OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
- - - - - - - - - - - - - - - — - - - - - -X

DECISION NO. B-14-74

DOCKET NOS. BCB-179-74
BCB-180-74
BCB-181-74

DECISION AND ORDER

In these three cases, District Council 37 as the City-wide representative of employees in the career and salary plan, demands arbitration of three grievances related to the City's failure timely to make certain payments due under collective bargaining agreements. The City contests the arbitrability of he grievances because the remedy sought includes interest on overdue payments allegedly owed to the grievants:

> (1) BCB-179 seeks arbitration of the "failure of" the Department of Health (HSA) to pay night differentials to custodial assistants and watchmen from 10/18/73 to present."

(2.)BCB-180 seeks arbitration of the "failure to pay night shift differential to Mental Health Workers employed by the Department of Health on Rikers Island from June 25, 1973 to present.

(3) BCB-181 seeks arbitration of the "continuing failure of the Department of Parks (PRCAA) to make overtime payments to climbers and pruners from June 1, 1970."

In all three cases, the Union seeks a remedy of retroactive payment with interest and current payment no later than the period following the pay period in which the work was performed.

The City does not deny that the question whether it failed to make the payments at issue is arbitrable: rather, the City argues that the requests for interest to be computed on the retroactive payments are impermissible and that for that reason the grievances are not arbitrable.

Positions of the Parties

The City shows that the parties negotiated over a union demand for an interest provision in the current City-wide contract but that no agreement was reached on such a provision. On the contrary, the parties agreed to leave this matter open for further negotiation. Upon these facts, the City argues that the Union is here attempting to obtain, through arbitration, what it failed to gain in contract negotiations. The City maintains that in light of this bargaining history and of the inclusion in the contract of specific provision for further negotiations on the subject of interest, any award of interest by an arbitrator would be ultra vires. The brief further argues that sound labor relations will be impaired if the Board permits an arbitrator to "prescribe a remedy which the Respondent clearly has not achieved through negotiation with the Petitioner."

The Union's answers argue that.:

> . . . the particular remedy which is appropriate for a particular violation of a contract is, of course, for the arbitrator to decide unless the con-ract itself limits his power to pro-vide a remedy. OLR cites no such limitations. Payment of interest is a very common remedy for failure to pay wages and is limited only by the statutory limit on the amount of interest a municipal corporation may pay.

The Union's brief points out that neither the NYCCBL nor the Board's rules require that the remedy sought be included in the request for arbitration. The form prepared by the OCB for filing requests does, however, ask the grievant to indicate the remedy sought. The brief argues that the Board functions as a court would in determining arbitrability, but "the Board was given no power to vacate or modify an arbitrator’s award and such power remains in the courts, pursuant to Section 7511 of the CPLR. "Thus, if a remedy deemed

appropriate by the arbitrator is considered to be in excess of his power the aggrieved party's remedy is by way of an Article 75 proceeding to vacate or modify the award."

The Union cites various federal cases for the proposition that "unless a particular remedy it; specifically prohibited in the contract or unless the contract clause provides for the precise remedy. . . the arbitrator is free to fashion an appropriate remedy." In response to the City's argument that the City-wide contract provisions leaving the demand for interest open to further negotiations indicate that interest is not a permissible remedy, the Union intends that that argument should be addressed to the arbitrator because it is an issue requiring construction and interpretation of the contract.

The Contract Provisions

Article III, Section lb, of the July 1, 1970 to June 30, 1973 City-wide contract provides:

> "Effective January 1, 1971, there shall be a shift differential of 10% for all employees covered by this contract for all scheduled hours of work between 6 P.M. and 8 A.M. with more than one hour of work between 6 A.M. and 8 P.M."

Article II, Section la, of the July 1, 1973 to June 30, 1976 City'-wide contract provides:

> "There shall be a shift differential of 10% for all employees covered by this Contract for all scheduled hours of work between 6 P.M. and 8 A.M. with more than one hour of work between 6 P.M. and 8 A. M.

Article IV, Section 1, of the 1970-1973 City-wide contract provides for the payment of overtime in various contingencies, including:

> a. "Ordered involuntary overtime . . which results in an employee working in excess of 40 hours . . . . "
>
> b. Ordered involuntary overtime “for those employees whose normal work week is less than' 40 hours . . . .”
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> C. "There shall be no rescheduling . . . to avoid the payment of overtime . . . . “ compensation
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> d. "Employees who are paid in cash for overtime may not credit such time for meal allowances."

