City v. L. 1180, CWA, 1 OCB 8 (BCB 1968) [Decision No. B-8-68 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, Docket No. BCB-1-68
Petitioner

vs.

COMMUNICATIONS WORKERS OF AMERICA, Decision No. B-8-68
LOCAL 1180, AFL-CIO,

Respondent :

DECISION AND ORDER

On July 21, 1968, Malcolm D. MacDonald, Esquire, Trial Examiner, issued his Intermediate Report herein, in which he found that the dispute between the parties was arbitrable. Exceptions to the Intermediate Report were filed by The City of New York on August 9, 1968, together with a request for oral argument, which was subsequently withdrawn. Both parties filed briefs.

Upon the entire record herein, and the briefs, the Board makes the following findings of fact and conclusions of law, and renders the following decision:

In December, 1967, Respondent sought arbitration of its contention that the City had violated certain provisions constituting part of the collective bargaining agreement between the parties. The City thereafter instituted the present proceeding in which it contested arbitrability on two grounds:

(1) no agreement had been reached on the contractual provision which the union asserts was violated, and,

(2) there is no written agreement to arbitrate disputes between the parties.

Prior to the hearing herein, the City withdrew its second contention, and, in an Amended Reply, admitted inter alia, "that the parties, in negotiating a collective bargaining agreement, did arrive at an understanding that said agreement should contain a provision setting forth the particulars for the arbitration of grievances" which provision

"awaits the consent and approval of the parties."[1]

The City's exceptions to the Intermediate Report allege that the Trial Examiner was biased and prejudiced, and that he exceeded his authority in that he passed upon the merits of the dispute between the parties. The record discloses no basis whatsoever for the claim of bias. The hearing was conducted fairly, impartially, and in a judicial manner. Nor do we find merit in the claim that the Trail Examiner usurped the arbitrator's function. It is the function of an arbitrator to interpret and apply the language of a contract. But here, the failure of the parties to prepare and execute a written contract, embodying the agreed terms,[2] made it necessary for the Trial Examiner to determine the nature and extent of the disputed provisions. Where the existence of a contract, or provision thereof, is disputed, that issue properly is resolved by the forum charged with the responsibility of determining substantive arbitrability.

As was said in Local 998, UAW v B&T Metals Co., 6 Cir., 315 F.2d 432, 436, 52 LRRM 2787, 2790:

> "In the Atkinson case [Atkinson v Sinclair Refining Co., 370 U.S. 238, 241, 50 LRRM 2433], the Supreme Court said, 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'
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> * * * *
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> "Whether such a contract exists is a question ,which, in our opinion under the authorities above cited, must be decided by the Court before any authority is conferred upon the arbitrator."

See also, Central Aviation & Marine Corp. v UAW, 2 Cir., 319 f.2d 589, 53 LRRM 2622.

The Positions of the Parties

[1] Section 8 of Executive order 52 contains grievance-arbitration provisions which are applicable "except as otherwise provided in collective bargaining agreements." In view of the City's withdrawal of its second contention, we need not pass upon the application of §8 herein.

[2] The agreed wage rates were embodied in An Implementing Personnel Order dated October 19, 1967 (IPO 67/37).

The parties agree that they engaged in collective bargaining negotiations starting in may, 1966, and which continued, from time to time, until April 12, 1967, when agreement was reached.

The Union contends that the City agreed to release one employee full time, with pay, to act as the Union's representative in the handling of grievances; that the Union designated Milton Balsam as such representative; that such designation was not subject to approval by the City; that .the City thereafter breached its agreement by refusing to release Balsam; and that such violation is arbitrable under the terms of the agreement.

The City concedes that released time was discussed, but asserts that such discussions were not part of the contract negotiations , and that provision for released time was not to be included in the contract; that it had merely indicated a willingness to grant the full time release of one man, with pay, when, as and if a contemplated policy of releasing one man for every two thousand employees became operative. The City acknowledges that the Union named Balsam as its grievance representative, but contends that under the proposed new policy the Union's designation of any particular employee would be subject to the approval of the head of the department in which he was employed. The City further asserts that it was agreed by the parties that the written agreement was to contain an arbitration clause to be agreed upon by the parties.

