

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

STATIONARY ENGINEERS, LOCAL 39,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,

ITEM NO. 295

CASE NO. A1-045505

Complainant,

DECISION

-vs-

CITY OF ELKO, NEVADA, a political
subdivision of the State of
Nevada,

Respondent.

For the Complainant: Larry D. Lessly, Esq.
MOSCHETTI & LESSLY

For the Respondent: Richard G. Barrows, Esq.
WILSON & BARROWS, LTD.

For the EMRB: Howard Ecker, Chairman
Salvatore C. Gugino, Vice Chairman
Tamara Barengo, Member

STATEMENT OF THE CASE

In a pre-hearing telephone conference held on April 14, 1992, the Complainant, STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO ("Union"), and Respondent, CITY OF ELKO, NEVADA ("City"), narrowed the issues to the following:

1. Whether prior to October 22, 1991, Mike Magnani, a business representative of Local 39, responsible for collective bargaining with the City, and David L. Cohen, a representative of the City and responsible for collective bargaining with the Union mutually agreed that on October 22, 1991, they would strike names for selection of a factfinder who would conduct factfinding for the parties with respect to current negotiations.

/ / /

1 2. Whether during a conversation between Mr.
2 Magnani and Mr. Cohen on October 22, 1991, the
3 parties agreed that on October 29, 1991 they would
4 strike the names of the panel members who would
5 determine if the factfinding would be binding.

6 3. Whether the Union has impermissibly
7 delayed in providing the City with relevant
8 information as set forth in paragraph 13 of the
9 City's Answer.

10 4. Whether or not the parties are precluded
11 from proceeding to factfinding if they fail to
12 schedule the dates and times for factfinding by
13 October 20, as required by NRS 288.200(4).

14 5. Whether the Union is precluded from
15 proceeding to factfinding because the Union failed
16 to schedule, or even attempt to schedule the dates
17 and times for the factfinding hearing before
18 October 21 as required by NRS 288.200(4), i.e.,
19 whether the deadline is mandatory as opposed to
20 directory.

21 6. Whether the Board is authorized by NRS
22 Chapter 288 to extend beyond October 21 the date
23 to schedule the dates and times for the fact-
24 finding hearing.

25 7. Whether the City's refusal to continue to
26 factfinding as a result of the failure to schedule
27 dates and times for the factfinding hearing before
28 October 21 constitutes a refusal to bargain
29 collectively in good faith as required by NRS
30 288.270(1)(e).

31 8. Whether the City is entitled to its
32 attorneys' fees and other reasonable costs
33 incurred in this matter pursuant to NRS
34 288.110(6).

35 9. Whether the Union is entitled to its
36 attorneys' fees and other reasonable costs
37 incurred in this matter pursuant to NRS
38 288.110(6).

39 Additionally, the Union presented the following issues
40 which were not stipulated to by the City:

41 1. Whether on October 29, 1991 in a
42 negotiation session between the City and the
43 Union, the City advised the Union that the parties
44 had no right to go forward into binding

1 factfinding because NRS 288.200(4) requires that a
2 schedule of dates and times for the factfinding
hearing be established before October 20, 1991.

3 2. Whether the Board has the authority,
4 pursuant to NRS 288.110(2), to extend the time in
5 which the parties may participate in factfinding
6 or the formation of a panel to determine if
factfinding shall be binding upon the parties, and
if so, is the Union entitled to such an order.

7 Also, the City presented the following issue which was
8 not stipulated to by the Union:

9 1. Whether the Union's delay in providing
10 the City with relevant information as set forth in
paragraph 13 of the City's Answer constitutes a
refusal to bargain in good faith.

11 On June 3, 1992, the Local Government Employee-
12 Management Relations Board ("EMRB" and "Board") conducted a
13 hearing on the instant Complaint. The Board's Discussion,
14 Findings of Fact, Conclusions of Law, Decision and Order are
15 set forth below:

16 DISCUSSION

17 From the facts stipulated to by the parties, the
18 testimony of witnesses cross-examined at the Hearing and other
19 evidence of record, the Board has determined that the
20 Complaint is meritorious.

