

**BEFORE
LABOR-MANAGEMENT RELATIONS BOARD
CITY OF ALBUQUERQUE**

In the Matter of

*International Brotherhood of Teamsters Local 492:
Request to Represent Transit Employees*

Background

The United Transportation Union (UTU) was the exclusive representative for transit employees in the Department of Transportation, City of Albuquerque. UTU and the City entered into a collective bargaining agreement covering the period of February 1, 2001 through February 8, 2003.

After the effective date of the agreement (February 1, 2001) but prior to its expiration (February 8, 2003), UTU issued a disclaimer of interest on or about December 20, 2001, wherein it disavowed its status as the exclusive representative for the unit of transit employees. At the time that it filed its disclaimer UTU asserted that the New Mexico Transportation Association (NMTA or NMTU) was the "successor" employee organization for the unit.

In June 2002, Robert Gutierrez, NMTU president, sent a memorandum to the Mayor stating that NMTU possessed cards signed by transit employees and it was the seeking to be recognized as exclusive representative for the transit employees.

On July 12, 2002, the Mayor signed an order finding that NMTU was seeking to represent transit employees under 3-2-6(C) of the Ordinance; that NMTU had 50% plus 1 in cards signed by transit employees as verified by the City Clerk; and the Mayor certified NMTU as the exclusive representative.

Section 3-2-6(C) references 3-2-6(B) where there is a requirement to post a notice as a means to determine whether other employee organization(s) seek to represent the unit of transit employees. Following a period of time for the posting, and assuming no other employee organization intervenes, 3-2-6(C) requires the Mayor to make a finding that no other employee organization has made a written claim. There was no posting and no finding by the Mayor as required under the Ordinance.

After the Mayor certified the NMTU as exclusive representative on July 12, 2002, NMTU contacted the City and requested negotiations for a collective bargaining agreement. Negotiations were initiated during the window period for making such a request in the "old" UTU-City agreement.

On January 13, 2003, LMRB Chair Juan Montoya signed an Order certifying NMTU as the exclusive representative. Although the Ordinance authorizes the Mayor to certify the NMTU under 3-2-6(C), the parties sought Board certification. The agenda for the January 13, 2003, meeting does not identify this matter as an item for final action. The parties submitted the Order to the Board under "public comment".

IBT Request to Represent Transit Employees

On November 13, 2003, IBT filed a request to represent the transit employees. Specifically IBT notes that 3-2-6(D) states "neither an election nor certification by a showing of interest shall occur if there is currently a lawful written agreement between the [City] and exclusive representative for the [unit] involved." On July 12, 2002, the Mayor certified NMTU as exclusive representative even though there was a collective bargaining agreement in effect (February 10, 2001 - February 8, 2003) between another employee organization and the City for the unit involved.

Also 3-2-6(J) states "no petition for representation or decertification shall be entertained by the Board unless such petition and the requisite showing of support... shall have been filed with the Board during the 30-day period between the 120th and the 90th day immediately preceding the expiration date of the agreement." The Mayor's recognition of the NMTU in July 2002 and the Board's Order of January 2003 are in direct conflict with 3-2-6(J) and both should be declared null and void.

IBT complied with 3-2-6(A). It requested recognition, filed a petition, has 50% plus 1 showing of support, and, under 3-2-6(B), no intervenor arose, and the matter was referred to the Board since the Mayor took no action. It should be recognized as the exclusive representative.

NMTU Response to IBT Request

NMTU, as successor to UTU, was assigned the UTU collective bargaining agreement. The Mayor in July 2002, as well as Board in January 2003, recognized NMTU as the exclusive representative. In the fall of 2002 NMTU requested negotiations with the City during the window period for doing so under the "old" UTU collective bargaining agreement.

In November 2003, approximately one year after NMTU and the City commenced negotiations, IBT filed its request for representation. The request is untimely because 3-2-6(J) states that "[n]o petition for representation... shall be entertained by the Board unless such petition... [has] been filed with the Board during the 30-day period between the 120th day and the 90th day immediately preceding the expiration date of the contract." The request does not fall within the period of time set forth in 3-2-6(J).

NMTU asserts there was much uncertainty surrounding the status of employee representation when UTU filed its disclaimer of interest. NMTU contacted employee organizations, such as IBT, during June 2002 to determine if any organizations were interested in representing employees. No one responded. NMTU conducted its own

employee survey to determine which labor organization should represent employees and NMTU garnered 95% of the vote.

City Position

According to the City it does not have a position in this matter. The UTU and NMTU matter was a question of internal affiliation between the labor organizations.

Findings and Conclusions

UTU filed a disclaimer of interest on or about December 20, 2001. It clearly and unequivocally revoked its legal status and associated obligations in continuing as the designated exclusive representative for transit employees. In the absence of an exclusive representative the employees were without representation and free to choose or not to choose another representative. Where representation of employees is pursued by an employee organization the proper procedures must be followed and such procedures are found in the Ordinance commencing in 3-2-6.