The Agreement on Released Time

Released time is an appropriate and lawful subject for collective bargaining and provision therefor conceitedly has been included in a number of contracts between the City and public employee organizations. Accordingly, if agreement was-reached thereon, it is enforceable

It is undisputed that released time was discussed at several meetings of the parties. During the course of these discussions, the Union's early request for the release of five employees was reduced to one, the number which the City's representatives had indicated would be acceptable. The crucial differences between the parties relate to whether the agreement on released time was unqualified, and whether the Union's designation of a particular individual was subject to the approval of his department head.

Herbert Haber, the City's Director of Labor Relations, testified (S. M. 28):

> "I indicated that in accordance with a program that the City was attempting to adopt, that we were prepared to have one person released for every 2,000 of membership, which -- under which formula this union would be entitled to one, and that since we were granting this, if the policy came to fruition, to other unions, that I was prepared to go along with that with this union on the same basis and terms as I had with the other unions."

William Hediger, A Deputy Director of Labor Relations, testified to the same effect.[3]

Although the Union's stated, formal position is that the agreement on released time was unqualified, the testimony of two of its witnesses is consistent, in part at least, with that of the City's witnesses. Thus, Ted Watkins, Director of the Union's Civil Service Division, testified (S.M. 250):

> "Throughout the course of the negotiations, Mr. Haber, when we talked about full time release, used the same language -- he was adopting or trying to establish a policy in the City of New York, one full time released person for every two thousand employees." (emphasis added)

[3] The Union stresses Mr. Haber's letter of July 17, 1967, to Goodman, the head of Balsam's department, requesting Balsam's release. However, as that letter was written three months after the agreement, it could have been written after the new policy became effective. Moreover, the fact the letter "requests" Balsam's release may indicate the department head's approval was required.

Mr. Balsam testified to the same effect, saying (S.M. 289):[4]

> "Well, as I stated before, he [Haber] felt that in dealing with this demand, he would be guided by and be forced to accede only to the extent that some Citywide policy, wherein one employee for every two thousand in a group would be so released." (emphasis added)

Thus testimony by witnesses on both sides indicates that the agreement on released time was conditioned upon the establishment of a new Citywide policy. Developments in the City's labor relations program add corroborative support to that testimony.

The City's Office of Labor Relations, of which Mr. Haber is the Director, had been established on February 7, 1967, by Mayor Lindsay's Executive Order 38. That Order centralized in the Director of Labor Relations the power to conduct the City's Labor Relations and to "establish broad City-wide policy governing them."

Prior thereto, released time had been governed by Mayor Wagner's Executive Order 38, issued in 1957, which was predicated upon departmental certifications. In the intervening years, collective bargaining had progressed to units of City-wide titles which crossed departmental lines (See Matter of District Council 37 and The City of New York, Decision No. 44-68). Policy concerning released time thus was a subject which normally would be reexamined at that time. In this connection, we note that the Union's original request for released time was made under the Executive Order issued in 1957.

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[4] Although the Union's third witness (Mr. Prial) testified that the agreement on released time was unqualified (S.M. 198), he also testified (S.M. 217):

> "I don't know whether he [Haber] referred to them as standard, but I assumed that if it were the policy of the City of one to two thousand, it was a standard item, similar to the City-wide clause being a standard item.
>
> "What I mean by them -- why I labeled those ones standard items? Basically, because they are those that are found in most of the agreements that the City comes into -- the grievance procedure, the Citywide clause, things of that nature."

Upon all the evidence, we find, therefore, that the parties reached an agreement for the full-time release of one employee, with Day, to become effective when and to the extent that the proposed new policy on released time became operative. We further find that the subsidiary question -- whether the Union's designation of a particular employee as its grievance representative was subject to approval -- also depends upon the nature and extent of the policy, if any, subsequently put into effect.

The Arbitration Clause

The parties agree that the contract, when reduced to writing, was to contain a "standard" arbitration clause. No other language was specified. However, the declared public policy of the City, the provisions of the New York City Collective Bargaining Law and Executive order 52, and the arbitration provisions contained in collective bargaining agreements between the City and other public employee organizations, establish, beyond doubt, that a dispute as to the interpretation and application of the agreement between the parties hereto is within the scope of the "standard" arbitration clause contemplated and agreed upon by them.[5]

Prior to the agreement reached by the parties on April 12, 1967, the City and a number of unions had entered into a contract which provided for the enactment of the New York City Collective Bargaining Law (NYCCBL). That agreement provides that "Collective bargaining agreements between the City and organizations representing City employees shall in all cases contain provision for grievance procedures in steps terminating with impartial arbitration of unresolved grievances." (Art. VII, Sec. A).