21 I.

22 THE CITY'S REFUSAL TO PROCEED
23 TO FACTFINDING CONSTITUTED A
24 FAILURE TO BARGAIN IN GOOD FAITH.
(Stipulated Issue No. 7 and
Union Issue No. 1)

25 By the actions and representations of Mr. David L. Cohen
26 (the City negotiator) the Union was clearly led to believe
27 that the City would be willing to proceed to factfinding,
28

1 without imposition of any conditions as to whether or not said
2 factfinding would be final and binding and notwithstanding t.
3 October 21 deadline for scheduling the dates and times for the
4 factfinding hearing, as set forth in NRS 288.200(4). In fact,
5 on October 22, 1991, after the October 21 deadline for
6 scheduling factfinding had elapsed, Mr. Cohen wrote the
7 Federal Mediation and Conciliation Service, advising that the
8 parties had selected a factfinder and requesting that the
9 factfinder provide the parties with available dates for a
10 hearing. It was not until a negotiating session on October
11 29, 1991, that Mr. Cohen belatedly notified the Union of the
12 City's position that the Union was precluded from proceeding
13 to factfinding due to the failure to schedule the factfinding
14 hearing by October 21, pursuant to NRS 288.200(4).

15 Mr. Cohen testified to the effect it is his positio..
16 that the City could have waived the deadline for factfinding
17 on other than a final and binding basis, if the Union had so
18 requested. However, his testimony indicated that in his
19 discussions regarding factfinding with the Union, he never
20 alluded to a particular type of factfinding, nor did he advise
21 the Union at any time prior to the hearing of his willingness
22 to proceed to non-binding factfinding; also, during the
23 Pre-Hearing Conference the parties stipulated (Issue No. 4)
24 that the issue was "whether or not the parties are precluded
25 from proceeding to factfinding . . ." (Emphasis added.) The
26 Union, therefore, had no reason to assume that the City's
27 position in the premise applied only to final and binding
28

1 factfinding.

2 During cross-examination Mr. Cohen testified that the
3 reason he did not advance the position that the Union was
4 precluded from proceeding to binding factfinding until October
5 29, 1991, was that he "hadn't had a chance to really sit down
6 and look over the statute and confer with my client (the
7 City)." He testified that he didn't intend to mislead the
8 Union. However, the totality of Mr. Cohen's actions and
9 representations throughout the negotiating process belie his
10 testimony in this regard and indicated a willingness prior to
11 October 29, 1991, to proceed to factfinding notwithstanding
12 the statutory deadline for scheduling same. It appears that
13 he either deliberately misled the Union or that the position
14 he belatedly advanced on October 29, 1991 (that the Union was
15 precluded from proceeding to factfinding) was an afterthought
16 and was pretextual in nature. In either event, the Board
17 finds that by virtue of Mr. Cohen's actions and
18 representations throughout the negotiating process (and even
19 beyond the statutory deadline), the City waived any right it
20 may have had to refuse to proceed to factfinding. Mineral
21 County Public Safety Dispatchers Association vs. Board of
22 County Commissioners of Mineral County and Mineral County,
23 Nevada, EMRB Item No. 265, Case No. A1-045482 (May 30, 1991).
24 Accordingly, under the particular facts and circumstances
25 involved in the instant case, the City's refusal to proceed to
26 factfinding - with the issue of whether or not to make the
27 factfinder's findings and recommendations final and binding to
28

1 be determined by a panel created pursuant to NRS 288.200(b)
2 constituted a failure to bargain in good faith as required by
3 NRS 288.270(1)(e).

4 II.

5 THE BOARD HAS THE AUTHORITY TO
6 EXTEND THE TIME IN WHICH THE PARTIES
7 MAY SCHEDULE AND PARTICIPATE IN
8 FACTFINDING, AS WELL AS THE TIME
9 FOR FORMATION OF A PANEL TO
10 DETERMINE IF FACTFINDING SHALL BE
11 BINDING.

12 (Stipulated Issues No. 4, 5 and 6
13 and Union Issue No. 2)

14 As concerns specifically the issue of whether or not the
15 Board has the authority, pursuant to NRS 288.110(1) and (2),
16 to extend the time in which the parties may schedule and
17 participate in factfinding as well as the time for formation
18 of a panel to determine if factfinding shall be binding up
19 the parties, the Board finds that it indeed does have such
20 authority, and it has exercised same whenever the parties have
21 waived statutory deadlines to facilitate constructive
22 negotiations. Reno Police Protective Association vs. City of
23 Reno, EMRB Item No. 175, Case No. A1-045390 (January 30, 1985)
24 and White Pine Association of Classroom Teachers vs. White
25 Pine County Board of School Trustees, EMRB Item No. 36, Case
26 No. A1-045288 (May 30, 1975).

27 At this point it is important to note that, from the
28 testimony and other evidence of record, it is clear that the
City was primarily responsible for the delay in selecting a
factfinder (the delay in striking names); therefore, the City
must bear most (if not all) of the responsibility for ti.

1 resulting failure of the parties to schedule factfinding on or
2 before October 21, 1991.

3 The list of factfinders provided by FMCS was received by
4 the City (Mr. Cohen) and the Union's business representative
5 (Mr. Magnani) on or about September 30, 1991. Mr. Magnani
6 testified that he contacted Mr. Cohen on or about October 1,
7 1991, and Mr. Cohen indicated that he was not prepared to
8 strike names at that time. During a subsequent telephone
9 conversation Mr. Cohen indicated he would be ready to strike
10 names when they met for negotiations on October 7, 1991. They
11 did not strike names on October 7, 1991; Mr. Cohen indicated
12 he had a plane to catch, but he would call Mr. Magnani on the
13 following day. Subsequently, Mr. Magnani called Mr. Cohen on
14 two occasions regarding striking names, to no avail. Mr.
15 Cohen was not prepared to strike names at a negotiating
16 session on October 17th, but indicated he would call Mr.
17 Magnani for that purpose on October 21st. A factfinder was
18 finally selected on October 22, 1991. This sequence of events
19 clearly places most (if not all) of the responsibility for the
20 delay upon the City and, as testified by Mr. Cohen, it was not
21 possible to schedule a factfinding date by the statutory
22 deadline (even if a factfinder had been selected on October
23 17, 1991); therefore, the failure to meet the statutory
24 deadline was a direct result of the refusal of Mr. Cohen to
25 strike names on a timely basis.

26 Following receipt of the Union's request for a panel to
27 determine whether or not the findings and recommendations of
28

1 the factfinder will be final and binding, the EMRB's
2 Commissioner wrote the parties on September 30, 1991, in
3 pertinent part as follows:

4 The EMRB has received your request for a
5 panel hearing pursuant to NRS 288.200(6) and NRS
6 288.201. The date for the determination by the
7 panel on whether or not to make the findings and
8 recommendations of the factfinder final and
9 binding in your negotiations may be extended upon
10 your request pursuant to NRS 288.200(6).

11 If no extension is requested, we will
12 schedule the panel hearing on your case as soon as
13 you have notified us of the names of the attorney
14 and the accountant which the parties have chosen.

15 Please inform me of the date(s) for your
16 factfinding hearing as soon as possible. Pursuant
17 to NRS 288.200(4), this scheduling must be
18 complete before October 20, a date which cannot be
19 extended.

20 Concurrently, the Union wrote the State Board of Nevada and
21 the Nevada State Board of Accountancy, requesting a list of
22 members who would serve on the panel. On October 17, 1991,
23 upon the instruction of the EMRB Commissioner, EMRB's
24 Secretary wrote the parties in pertinent part as follows:

25 This letter is to confirm telephone
26 conversations had with a representative for
27 I.U.O.E. Local 39 and David Cohen, representative
28 for the City of Elko, wherein the parties were
instructed by the EMRB Board Secretary not to
strike names from the list of attorneys recently
provided by the Nevada State Bar.

The lists provided to the parties by the
Nevada State Bar were incorrect lists containing
names of Southern Nevada attorneys rather than
Northern Nevada attorneys. Due to the location of
the parties involved, the parties should have been
provided with lists of Northern Nevada attorneys
in which to strike names from.

The Nevada State Bar was contacted by the
EMRB Board Secretary on October 17, 1991, and
informed of the mix-up in lists. Linda, from the

1 Nevada State Bar, indicated that she would send
2 out the correct lists to the parties immediately.
3 Upon receipt of the correct lists, the parties
4 will have eight (8) days in which to strike names.

5 As for the October 20th deadline, or in this
6 case October 21st due to the 20th falling on a
7 Sunday, the parties should have established a
8 schedule of dates and times for the factfinding
9 hearing. As for a determination being made by the
10 factfinding panel not later than October 20th,
11 this date will have to be extended by the
12 Commissioner due to the mix-up in lists delaying
13 the date in which a panel could possibly be
14 formed.

15 Please contact the EMRB immediately following
16 the striking of names from both lists and provide
17 the EMRB with the names of the attorney and
18 accountant who will sit on the factfinding panel,
19 along with the date scheduled for the factfinding
20 hearing.

21 As evidenced by the above, it is quite likely that the
22 delay in selecting the panel, which resulted from the Nevada
23 State Bar sending out the incorrect list of attorneys,
24 contributed to the failure of the parties to schedule the
25 factfinding hearing by October 21st, as required by NRS
26 288.200(4). (The panel must be convened prior to the
27 factfinding hearing, to determine which, if any, of the
28 factfinder's findings or recommendations will be final and
binding; therefore, the selection of the panel and arranging a
meeting date/place for the panel could have been a
determinative factor in scheduling the factfinding hearing.)
It is clear, however, that the overriding reason for the
failure of the parties to schedule factfinding on or before
October 21, 1991, was the fact that the Union had been
convinced by the actions and representations of Mr. Cohen that
the City would be willing to proceed to factfinding, even if

1 same were to be scheduled after the statutory deadline.
2 (Prior to October 29, 1991, Mr. Cohen certainly had not give.
3 the Union any reason to suspect that he would refuse to
4 proceed to factfinding if same were not scheduled on or before
5 October 21st.) Under the circumstances, therefore, it is
6 entirely proper and appropriate for the Board to exercise the
7 authority with which it is vested and extend the time limit
8 for scheduling factfinding and formation of a panel to
9 determine if factfinding shall be binding upon the parties.

10 III.

11 PRIOR TO OCTOBER 22, 1991, UNION'S
12 BUSINESS REPRESENTATIVE AND CITY'S
13 REPRESENTATIVE (MR. COHEN) AGREED TO
14 STRIKE NAMES FOR SELECTION OF A
15 FACTFINDER ON OCTOBER 22, 1991.
16 (Issue No. 1)

17 Based on the totality of the testimony elicited durin
18 the hearing, as well as other evidence of record, the Board
19 finds that the question posed by Issue No. 1 must be answered
20 in the affirmative.

21 IV.

22 DURING CONVERSATION BETWEEN UNION'S
23 BUSINESS REPRESENTATIVE AND CITY'S
24 REPRESENTATIVE (MR. COHEN) ON
25 OCTOBER 22, 1991, THE PARTIES AGREED
26 THAT ON OCTOBER 29, 1991, THEY WOULD
27 STRIKE THE NAMES OF THE PANEL MEMBERS
28 WHO WOULD DETERMINE WHETHER OR NOT
FACTFINDING WOULD BE FINAL AND BINDING.
(Issue No. 2)

Based on the totality of the testimony elicited during
the hearing, as well as other evidence of record, the Board
finds that the question posed by Issue No. 2 must be answered
in the affirmative.

V.