NMTU claims that 95% of the employees sought its representation as reflected in its internal survey conducted in June 2002. The Ordinance and Board rules do not authorize or recognize the survey conducted by NMTU as a means to sanction the representation process or certify an exclusive representative. The survey may not be as free from influence as NMTU has represented to the Board. In this regard on December 20, 2001, the City initiated with the Board a proceeding seeking clarification of rights and obligations under the Ordinance. In its submission the City states that NMTU presents itself as the exclusive representative and seeks to collect dues at a time more than six months *prior* to NMTU's certification as exclusive representative by the Mayor on July 12, 2002.¹ The survey must be considered in context, that is, it was undertaken by an employee organization (NMTU) publicly professing that it was the exclusive representative even though it had not been designated as such for transit employees.

The Ordinance does authorize, however, the Mayor to certify an exclusive representative. Under 3-2-6 there must be a showing of interest through a card check authorization of 50% plus 1 and there must be a posting for intervenor and no written claim filed in response thereto. Here there was a card check showing that NMTU attained the 50% plus 1 but there was no posting. A posting is significant. It is a sanctioned declaration that allows employees the right to exercise a "freedom of choice" to be represented or not and, if representation is the choice, then a choice as to who that representative is to be. Entertwined with that exercise and choice is implicated a constitutional right of freedom association. Where there is no declaration of these rights for exercise by the individual employee then such rights are displaced and the representation process is skewed against the individual and in favor of an organization.

NMTU claims there is a collective bargaining agreement between it and the City which serves to bar IBT's request at this time. In this regard NMTU and the City started

¹In the Matter of a Determination of an Appropriate Bargaining Representative for the Suntran and Sunvan Drivers, Case No. LB-01-24 (December 20, 2001).

negotiations in Fall 2002 and IBT did not file a request until November 2003. When an incumbent, exclusive representative has a lawful, written agreement, then 3-2-6(D)(3) prohibits an election or decertification election and, under 3-2-6(J), IBT's petition (November 2003) falls outside the 120th day to 90th day period for filing prior to the expiration date (February 2002) of the agreement.

The "old" UTU-City agreement contained a provision that the agreement could be assigned to a "successor" and when UTU filed its disclaimer it asserted that NMTU was the successor. UTU's designation of a successor is not binding on the Board. A "successor" must be designated as the exclusive representative following the procedures in the Ordinance. Self-appointed status as "successor" does not rise to the level of exclusive representative without the imprimatur of the Board or Mayor adhering to the Ordinance. Allowing the "successor" issue to bypass the requirements in the Ordinance skirts the freedom of choice issue paramount in representation proceedings and elevates internal surveys purporting to reflect employee choice to a status not subject to third-party scrutiny.

Furthermore, the assignment of the "old" UTU collective bargaining agreement can not occur until an exclusive representative has been certified for the City can enter into a "lawful written agreement" only with an exclusive representative. Once designated as exclusive representative the collective bargaining agreement may be assigned. The earliest date to which the "old" UTU agreement could have been assigned to NMTU was the date of the Mayor's certification - - July 12, 2002. If the Board's Order is the operative date, then January 13, 2003, is the assignment date. No document has been produced that at any time showing an assignment of the contract. There is no contract bar because the contract expired in February 2003 and IBT's petition was filed in November 2003.

Turning to IBT's assertion that there is no "election bar" and the Board should declare null and void its Order of January 2003 and the Mayor's of July 2002, where a representation process has been conducted, another representation proceeding is not permitted for one year thereafter. This allows time for a newly certified union to attain an agreement without concern about its exclusive status and the employer is freed from enduring another proceeding. Since July 12, 2002, the City and NMTU have interacted in a manner consistent with the designation of one entity (NMTU) as an exclusive representative. A newly-designated exclusive representative is accorded, under generally accepted labor-management principles and law, a protective status of 1-year to obtain an initial collective bargaining agreement, and that one year period, commencing from the date of the Board's January 13, 2003, Order has not lapsed for NMTU.²

As for that Order, the basis under which the Board was authorized to take action on the joint request from NMTU and the City is problematic. Section 3-2-6(D) provides that a representation question is referred to the Board where there is a "dispute over

²See *The Developing Labor Law*, 4th ed. (BNA, 2001) and *Labor Management Relations in the Public Service* (LRP Publications 1999).

whether an employee organization represents a majority of employees in an appropriate bargaining unit, or if, within 10 days of the filing of a request for recognition, the Mayor has made no decision regarding certification[.]” The Mayor made a decision when he determined there was no question that a majority of employees in an appropriate unit sought representation and signed an order designating NMTU as exclusive representative. There were no questions to be referred to the Board.

Even if IBT’s request to invalidate the January 2003 Order was granted there remains the Mayor’s order. The Mayor is authorized to act in these matters under the Ordinance; the parties have relied upon it (as well as the Board’s Order) as disposing of the certification issue; the Board is without authority to revisit the Mayor’s recognition and certification of NMTU.

Given the ongoing collective bargaining relationship between the City and NMTU, the absence of a legal basis for the Board to review the Mayor’s decision that recognizes NMTU as exclusive representative, and the 1-year protective period for attaining an agreement accorded to NMTU as a result of the Board’s Order, IBT’s request to represent transit employees will not be entertained at this time. Accordingly, IBT’s request is denied and dismissed.

Patrick Halter 6/18/04

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LMRB - Chair

Deborah Lattimore

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Debra B. Saine

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