations may be submitted to mediation pursuant to Section 3518 of the Dills Act.
>
> E. Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Agreement, once approved by the Department of Personnel Administration.
>
> F. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding.

Based on these facts and Dills Act section 3514.5, this charge must be deferred to arbitration under the MOU and dismissed in accordance with PERB Regulation 32620(b)(5).

Section 3514.5(a) of the Dills Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private

> sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

Although Dry Creek was decided under the Educational Employment Relations Act[2] the NLRB deferral standard has also been applied to the Dills Act. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Linda Nelson, dated April 24, 2003, the Respondent has indicated its willingness to proceed to arbitration and to waive procedural defenses. Finally, the issue raised by this charge, that the State unilaterally changed the workweek schedule for employees at Shop #31 without first providing notice and an opportunity to bargain, directly involves an interpretation of Article 22 of the MOU. As noted above, this provision requires the State to provide IUOE with notice and an opportunity to bargain before implementing changes in terms and conditions of employment. Further, although Article 7 addresses alternate workweek schedules, it does not cover unilateral changes in workweek schedules.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[3]

If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the

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[2] The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 27, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney

Attachment