WHETHER UNION DID OR DID NOT
IMPERMISSIBLY DELAY PROVIDING THE
CITY WITH RELEVANT INFORMATION IT
HAD REQUESTED IS NOT RELEVANT.
(Issue No. 3 of stipulated issues and
Issue No. 1 of City's issue(s))

As an initial observation regarding the City's allegation in the premise, the Board notes that an "impermissible delay in providing . . . relevant information" in the context of collective bargaining could be considered as constituting a failure to bargain in good faith, a prohibited practice under NRS 288.270(1)(e). In the instant case, the Board received no counterclaim or complaint from the City, alleging that the Union failed to bargain in good faith. For this reason, the Board is inclined to view the City's position regarding the Union's alleged "impermissible delay in providing . . . relevant information" as a pretextual defense for its own delay in striking names for selection of a factfinder. The Board finds no reason to conclude from the testimony and other evidence of record that the Union's alleged delay in providing information requested by the City was causative, either directly or indirectly, of the failure of the parties to schedule factfinding by the statutory deadline. Accordingly, the question(s) posed by Issue No. 3 of the stipulated issues and Issue No. 1 of the City's issues is not deemed relevant to deciding the case at bar.

/ / /

/ / /

/ / /

1 VI.

2 THE UNION IS ENTITLED TO ATTORNEY'S
3 FEES.
4 (Stipulated Issues No. 8 and 9)

5 In view of the City's failure to bargain in good faith
6 (which resulted in the Union being required to incur
7 attorney's fees and related costs in order to restore
8 integrity to the collective bargaining process), the Board
9 finds that the Union is entitled to attorney's fees as set
10 forth in the Board's Decision and Order which follows:

11 FINDINGS OF FACT

12 1. That the Complainant, Stationary Engineers, Local
13 39, International Union of Operating Engineers, AFL-CIO, is a
14 local government employee organization.

15 2. That the Respondent, City of Elko, Nevada, is
16 local government employer.

17 3. That on September 13, 1991, the Union requested
18 factfinding and on or about September 30, 1991, the parties
19 received a list of factfinders from the Federal Mediation and
20 Conciliation Service, from which they were to select a
21 factfinder.

22 4. That on or about October 1, 1991, the Union's
23 business representative (Mr. Magnani) placed a telephone call
24 to the City' negotiator (Mr. Cohen) wherein Mr. Cohen
25 indicated he was not prepared to strike names at that time.

26 5. That during a subsequent telephone conversation the
27 parties agreed to select a factfinder when they met for
28 negotiations on October 7, 1991.

1 6. That on October 7, 1991, following completion of the
2 parties negotiation session, Mr. Magnani asked Mr. Cohen if he
3 was ready to strike names and Mr. Cohen indicated that he had
4 a plane to catch and he would call Mr. Magnani on the
5 following day.

6 7. That subsequent to October 7, 1991, Mr. Magnani
7 called Mr. Cohen regarding the striking of names and again was
8 told that he was not prepared to strike names for a
9 factfinder; also, that the parties should strike names for the
10 factfinding panel (from the lists provided by the State Bar
11 and the State Board of Accountancy) at the same time as they
12 struck names for the factfinder.

13 8. That subsequent to the above-referenced conversation
14 Mr. Magnani again called Mr. Cohen regarding the striking of
15 names and again was told that he was not prepared to strike
16 names, but that the parties could strike names at their next
17 negotiating session on October 17, 1991.

18 9. That on October 17, 1991, Mr. Magnani asked Mr.
19 Cohen if he was prepared to strike names and again he was told
20 that he was not prepared to strike names; also, that the
21 parties were waiting for another (correct) list from the State
22 Bar to be utilized in connection with striking names for the
23 factfinding panel. Mr. Cohen suggested that the parties could
24 strike names when they received the new list from the State
25 Bar, and that he would get in touch with Mr. Magnani.

26 10. That on October 18, 1991, the Union's secretary (Ms.
27 Cloyd) telephoned Mr. Cohen and attempted to strike names for
28

1 factfinder. Mr. Cohen told Ms. Cloyd that he was not prepared
2 to strike names, did not feel it was necessary and he would
3 get back in touch with Mr. Magnani.

