

City v. UFA, 29 OCB 24 (BCB 1982) [Decision No. B-24-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

Decision No. B-24-82

THE UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,

Docket No. BCB-536-81
(A-1335-81)

Respondent.

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DECISION AND ORDER

On September 30, 1981, the Uniformed Firefighters Association of Greater New York (the "UFA") filed its request that a grievance concerning the alleged "wrongful payment of contractual night differential to members performing overtime tours of duty" be submitted to arbitration. The City of New York, by its Office of Municipal Labor Relations (the "City") opposed the request in a petition filed on October 13, 1981. Respondent filed an answer with a supporting brief on October 27, 1982, in response to which the City submitted a letter reply on November 9, 1981.

BACKGROUND

In 1972, PA/ID 12-72, an internal departmental memorandum, issued on the subject of night shift differential for overtime tours. The memorandum, according to the facts as presented in the UFA's brief, states that a 10% night shift differential is to be paid for overtime hours worked on the day tour (9:00 a.m. 6:00 p.m.) if the overtime follows a night tour (6:00 p.m. 9:00 a.m.). In 1973, the parties negotiated and executed a collective bargaining

agreement which contained following provision on night shift differential.

Article VIII. Night Shift Differential.

Section 1 .

There shall be a 10% differential continued for all work actually performed between the hours of 4 p.m. and 9 a.m., provided that more than one hour is actually worked after 4 p.m. and before 8 a.m.

Section 2..

In lieu of the payments required by Article Section 1, of this Collective Bargaining Agreement, the employer shall pay all employees except those probationary Firemen, who are attending the Probationary Firemen's School, pro rata, an annual amount equal to 5.7 percent of the sum of each such employee's base annual salary rate plus longevity adjustments.

This benefit shall be computed on the basis of the rates set forth in Article VI, plus longevity adjustments for all Firemen and Fire Marshals.

This provision, it is alleged, although incorporated "unchanged" in every subsequently executed collective bargaining agreement, has never been enforced. Instead, overtime payments have been administered, in accordance with PA/ID 12-72, for overtime hours worked on a day tour which follows a night tour. Based on this continuing violation of the contractual provision

on overtime, the UFA requests that the matter be submitted

to arbitration.

POSITION OF THE PARTIES

City's Position

The City urges that there has been no allegation by the UFA that PA/ID 12-72 has been violated, misinterpreted or misapplied. Hence, it is argued, the request for arbitration is a mere vehicle by which the UFA is seeking to overturn the memorandum. PA/ID 12-72, having stood unopposed for nine years, cannot now be challenged. In support of this argument, based on the defense of laches, the City cites the unavailability of witnesses as well as the increased financial liability engendered by the nine-year delay as basis for denying the request for arbitration. UFA's Position

The UFA alleges that by Fire Commissioner Charles J. Hynes' own admission, night shift differential has not been paid for night work performed between 4:00 p.m. and 8:00 a.m., as required by Article VIII of the current collective bargaining agreement. Instead, night shift differential has been paid for

... overtime hours worked on the day tour (9:00 a.m. to 6:00 p.m.) if the overtime worked followed a night tour (6:00 p.m. to 9:00 a.m.),¹

in complete derogation of the contractual provision on overtime.

¹ Brief of Respondent in opposition to Petition Contesting Arbitrability.

In response to the City's objection to arbitrability based on the defense of laches, the UFA maintains that since it is complaining of a current violation, the defense is ineffectual to bar the claim from arbitral consideration -i.e. the very refusal, at present, to make payments as required by the agreement constitutes prima facie basis for a finding of arbitrability. where a continuing violation is alleged, laches will not operate as an absolute bar even if sustained by the Board as a partial defense.

DISCUSSION

The City has, essentially, advanced two theories for denying arbitrability:

1. The grievance-arbitration procedure, provided in the agreement, does not cover a dispute over the existence, as opposed to the violation, of an order;
2. The claim herein is time-barred by laches because of the prejudicial delay in bringing the grievance.

Where, as in the instant proceeding, a party raises a question as to the scope of the parties' contractual obligation to arbitrate, the Board's authority to consider and determine substantive arbitrability is undisputed.² The City's assertion that the violation or misapplication of an order is arbitrable but that its existence or application is not is misleading. While it may be true that in certain situa-

² B-2-69; B-14-74; B-1-76; B-10-77.

tions the existence of an order would not be grievable, and its rescission not obtainable through arbitration, but rather through negotiations, we are not confronted with such a situation in this matter. The UFA has alleged that the enforcement of PA/ID 12-72 violates the explicit contractual provision on overtime. Hence, the mere possibility that the memorandum may, as a result of the arbitrator's award, in effect be overturned, is both inconsequential and incidental to the principle controversy before this Board. Having alleged the failure to pay night shift differential for night-time overtime hours worked following a day tour, the UFA has met its burden of establishing a prima facie relationship between the act complained of and the source of the alleged right.

It may be noted that had the UFA alleged a violation of the memorandum, its viability would be a question for the Board. Having alleged, however, a violation of the agreement, the viability of which is not in dispute, the operability of PA/ID 1-2-72 is a question which goes to the merits of the dispute and must be left for the arbitral forum.

With respect to the second ground for opposing arbitrability -- the timeliness of the request -- the Board has repeatedly held that where a continuing violation is alleged, the defense of laches will not operate as a complete bar.³

³ B-3-80; B-12-81; B-4-82; B-5-82.

Since the grievance-arbitration provision of the agreement calls for the filing of a grievance within 120 days from the date on which the grievance arose, we find that the portion of the UFA's claim which relates to misapplication of night shift differential from June 2, 1981 (120 days prior to the filing of the grievance herein) to the present is timely asserted.

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 request for arbitration filed by the United Firefighters Association of Greater New York be, and the same hereby is, granted insofar as the request seeks arbitration of the claim of wrongful payment of night shift differential from and including June 2, 1981 to the present, and is denied insofar as the request seeks arbitration of the claim for the period prior to June 2, 1981.

DATED: New York, New York
June 17, 1982.

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER