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

THE CITY OF NEW YORK,

Petitioner

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION,

Respondent

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DECISION AND ORDER

This case comes before the Board pursuant to a formal recommencement of the above-docketed matter by the Uniformed Firefighters Association. The issue in this proceeding, which had been held in abeyance in accordance with Board Decision No. B-10-74, is whether a prior arbitration proceeding bars Respondent Union from seeking arbitration of a dispute arising out of the same incident which gave rise to the earlier arbitration case.

Background

On January 4, 1974, the New York City Fire Department (hereinafter called the Fire Department) promulgated Fire Department Order No. 3, which resulted in the transfer of various employees from one unit of the Fire Department to another. Thereafter, Respondent UFA, along with the Uniformed

Fire officers Association, filed a grievance (Case No. A-345-74) alleging that order N-o- 3 constituted a violation of Article XXVIIA, Section 4D(l) of the parties' collective bargaining agreement. This Article provides in substance that the City may make unilateral chances and install programs unilaterally subject to a two-week notice provision.

The arbitration award in Case No. A-345-74, dated January 14, 1974, stated in relevant part:

> "The Unions have not offered or adduced sufficient evidence to show that the transfers set forth in Departmental Order No. 3 dated January 4, 1974 were for the reason or reasons for which two weeks notice is required under Article XXV Section 4D 1 of the UFOA contract and Article XXVII-A Section 4D 1 of the UFA contract. Therefore the grievance is denied." (Impartial Chairman, Eric J. Schmertz)

In Case No. A-345-74, pursuant to Section 1173-8.0(d) of the New York City Collective Bargaining Law, Respondent UFA executed and filed a waiver of its right, if any, "to submit the underlying dispute to any other administrative or judicial tribunal except for the Purposes of enforcing the arbitrator's award." Such waiver was executed by the UFA subsequent to January 4, 1974 and prior to January 9, 1974.

On April 26, 1974, the UFA filed with the Board a Request for Arbitration, alleging that 7ire Department Order No. 3 violated the existing policy and practice of the Fire

Department with respect to involuntary transfers in that the transfers set forth in the Order were made as punishment for Union activity. 1/ Petitioner City of New York thereupon filed a Petition Challenging Arbitrability of the Union's Request for Arbitration, alleging that the waiver executed by the UFA in Case No. A-345-74, which the City claimed involved the same underlying dispute, barred the Respondent from seeking arbitration of the instant dispute.

Thereafter, the UFA filed improper practice charges against the City at the New York State Public Employment Relations Board (hereinafter "PERB"), alleging, inter alia, that the transfers effected by Department Order No. 3 constituted discrimination, reprisal, and punishment for union

In its original Request for Arbitration, the UFA also alleged that Department Order No. 3 violated Article XX of the collective bargaining agreement, which deals with the use of seniority in filling vacancies. However, in its Answer filed May 31, 1974, the UFA withdrew "so much of its claimed grievance as deals with any claimed violation of Article XX....."

The agreement between the parties defines grievance in Article XXII, Section 1 as follows:

> A greivance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.

activity in violation of Sections 209(a)(1) and (c) of the Civil Service Law. [1]

On July 29, 1974, the Board issued its Decision and Order (B-10-74), finding that the UFA's Request for Arbitration and its improper practice charge before PERB both stemmed from and challenged the involuntary transfers made pursuant to Department Order No. 3 and, therefore, involved "the same underlying dispute." The Board found that the Union violated the waiver provision of the NYCCBL and could "not available itself of arbitration while simultaneously pressing an improper practice charge with PERB." The Board directed the City's Petition to be held in abeyance pending either a ruling by PERB or withdrawal by the UFA of the improper practice charges lodged before PERB.

By letter dated September 30, 1974, the UFA withdrew its charges before PERB. By submission of its Memorandum on November 1, 1974, the Union reinstituted the proceedings held in abeyance pursuant to the Board's Decision No. B-10-74.

[1] The charge was based, in part, on the fact that since the New York City firefighters strike of November 5, 1973, membersand delegates of the UFA had been "involuntarily transferred in unprecedented numbers by Fire Department Orders Nos. 225/72, 3/74, and 12/74 ..." in reprisal for the strike. The Union charged that these actions on the part of the City "constituted[d] a threat to the continued existence of the UFA" and violated the rights of Union members to engage in concerted activity.

The Issue

In the instant proceeding the Board must determine the issue that it specifically reserved in Decision No.- B-10-74: "whether the arLitration award in Case A-345-74 precludes the Union from seeking arbitration on the allegations presented in the instant grievance."

Positions of the Parties

The UFA, in its Memorandum of October 31, 1974, and the City, in its Reply Memorandum of November 6, 1974, have reiterated and elaborated their original arguments concerning the arbitrability of the Union's claim that Department Order No. 3 violated the existing policy and practice of the Fire Department. These arguments, therefore, are summarized below.