4 11. That on October 22, 1991, the parties struck names
5 (selected a factfinder) and Mr. Cohen wrote the Federal
6 Mediation and Conciliation Service, notifying said service of
7 the selection and requesting that the factfinder selected
8 provide the parties with available dates for a hearing.

9 12. That on October 29, 1991, Mr. Cohen advised Mr.
10 Magnani it was his position (the City's position) that the
11 Union does not have the legal right to proceed to (binding)
12 factfinding because the factfinding hearing was not scheduled
13 within the time required by NRS 288.200(6).

14 13. That on November 12, 1991, the Union brought the
15 instant Complaint before the board, alleging that the City's
16 refusal to proceed to factfinding constitutes a refusal to
17 bargain in good faith and a violation of NRS 288.270(1)(e).

18 14. That on December 2, 1991, the City filed a Motion to
19 Dismiss the instant Complaint on the premise that the
20 Complaint failed to state a claim upon which relief can be
21 granted based on the failure of the parties to schedule dates
22 and times for the factfinding hearing by the statutory
23 deadline.

24 15. That on January 9, 1992, the Board denied the City's
25 Motion to Dismiss, in order to afford the Board an opportunity
26 to consider the facts and any mitigating factors which may
27 have been involved in the parties' failure to comply with the
28

1 statutory deadline.

2 CONCLUSIONS OF LAW

3 1. That the Local Government Employee-Management
4 Relations Board has jurisdiction over the parties and the
5 subject matter of this Complaint, pursuant to the provisions
6 of NRS Chapter 288.

7 2. That the Complainant, Stationary Engineers, Local
8 39, International Union of Operating Engineers, AFL-CIO, is a
9 recognized employee organization as defined by NRS 288.040.

10 3. That the Respondent, City of Elko, Nevada, is a
11 recognized local government employer as defined by NRS
12 288.060.

13 4. That, under the facts and circumstances prevailing
14 in the instant Complaint, the parties' failure to schedule the
15 factfinding hearing by October 21, 1991 (the statutory
16 deadline) does not preclude the parties from proceeding to
17 factfinding, pursuant to NRS 288.200, with the issue of
18 whether or not the factfinder's recommendations are to be
19 final and binding to be determined by a panel selected
20 pursuant to NRS 288.200, NRS 288.201 and NRS 288.202.

21 5. That, under the facts and circumstances prevailing
22 in the instant Complaint, the Board has the authority,
23 pursuant to NRS 288.110(1) and (2), to extend the time in
24 which the parties may schedule and participate in factfinding,
25 as well as the time for formation of a panel to determine
26 whether or not factfinding is to be final and binding.

27 6. That, under the facts and circumstances prevailing
28

1 in the instant Complaint, the City's refusal to proceed to
2 factfinding, with the issue of whether or not the factfinder's
3 findings and/or recommendations are final and binding to be
4 decided by a panel, constitutes a failure to bargain in good
5 faith and a violation of NRS 288.270(1)(e).

6 DECISION AND ORDER

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

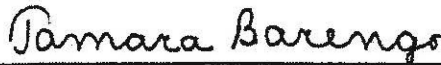
8 1. That the Union's Complaint is upheld to the extent
9 set forth in the Board's Conclusions of Law, and the
10 factfinding hearing shall be scheduled immediately, with the
11 issue of whether or not the factfinder's findings and/or
12 recommendations to be decided by a panel, selected from the
13 lists previously furnished the parties by the Nevada State
14 Board of Accountancy and State Bar of Nevada, pursuant to NF
15 288.202; and

16 2. That the Respondent, City of Elko, Nevada, shall pay
17 Complainant, Stationary Engineers, Local 39, International
18 Union of Operating Engineers, AFL-CIO, \$1,000.00 for costs and
19 attorney's fees incurred in connection with this proceeding.

20 DATED this 18th day of August, 1992.

21 LOCAL GOVERNMENT EMPLOYEE-
22 MANAGEMENT RELATIONS BOARD

23 By 
24 SALVATORE C. GUGINO, Chairman

25 By 
26 TAMARA BARENGO, Vice Chairman

27 By 
28 HOWARD ECKER, Member