Section 1173-2 of the NYCCBL expressly declares it to be the policy of the City "to favor and encourage final impartial arbitration of grievances between municipal agencies and certified employee organizations, and §1173-8.Of states "written collective bargaining agreements should contain provisions for grievance procedures and impartial binding arbitration."

[5] The City's exceptions to the Intermediate Report contain no specific exception to the Trial Examiner's finding that the dispute was within the scope of a "standard" arbitration provision. See N.L.R.B. v Cheney Lumber Co., 327 U.S. 385, 387-8; Holland v Edwards (S.C.A.D), 307 N.Y. 38; N.L.R.B. v Seven-Up Bottling Co., 344 U.S. 374).

Section 8a(2) of Executive order 52, which establishes the grievance-arbitration procedures to be applicable "except as otherwise provided in collective bargaining agreements," defines the term "grievance" as including "a dispute concerning the application of the terms of (i) a collective bargaining agreement, *** * ***."

A contract between the City and Social Service Employees Union, dated September 21, 1967, was marked in evidence at the hearing. That contract, which covers the period from January 1, 1967 to December 31, 1968, includes in its definition of arbitrable grievances "a claimed violation, misinterpretation, inequitable application, or non-compliance with the provisions of this contract or any supplemental agreement." (Art. XIV, Sec. I 1). Other contracts between the City and various unions, filed with the Board pursuant to Rule 3.5, though varying in verbiage, provide that grievances concerning the interpretation and application of the contract are arbitrable.[6]

We find, therefore, that the "standard" arbitration clause contemplated by the parties covers and includes the interpretation and application of the agreement between them.

Conclusion

Testimony at the hearing established that it is customary for the City to prepare the written contract embodying the terms agreed upon, but unions are not barred from doing so. At the time of the hearing herein, no written contract had been prepared by either party, although more than a year had elapsed since agreement was reached.

Section 1173-2 of the NYCCBL states it to be the policy of the City "to favor and encourage *** * *** written collective bargaining agreements *** * *** ." The instant case is a classic example of the vexatious problems arising out of a failure to follow that policy -- problems which could have been avoided if the contract had been reduced to writing, promptly. The duty of full faith compliance

[6] Rule 3.5 requires every public employer entering into a collective agreement to file a copy thereof with this Board, and that copies so filed shall be public records. Accordingly, the Board may, and should, take official notice thereof.

with the provisions of the statute includes the obligation to reduce agreements to writing within a reasonable time, and the Board will expect such compliance in the future by the City and by public employee organizations. Enlightened self-interest should dictate the same policy.

Having found that the parties entered into an agreement for the full time release, with pay, of one employee, to become effective when, and to the extent that, the then proposed new City policy on released time became operative, and that the "standard" form of arbitration clause contemplated by the parties encompasses disputes concerning the alleged violation,. interpretation and application of the agreement, we shall direct that the following questions be submitted to arbitration:

1. Did the parties' agreement on released time become operative, in whole or in part, by virtue of subsequent action by the City establishing and putting into effect a new policy of releasing one employee for each two thousand employees?

2. If such new policy was established and put into effect, in whole or in part, did that policy require that the employee designated by the Union as its grievance representative be approved by the City ?

3. If such new policy was established and put into effect, in whole or in part, did the City's refusal to release Milton Balsam full time, with pay, violate the terms of the agreement between the parties?

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the questions specified above be, and the same hereby are, referred to an arbitrator to be agreed upon by the parties or to be appointed by the Director of the office of Collective Bargaining in accordance with the provisions of the New York City Collective Bargaining Law and the Rules of the Board.

Dated, New York, N.Y.

October 4 , 1968.

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

SAUL WALLEN
Member

TIMOTHY W. COSTELLO
Member

EDWARD SILVER
Member

Messrs. Hall and Van Arsdale concur in the findings that the Trial Examiner was not biased and did not exceed his authority, and would adopt the Intermediate Report without modification.