The Union contends that its waiver executed in Case No. A-345-74 does not bar it from bringing the instant grievance because "... the grievance herein is not the same underlying dispute that the Impartial Chairman addressed himself to in Case No. A-345-74."

The UFA relates that in Case No. A-345-74, believing that the City violated a provision of the collective agreement relating to a two-week notice requirement predicate to unilateral installation of changes, the Union filed its Request for Arbitration almost immediately after the promulgation of Department Order No. 3 on January 4, 1974. A hearing

was, in fact, held on January 7, 1974 and the Impartial Chairman issued his award on January 14, 1974. It was only sometime thereafter, claims the Union, that it discovered that the employees transferred pursuant to Department Order No. 3 were selected in a manner which indicated that they were being punished for union activity. The Union argues that when it filed its Request for Arbitration less than five days after the promulgation of Department Order No. 3, it did not know and could not have known that certain UFA members were, in fact, transferred involuntarily. Therefore, it did not make of a knowing waiver of any right with respect to an issue arising out of a situation of which the UFA could not have possibly been aware at the time of the execution of such waiver."

Additionally, the Union claims that the instant issue is not, the same underlying dispute as that resolved in Case No. A-345-74. In the earlier case, the issue was narrowly defined as whether or not the City's failure to give notice of its intention to promulgate Department Order No. 3 violated the collective bar7aining agreement. In the instant proceeding,the issue is whether the transfers effected by Department Order No. 3 were contrary to the existing policy and practice of the Fire Department with respect to involuntary transfers. The Union, therefore distinguishes the issues presented in Case No. A-345-74 and in the instant proceeding and maintains that the NYCCPL's waiver provision was intended "to prevent recourse to several tribunals for resolution [only]

of an identical issue."

Finally, the UFA contends that the waiver it executed prior to its full - knowledge of the facts giving rise to the instant grievance `cannot reasonably be held to bar arbitration ... I and that any contrary view would allow Petitioner City to escape by technicality its responsibility under the Collective Bargaining Agreement and the Law to arbitrate such disputes."

The City, in its Reply Memorandum, argues that the doctrines of res judicata and collateral estoppel bar arbitration of the instant matter:

> It is well settled law that where parties have had an opportunity to litigate a controversy before a competent tribunal which has thereupon rendered a valid final judgment on the merits, the judgment is res judicata. If, thereafter, one of the parties attempts to relitigate the same controversy, the other party may move to dismiss the action on the ground of res judicata.
>
> Similarly, it is well settled that under the doctrine of collateral estoppel, where an issue has been adjudicated finally and on the merits, it may not be relitigated eventhough the cause of action in the second proceeding may differ. Not only have the Courts of New York determined that Arbitrators' awards are final and conclusive, but these same Courts have held that the principles of res judicata and collateral estoppel apply to prior arbitration awards equally as to Court judgments.

In the City's view, Case No. A-345-74 and the instant matter involve the same "cause of action,," i.e., "the alleged violation of the same collective bargaining agreement based upon the identical facts" (the City's promulgation of Department Order No. 3). The City maintains that Lew York case law has established that if two actions are based upon the same evidence, res judicata applies even though the remedies sought are different.

It is irrelevant, argues the City, that the UFA, when it initiated its first action in response to Department Order No. 3, was not aware of other alleged claims deriving from the same set of facts. "... Respondent should have been aware, and should be expected to have been aware, and that by submitting its original Reguest without setting forth all alleged grounds for a finding of a breach of contract, on the same set of facts, it thereby waived the right later to raise these allegations." [2]

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[2] The City cites, Petroleum Workers v. American Oil, 324 F.2d 903, 54 LRRM 2598 (7th Circ. 1963), Aff'd. 379 U.S. 130, wherein the Court stated:

> "Absent the application of the doctrine of collateral estoppel, we have before us a situation in which plaintiff relied yesterday upon one provision of the collective bargaining agreement in support of its claim or demand that defendent be required to submit to compulsory arbitration; today it relies upon a different provision of the same agreement in support of the same claim or demand, and tomorrow it will be at liberty to rely upon still another provision of the same agreement in support of the same claim or demand. It is our judgment that the doctrine should be applied and given effect."

The City also contends that even if the doctrine of res judicata and collateral estopnel do not bar the instant request for arbitration, the Union's waiver in Case No. A-345-74, executed pursuant to Section 1173-8.Od of the NYCCBL, acts as such a bar. Emphasizing that the key term in the statutory waiver provision is "underlying dispute," the City argues:

> "The meaning of this term must be understood to be different from simply seeking to prohibit the kind of subsequent actions which the doctrines of res judicata and collateral estoppel bar. For the would be no need for the extension of such a waiver if that were all that were intended, since, as has been shown, those principles do apply to arbitration awards."