Article IV, Section 2, of the 1973-1976 City-wide contract is to the same general effect.

Article XIV of the 1973-1976 City-wide contract defines a grievance as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement` and provides for the

various steps to be followed in processing grievances.[1]

The contractual provision cited by the City of New York as having the effect of precluding arbitration herein is Article IX, Section 10 of the 1973-1976 City-wide contract which provides:

> "The City shall make every reasonable effort to expedite the payment of agreed-upon wage increases, overtime compensation, shift differential pay, premium pay, and employee out-of-pocket expenses, an~ the Union shall be kept apprised of all progress. If the Union is dissatisfied with the City's effort in these areas, the Union may at any time subsequent to July 1, 1974, upon thirty days notice to the City, re-open its demands number 8, 16, 17, 18 and 24 as listed in Appendix C."

Appendix C, Demand No. 17, states:

> If overtime compensation is not paid on the second payday following the day on which it was earned, employees shall not be required to perform overtime work until overtime compensation has been paid.
>
> "Delayed overtime compensation shall be increased by ten percent (10%) for each week of the delay beyond the second payday.,,

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[1] Grievances under the 1970-1973 City-wide contract were governed by Executive Order 52 which defined a grievance as, inter alia "a dispute concerning the application or interpretation of the terms of a collective bargaining agreement."

> "Demand No. 18 states:
>
> All night shift, weekend, and assignment differential payments shall be paid within thirty (30) days after they are earned. Such differentials not paid within thirty (30) days shall draw interest of two percent (2%) per month."

A provision identical to Union Demand No. 17.regarding overtime compensation was included as an open item "for further negotiation upon the request of the Union" in Article XVI of the 1970-1973 City-wide contract. However, no mention is made in that article of interest payable an overdue shift differential payments.

Discussion

The Union's Demands Nos. 17 and 18 deal with the addition of interest to overdue payments of overtime and shift differential earned by employees. These demands are thus identical in form to the remedies requested in the instant grievances. Therefore, it is clear from the City-wide contract that the parties negotiated concerning the remedies requested herein and that they agreed that the Union might "at any time subsequent to July 1, 1974,,upon 30 days' notice to the City,

re-open its demand Pursuant to this provi sion, the Union filed a bargaining notice No. 747-74) on September 4, 1974, requesting further negotiations under Article IX. The City would have the Board find that, on its face, the contract precludes an award of interest because the parties have discussed the levying of interest, have agreed to negotiate further concerninq interest, and have not agreed that interest is a proper remedy.

The City's arguments go solely to the alleged impermissibility of the remedy requested. There is no contention that, apart from the demand for interest, the grievances are not arbitrable under the NYCCBL and the Board's prior decisions on arbitrability.

The Union argues that the City's contentions should properly be addressed to the arbitrator and not to the Board because they involve the interpretation and construction of the contract and the fashioning of an appropriate remedy, functions traditionally within the province of the arbitrator.

The Board has consistently followed the rule that the question of remedy is for the arbitrator,

(City of New York and Local 371, Decision No. B-9-71). In City of New York and CWA, et al., Decision No. B-5-74 the Board, commenting on "the City's failure to make a distinction between the alleged impermissibility of the remedy' sought and the arbitrability of the underlying alleged contract breach" said:

> "it is the general rule that arguments addressed to questions of remedy are not a bar to the arbitrability of the grievance, and the propriety of the remedy sought is to be considered by the arbitrator.,,
>
> "the possibility that the arbitrator's award might be in violation of his authority [does not] constitute a basis for departure from the general rule stated above that the question of remedy should be resolved by an arbitrator rather than this Board."

These precedents were adhered to in two recent cases with the additional admonition that the remedy, if any, must be consistent with applicable law. (City of New York and CWA, Decision No. B-6-74; City of New York and D.C. 37, Decision No. B-9-74.)

However, the City's argument herein, that the bargaining history between the parties conclusively precludes the arbitrator from considering the remedy requested by the Union, is an argument that has not previously been dealt with by the Board.

