City v. DC37, 25 OCB 18 (BCB 1980) [Decision No. B-18-80 (Arb)]

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

THE CITY OF NEW YORK, DECISION NO. B-18-80

Petitioner, DOCKET NO. BCB-401-80 (A-993-80)

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.
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**DECISION AND ORDER**

This proceeding was commenced on February 8, 1980 by the filing of a request for arbitration by Local 983, District Council 37, AFSCME, AFL-CIO (D.C. 37 or the Union). The grievance concerns the denial of a shortened workday scheduled during the months of July and August of 1978 and 1979 to Motor Vehicle Operators (MVOS) and Motor Vehicle Foremen (MVFS) employed in the Department of Social Services. On March 7, 1980 the City, through its Office of Municipal Labor Relations (OMLR), filed a petition challenging arbitrability on the ground that the claim for 1978 was not timely filed and, as to 1979, was without merit.

**BACKGROUND**

Article V, Section 18 of the July 1, 1978 - June 30, 1980 City-Wide Contract to which the City and D.C. 37 are parties, provides:

> All shortened workday schedules or heat days in lieu thereof for employees who have traditionally enjoyed shortened workday schedules or heat days in lieu thereof shall begin on July 1 and terminate on Labor Day ....

A grievance alleging that Article V, Section 18 had been violated in the summer of 1978 and 1979 was submitted on August 20, 1979 at Step III of the grievance procedure set forth at Article XV, Section 4 of the contract.[1] A Step III Conference was held on December 21, 1979 at which time the Union presented witnesses who testified that they had received shortened summer workdays (or heat days in lieu thereof) every summer except 1977 when the contract then in effect (the 1976-1978 City-Wide Contract)specifically excluded MVOS and MVFS from coverage by the shortened workday provision.[2]

[1] Article XV, Section 4 provides as follows:

> Any grievance of a general nature affecting a large group of employees and which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of the Agreement shall be filed at the option of the Union at Step III of the grievance procedure, without resort to previous steps.

[2] The employees in question appear to have received summer hours in 1976 because the 1976-1978 contract was not signed until January 13, 1977.

The Step III decision denied the grievance for 1978 on the ground that it was untimely and denied the grievance for 1979 on the basis that MVOS and MVFS were not traditionally granted a shortened summer workday and, therefore, had no right to grieve the denial of such benefits. OMLR's Review Officer stated:

> It is apparent from the testimony of witnesses that in the Department of Social Services many such employees have received this benefit through Department error since before 1967 and through the summer of 1976.

## POSITIONS OF THE PARTIES

The City maintains that the 1978 grievance should be denied because it was not filed within one hundred twenty days after the date on which the grievance arose, as required by the contract (Article XV, Section 2). The City also argues that the doctrine of laches should be applied to bar the Union's claim since grievants "must have been aware of the fact that they were not enjoying [the shortened summer workday] from the beginning of the summer of 1978", and did not file a grievance until August 20, 1979. OMLR claims that it has been prejudiced by the Union's delay in that time records which would reflect whether or not MVOS and MVFS had received shortened summer hours are only kept for a three-year period and other records do not reflect whether the em-

ployees in question received "summer hours." In addition, OMLR claims that "certain vital witnesses" no longer work for the City and may be unavailable.

D.C. 37 contends that MVOS and MVFS traditionally received shortened summer workday schedules in the years up to and including 1976. Under the current City-wide Contract (1978-1980), the right to summer hours which was taken away by the 1976-1978 contract is restored. Thus, the Union maintains, the denial of summer hours in 1978 and 1979 was in violation of the terms of the City-Wide Contract.

As an affirmative defense to the City's claim that the 1978 grievance is untimely, the Union submits that the delay was due to "the time-consuming process of collective negotiations beyond grievants' control.." Since the 1978-1980 contract was not consuming until June 8, 1979, D..C. 37 asserts that the time in which to file the 1978 grievance did not begin to run until that date.

The City refutes the Union's contentions, offering as support for its position a side-letter agreement dated December 13, 1976, signed by Anthony Russo, First Deputy Director of OMLR (then the Office of Labor Relations) and by Victor Gotbaum, Executive Director of D.C. 37. Insofar as pertinent herein, the agreement states:

> The City-Wide Contract for the period of 7/1/76 to 6/30/78 contains various provisions, listed below, for which District Council 37 received monetary credit consistent with the New York City 1977 and 1978 financial plans and consistent with the Memorandum of Interim Understanding, dated June 30, 1976. It was the understanding of the parties that these enumerated provisions would remain in full force and effect for the period of the City-Wide agreement.
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> The affected articles in the 7/1/76 - 6/30/78 contract are:
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> (1) Article V, Sec. 18 [summer hours]
> (2) Article V, Sec. 23
> (3) Article VI, Sec. 6
> (4) Article IX, Sec. 16
>
> These provisions may be superseded by provisions to be negotiated for the City-Wide Contract commencing 7/1/78. Unless superseded, the new contract will revert to the antecedent provisions of the above-sections effective July 1, 1978. (emphasis added)

The Union, in its answer to the City's petition, interprets the last sentence of the above-quoted agreement to mandate a reversion to the 1976-1978 contract's summer hours provisions in the event that these provisions are not superseded in the 1978-1980 contract. The 1976-1978 contract specifically excluded MVOS and MVFS from a shortened workday schedule.[3] The City

[3] Article V, Section 18 of the 1976-1978-City-Wide Contract provided in pertinent part:

> All other field personnel, such as Law Enforcement Personnel, Parking Enforcement Agents, Traffic Control Agents, Traffic Device Maintainers, Motor Vehicle Operators, and similar titles, will be excluded from shortened workday schedules.

maintains, however, that the "antecedent provisions" referred to are the provisions of the 1973-1976 City-Wide Contract.[4] OMLR attached to its letter of reply a statement by Harry Karetzky, Deputy Director of OMLR, who was involved in negotiations which produced the letter. This statement substantiates the City's position.