In the City's view, the NYCCBL's waiver provision, particularly its use of the term "underlying dispute," broadens the scope of the legal doctrines to prevent repeated litigation of once arbitrated disputes for the purpose of enforcing a strong public policy. This public policy seeks to promote grievance arbitration asa means of avoiding industrial strife and fostering labor-management harmony. Harmony cannot be achieved, however, where a party is allowed to relitigate in various tribunals issues or grievances deriving from one set of facts. "In short," the City maintains, "the waiver attempts to finalize arbitration awards based on the same 'underlying dispute' - i.e., alleged violations of collective bargaining agreements originating from one action of an Emplover...."

Finally, the City urges that the Board's determination in Decision B-10-74, that the Union's request for arbitration and its improper practice charge I-efore PERB involved the same underlying dispute, in effect barred a new arbitration. According to the City, the Board has adovted a broad interpretation of the NYCCBL's waiver provision and a policy of preventing a grieving union from taking "two bites of the same apple. It matters not where the Union seeks to take its bites - be they the same or different forums." The policy, concludes the City, is clearly that where a party requesting arbitration seeks an award based on a contract violation deriving from one sets of facts, that party must place bevore the arbitrator all of its allegations, or be barred from later raising them.

Discussion

As we see the matter before us, there is a serious question as to whether the Union could reasonably have been expected to raise before the arbitrator in Case No. A-345-74 the issue which it raises herein. After the promulgation of Department Order No. 3, the UFA, believing that the Fire Department violated the contract's two-week notice requirement, acted quickly to obtain a hearing before the parties' Impartial Chairman. It sought to enjoin the City

from making the transfers and argued that the effectuation of Department Order No. 3 would not only, breach the contract but result in irreparable harm to the Union and its members affected by the Order. The UFA maintains that when it acted promptly in order to stop the transfers, it did not know, and indeed could not have known, which Union members were affected. The nature of the situation, contends the UFA, "did not reveal itself until it could be ascertained which of the UFA members ... were in fact transferred involuntaril , and not until such members had been contacted and interviewed and a full investigation of the matter had been conducted."

The City does not allege that at the time the UFA sought arbitration in Case No. A-345-74, the Union knew, in fact, which of its members were involuntarily transferred pursuant to Department Order No. 3. But the City does insist that the Union "should have been aware, and shoud be expected to have been aware," of all possible claims arising from the City's promulgation of Department Order No. 3.

We believe that the extent of the Union's knowledge of the situation at the time it went to arbitration in Case No. 345-74 may be significant to a proper resolution of the instant matter. If, in fact, the Union did not know or could not have known which UFA members would be involuntarily transferred purusant to Department Order No. 3, it may not

reasonably have been required to grieve at that tire that the Order violated the existing policy and practice of the Fire Department with respect to involuntary transfers. Nor can we say that the Union should have waited until it had complete information about the nature of the transfers before it filed its initial grievance relating to Department Order No. 3. Believing, although in error, that it had a contractual right to two weeks' notice of the City's intention to make transfers,the Union cannot be faulted for endeavoring to stop the implementation of Department Order No. 3, at least until the City complied with the contract's notice requirement.

Having reviewed case law on res judicata and collateral estoppel and the record before us in the instant matter, we conclude that we need not reach, at least at this time, the question of the applicability of those legal doctrines to the issue herein. In our opinion, before we can rule on the City's Petition Challenging Arbitrability, we need to ascertain the extent of the Union's knowledge about the nature and potential effects of the transfers mandated by Department Order No. 3 at the time it arbitrated its grievance in Case No. A-345-74. A proper judgment as to the applicability of the doctrines of res judicata and/or collateral

estoppel to the instant matter and to the question of the effect of the UFA's waiver in Case No. A-345-74 may rest upon our ascertaining whether or not the Union might have brought forward in its initial arbitration information within its possession or reasonably available to it. For this reason, we shall grant the parties a hearing before a Trial Examiner of this Board so that they may present evidence on the question of whether or not the UFA knew or could have known at the time it arbitrated its grievance in Case No. A-345-74 that the individuals subject to Department Order No. 3 were transferred involuntarily and allegedly in breach of the existing policy and practice of the Fire Department. We, therefore, make no ruling at this time on the City's petition herein.

O 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 parties be granted a hearing before a Trial Examiner of this Board, at a time and place to be established, on the question of whether the contention herein could have been raised by the Union in its original grievance which was the subject of an arbitration decision and award in Case No. A-345-74.

DATED: New York, N.Y.
December 13, 1974.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

VINCENT D. McDONNELL
M e m b e r

EDWARD SILVER
M e m b e r

EDWARD F. GRAY
M e m b e r

N.B. Member Eric J. Schmertz did not participate in this decision.