It is well settled Board policy (consistent with the decisions of the United States Supreme Court)[2] that doubtful issues of arbitrability are to be resolved in favor of arbitration. The scope of the Board's inquiry is limited to ascertaining whether the parties are in any way obligated to arbitrate disputes and if so whether the obligation is broad enough to cover the particular dispute presented.[3] If the grievance meets this limited test, it should be submitted to an arbitrator. As a corollary to this principle, it has often been held that the scope of inquiry in a suit to compel arbitration is much narrower than the review which may be had in a suit challenging an arbitrator's award as

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[2] Steelworkers v American Mfg. Co., 46 LRRM 2414 (1960); Steeworkers v Warrior & Gulf Navigation Co., 46 LRRM 2416 (1960).

[3] See OLR v SSEU, Decision No. B-2-69; City of New York and CWA and CSBA, Decision No. B-5-74.

being in excess of his jurisdiction.[4] In a few cases, however, the courts have made an extensive pre-arbitration inquiry into the powers of the arbitrator under a contract. In these cases, the courts have held that the contract language indicated that the parties intended that the forum deciding arbitrability, rather than the arbitrator, should initially determine the extent of the arbitrator's power to fashion a remedy under the contract.

The courts have undertaken this type of inquiry in only a very few cases and they have been mindful of the holding in United Steelworkers of America Warrior & Gulf Navigation Co., supra, that in a suit to compel arbitration it was error to admit evidence of bargaining history to show that the union failed to obtain through negotiation a provision relating to the subject it was seeking to arbitrate. The contract contained no express limitation of the right to arbitrate, only a phrase that matter

[4] Holly Sugar Corp. v Distillery Workers, 71 LRRM 2841 (9th Cir., 1969); Torrington Co.v-Metal Products Workers, 62 LRRM 2495 (2nd Cir., 1966).

"strictly a function of management" were not subject to arbitration. The court held that the language claimed to exclude the dispute from arbitration was not specific enough:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." (4G LRRM at 2420)

In Strauss v Silvercup Bakers, Inc., 61 LRRM 2001 (2nd Cir., 1965), the Union appealed from a district court decision compelling arbitration of a dispute over changes in methods of delivery. The contract included a broad arbitration clause; however, it also contained a provision that the employer could demand negotiations with the union on proposed changes in the delivery system and "in the event the parties are unable to agree, the dispute shall not, be subject to the Arbitration Procedure of this Agreement." The circuit court stated: "it is clear that a provision must be specific if it is to exclude a claim from arbitration . . . . .. The court found that the exclusionary language was not clear and it remanded the case for findings as to the intent of the parties at the time they drafted the exclusion. The court held

that the juxtaposition of a broad arbitration clause with a specific exclusionary proviso indicited that the parties wished the court to rule on the extent of the duty to arbitrate rather than leaving the interpretation of the exclusionary clause to the arbitrator. The court emphasized that the inquiry related only to the duty to arbitrate and not to the merits of the claim.

Strauss was followed in Jennings v Westinghouse Electric Corp., 67 LRRM 2851 (SDNY, 1968) where the contract included an arbitration clause which limited the matters subject to arbitration. The court held that it would take evidence on the intent of the parties in drafting the exclusionary language in order to determine the scope of matters excluded.

The arbitrability clause in the City-wide contract herein is broad and contains no exclusionary language limiting the matters subject to arbitration or prescribing the powers of the arbitrator. Unlike the language cited by the courts in Strauss and Jennings, the language which it is alleged precludes the power of the arbitrator herein is not part of the arbitrability clause. Therefore, under the rule of Strauss and Jennings, there is no clear and express indication on the face of the contract that matters pertaining

to interest on overdue payments are excluded from the purview of the arbitrator. Nor is there any indication that the language relating to reopening of negotiations on interest was intended to preclude an arbitrator from awarding interest in a proper case. The tests which mu-=t be met under Strauss and Jennings to permit the Board to determine whether interest on overdue payments is a permissible subject of arbitration under the contract have not been met. Therefore, we conclude that that determination must be left to the arbitrator. The City does not argue that interest may not be awarded by an arbitrator in a proper case. It is well settled that an award of interest is "within the broad discretion of an arbitrator in fashioning appropriate relief," [5]

In Torringtcn Co. v Metal Products Workers, 62 LRRM 2495 (2nd Cir., 1966), the court ventured into an examination of thee bargaining history in order to determine whether the arbitrator's award was in excess of his jurisdiction as claimed by the employer. The arbitrator awarded a continuance of a "voting time" policy which