Finally, D.C. 37 refutes the City's claim that it was prejudiced by delay, asserting that the side-letter agreement discussed above put the City on notice of the likelihood that summer hour benefits, which were surrendered by the Union in the face of the fiscal crisis for the duration of the 1976-1978 City-Wide Contract only, would be regained in a subsequent contract. The Union maintains that the City should have preserved documentation to meet claims that would arise under a successor contract.

## DISCUSSION

It is clear that the City and D..C. 37 are obligated under the City-Wide Contract for 1978-1980, as well as prior years, to arbitrate their controversies. Article XV of the current contract provides a procedure which is the "exclusive remedy" for the

[4] Article V, Section 17, the summer hour provision of that contract, did not on its face exclude MVOS and MVFS and is substantially similar to its counterpart in the current contract.

resolution of grievances. Section 1 of that article defines a grievance as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement."

Having decided that the parties are obligated to arbitrate their disputes, we must determine whether that obligation is broad enough in scope to include the particular controversy at issue.[5] In order to make this determination with respect to the 1978 grievance in this case, it is necessary first to resolve the dispute over which collective bargaining agreement's summer hour provisions were applicable at the time the grievance arose.

We are persuaded that the City's construction of the side letter agreement is the more reasonable interpretation and that the summer hour provisions of the 1973-1976 contract were the applicable provisions during the period in question. D.C. 37 concedes that it gave up certain benefits for the 1976-1978 contract period only. The side-letter makes it clear that the Union received monetary credit in exchange for these concessions. It is thus unlikely that the 1976-1978 summer hour provisions were intended to extend beyond the expiration of that contract without a concomitant extension of monetary credit.

If, as the Union contends, it was the intention of the parties that upon termination of the 1976-1978 contract on

[5] See Board Decisions B-10-77; B-5-77; B-1-77; B-11-76; B-5-76; B-1-76; B-28-75; B-18-74; B-14-74; B-8-74; B-4-72; B-8-69; B-2-69.

June 30, 1978 - and in the absence of a successor contract superseding the "affected articles" - the parties would be governed by the 1976 -1978 contract terms as to the "affected articles," there would have been no need for a side-letter. The status quo provisions of the NYCCBL would have accomplished precisely that effect. The side-letter has purpose only if interpreted to clarify the fact that there was a quid pro quo basis for the Union's surrender of certain rights and that the duration of the loss of those rights was to be limited strictly to the term of the contract. Instead of being deprived of those rights during an additional indefinite period until a new contract was signed, the Union was assured that, during any such hiatus, the parties would resort to the antecedents to the "affected articles" - the provisions as to those matters set forth in the 1973-1976 contract, which granted all of the rights surrendered during the term of the 1976-1978 contract.

As to all other matters, of course, the terms of the 1976-1978 contract continued to govern the parties during the status quo period.[6] The Union could and should have brought its grievance in a timely fashion under the grievance procedure of that contract which, by virtue of the side-letter agreement, included the summer

[6] NYCCBL §1173-7.0 d.

hour provisions and other "affected articles" of the 1973-1976 contract.[7] In fact, D.C. 37 has failed to state a grievance under the current contract wherein "grievance" is defined as a "dispute concerning the application or interpretation of the terms of this collective bargaining agreement" (emphasis added).

Even if a grievance had been stated, however, we would deny the Union's request for arbitration on the ground of laches. This Board has adopted the reasoning of the Fourth Circuit Court of Appeals that, for laches to bar a request for arbitration, there must be "an unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant."[8] Although the Union's delay in filing its grievance for the summer of 1978 has been explained, we find it inexcusable under the circumstances herein. We find, further, the City has been prejudiced at least to the extent that its potential liability is greater than it would have been had the Union brought its grievance promptly.

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[7] Since 1972, the Board of Collective Bargaining has held that, where the underlying controversy derives solely from the statutory extension of the provisions of a prior contract, the arbitration provisions which applied during the term of that contract provide the most appropriate means of dealing with such a controversy. See Board Decisions B-13-76; B-20-75; B-13-74, B-4-72; B-1-72.

[8] See Board Decision B-11-77.

The question of summer hours might have been resolved before the summer of 1979 began, thus preventing the City from incurring any further liability.[9]

As to the portion of the Union's grievance which relates to 1979 and which was timely filed within two months of the alleged violation, we find that a grievance has been stated and we shall grant the Union's request for arbitration. In the months of July and August 1979, the summer hour provisions of the 1978-1980 contract were clearly in effect, that contract having been concluded on June 8, 1979. This decision is in no manner a reflection of our view on the merits of the underlying dispute, however.[10] Whether MVOS and MVFS were in fact entitled to such benefits is a question for determination by an arbitrator.

[9] See Board Decision B-9 -76.

[10] See Board Decisions B-9-78; B-7-77.

**ORDER**

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 request for arbitration filed herein by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied insofar as the request seeks arbitration of the denial of a shortened workday schedule for July and August of 1978, and is granted insofar as the request seeks arbitration of the denial of a shortened workday schedule for July and August of 1979.

DATED: New York, N.Y.
June 4, 1980

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

DANIEL G. COLLINS
Member

FRANKLIN J. HAVELICK
Member

EDWARD F. GRAY
Member

EDWARD J. CLEARY
Member