[5] Steelworkers v U.S. Gypsum Co., 79 LRRM 2833, 2838 (ND Ala., 1972) ; See also, Cloak, Suit & Dressmakers v Senco, Inc., 69 LRRM 2142 (D Mass., 1968); Textile Workers Local 179 v Western Co. , 86 LRRM 2039 (ED Miss. , 1974)

the employer had discontinued prior to the signing of the new contract and which the union had failed to obtain in the new contract. The contract contained language prohibiting the arbitrator from adding to its terms. The court found that the bargaining history showed that the union had failed to obtain "voting time" in the new contract and thus the arbitrator exceeded his jurisdiction by expanding the contract on the basis of a the express terms of a discontinued past practice. The court in Torrington reviewed the bargaining history and disagreed with the arbitrator's interpretation of that history. Judge Feinberg, in a strong dissent, noted that the arbitrator had drawn different conclusions from the negotiations between the parties:

> "Whether the arbitrator's conclusion was correct is irrelevant because the parties agreed to abide by it, right or wrong." (62 LRRIM at 2501)

Other courts have refused to follow Torrington and have rejected the second circuit's approach. In Holly Sugar Corp. v Distillery Workers, 71 LRRM 2841 (9th Cir., 1969), the employer argued that the arbitrator had exceeded his authority. The court said:

> "[the company's] interpretation of the 1965 negotiations was rejected by the arbitrator, and, as previously noted, unless wholly unreasonable, his is the interpretation which the courts. must accept. To the extent Torrington may be read to author-ize greater judicial intervention, we cannot accept it." (71 LRRM at 2845)

Torrington was similarly rejected in Safeway Stores v Bakery Workers, Local 111, 67 LRRM 2646 (5th Cir., 1968).

Although Torrington suggest that the failure to achieve a demand in negotiations may preclude an arbitrator from awarding the subject of demand, it does not suggest that the initial determination of the effect of the failure to obtain a demand should be removed from the arbitrator's jurisdiction. Even under Torrington, arguments relating to the history of nego-tiations must properly be heard by the arbitrator.

To summarize, the Union is demanding an award of allegedly overdue pay together with interest. The City objects to that portion of the Union's demand relating to interest. The allowance of interest as part of a money award is clearly within the discretionary powers of any arbitrator, subject to applicable law. Of course, the parties to any arbi-

tration agreement may limit and define the powers of an arbitrator, including the power and discretion to grant interest; they may, in a given case, agree that in any arbitration involving an award of money, interest must be granted. By the same token they might agree that in such case the award of interest would be precluded. any such agreement, however, would constitute a limitation on the broad discretion generally vested in the arbitrator. In the instant case, the parties have bargained on the subject of interest without reaching any agreement other than agreement to bargain further.[6] The parties have done nothing to date which would tend to limit the general powers of an arbitrator, dealing with a dispute under their contract, to consider interest. It is this fact which mandates our decision that the matter is arbitrable. The fact that the parties have bargained on the subject of interest, pursuant to a union demand and that agreement has not been reached may or may not have significance to the arbitrator in determining whether or not an award of interest would be an appropriate remedy herein, assuming that any remedy is warranted. For purposes of this Board's determination of the arbitrability of the issue, however, those facts are irrelevant.

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[6] Such further bargaining may, of course, lead to an agreement being reached on the subject of interest or to the matter being submitted to an impasse panel.

Based on the parties' board contractual agreement to arbitrate their disputes and the lack of a clear and express limitation on the power of the arbitrator to consider an award of interest on overdue payments, we shall refer the grievances to an arbitrator. We find that the contract indicates that the parties intended that an arbitrator, and not the Board, decide the appropriateness of the remedy requested by the grievants as well as the merits of the claims to back pay.

Consolidation of Cases

The City has requested that the three cases herein be consolidated for hearing before an arbitrator. The Union does not oppose the City's request. We shall grant the parties ten days from the date of the decision herein in which to request, in writing, that the cases be heard by a single arbitrator. If no such written request is received, we shall refer the matters to arbitration separately.

O R D E R

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

ORDERED, that the petitions of the City in cases Nos. BCB-179-74, BCB-180-74, and BCB-181-74 be, and the same hereby are, denied and it is further

ORDERED, that the requests of the Union for arbitration in cases Nos. BCB-17~-74, BCB-180-74, and BCB-181-74, be, an.-" the same hereby are, granted; and it is further

ORDERED, that the partied may, within ten days of the date of this decision, jointly request, in writing, that the cases be consolidated for hearing before an arbitrator,

DATED: New York, N.Y.
October 23, 1974.

ARVID ANDERSON
C h a i r m a n

WALTER L EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

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