

City v. L.375, Civil Service Tech. Guild, 29 OCB 33 (BCB 1982) [Decision No. B-33-82 (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-33-82

Petitioner,

DOCKET NO. BCB-593-82
(A-1506-82)

-and-

CIVIL SERVICE TECHNICAL GUILD,
LOCAL 375, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On May 24, 1982, the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO (hereinafter "the Union" or "Local 375") on behalf of grievant Daniel Voccola on flay 14, 1982. Local 375 filed an answer on July 16, 1982, to which the City replied on July 20, 1982.

Request for Arbitration

The request for arbitration alleges that the City violated Article VI, Section 1(c) (entitled "Grievance Procedure") of the 1980-1982 collective bargaining agreement (hereinafter "the Agreement") entered into between the

parties. Article VI, Section 1(c) defines the term "grievance" as follows:

A claimed assignment of employees to duties substantially different from those stated in their job specifications.

The Union states the grievance as follows:

Was Dan Voccola, Waterfront Construction Inspector, Dept. of Ports & Terminals performing duties substantially different than those stated in his job specifications?

Grievant alleges to have been performing out-of-title assignments since March 7, 1979. The underlying Step I grievance was filed on March 27, 1981.

With regard to out-of-title claims, Article VI, Section 2 of the Agreement states that

no monetary award shall in any event cover any period prior to the date of the filing of the Step I grievance unless such grievance has been filed within thirty (30) days of the assignment to alleged out-of-title work.

As a remedy, Local 375 seeks "out-of-title pay" and "provisional upgrading of title."

Positions of the Parties

The City's Position

The City challenges the arbitrability of the instant grievance on several grounds. Article VI of the Agreement proscribes a 120 day limit after a claim arises to file a

grievance. The City argues that the claim is barred from arbitration because the alleged out-of-title work commenced in March, 1979, yet the instant grievance was filed in March, 1981, well beyond the 120 day limit.

The City further seeks dismissal of the request for arbitration on the grounds of laches. OMLR contends that as a direct result of the Union's two year delay in filing, the City's potential monetary liability has "Significantly increased" and it has become "impossible" to obtain relevant evidence and witnesses to properly defend the alleged contractual violation.

In addition, the City maintains that Section 65 of the Civil Service Law precludes an arbitrator from ordering the appointment or promotion of any employee to a civil service title. The City further contends that the granting of provisional appointments are within the realm of managerial rights defined by New York City Collective Bargaining Law (hereinafter "NYCCBL"), Section 1173-4.3(b). Thus, OMLR urges that the relief requested is prohibited by law. Absent dismissal, the City would have us limit the remedy sought to that which is available under the Agreement.

The Union's Position

The Union asserts that an out-of-title grievance is by nature a continuing violation. Local 375 urges that when Voccola filed his Step I grievance in March, 1981, he was in compliance with the contractual time frame for filing Step 1 grievances, since the period from 1979 to the present "subsumes the date and 120 days prior thereto."

The Union also maintains that the doctrine of laches does not bar arbitration of the present dispute. It contends that the City has had "more than sufficient notice" of the claim in order to rectify the situation, thereby limiting liability.

Local 375 argues that the City has failed to controvert the substantive arbitrability of the instant grievance. No evidence was offered to dispute the Union's theory that the present matter involves a grievance that the parties contractually agreed to submit to arbitration for final resolution.

The Union states that since it is not seeking to arbitrate a matter beyond the scope of collective bargaining, questions of remedy should be left to the arbitrator. Furthermore, whether or not the remedy requested violates statutory proscriptions is not a basis for denying an otherwise valid request for arbitration.

The Union seeks to have the City's petition challenging arbitrability declared null and void because of OMLR's alleged failure to comply with Rule 7.5 of the Revised Consolidated rules of the Office of Collective Bargaining, (hereinafter "the Rules"), which requires that petitions be verified. OMLR, however, claims that the petition filed was indeed verified.

The parties also differ as to issues of jurisdiction. Local 375 contends that questions concerning the timeliness of a request for arbitration under a contract are to be resolved by the arbitrator, as are other procedural matters. The City counters by stating that applicability of the laches doctrine constitutes a substantive issue which is to be decided by this Board.

Discussion

The parties to this proceeding do not question their obligation under the Agreement to submit to arbitration a grievance pertaining to out-of-title assignments. Rather, the City is contesting arbitrability on the grounds that, inter alia, the present grievance was untimely filed and also is barred by the doctrine of laches. There appears to be confusion as to whether the arbitrator or the Board has proper jurisdiction to decide these issues.

As stated by the Union, questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract, are for the arbitrator to resolve.¹ The City, however, is also correct when it states of substantive arbitrability, is for that laches, a matter decision by the Board.²

Laches, or extrinsic delay, is to be distinguished from intrinsic delay, which denotes a failure to observe contractual time limitations. It is therefore proper that the Board make a threshold determination concerning the probative sufficiency of the Union's excuse for delay in not observing negotiated filing requirements.

In arbitrability cases involving a "continuing violation" one which takes place, and continues to take place, every time the grievant receives a paycheck - in which both laches and contractual timeliness have been raised, the Board has adopted a policy of recognizing contractual time limitations (of usually 120 days) in which to file claims

¹ Decisions Nos. B-6-68; B-7-68; B-18-72; B-6-75; B-25-75; B-28-75; B-3-76; B-9-76; B-14-76; B-11-77; B-6-78; B-3-79; B-14-79; B-20-79; B-3-80; B-4-80; B-9-80; B-13-80; B-19-80; B-20-80; B-23-80; B-29A-80; B-38-80; B-12-81; B-15-81.

² Decisions Nos. B-6-75; B-29-75; B-3-76; B-4-76; B-9-76; B-15-81; B-4-82; B-7-82; B-17-82; B-24-82; B-26-82.

as representing a block of time that the parties have agreed would not form the basis of a claim of prejudicial, unexplained delay.³ Our application of both the equitable doctrine of laches and the parties' contract to the circumstances of these cases, we believe, strikes a balance among policy considerations related to arbitrability of grievances. Thus, where the delay in filing appears unwarranted, we have barred arbitration of the grievant's claim except for that part of the grievance alleging the continuous commission of a wrong, for a period 120 days prior to the filing of the grievance. Such findings, which usually emanate from cases involving out-of-title claims, do not usurp or infringe upon the arbitrator's authority to decide matters concerning, procedural arbitrability. Rather, these decisions acknowledge and defer to the contractually agreed upon intentions of the parties.⁴

Contrary to the Union's assertions, not every out-of-title claim can automatically be sounded as a continuous wrong. In the present matter, however, we are faced with an out-of-title claim that is allegedly currently occurring; hence, a prima facie continuing violation has been pleaded.

³ Decisions Nos. B-3-80; B-12-81; B-15-81; B-4-82; B-17-82 ; B-19-82; B-20-82; B-24-82.

⁴ See Discussions in Decisions Nos. B-3-80 and B-15-81.

Nevertheless, the City argues that the Union's claim is time-barred. Local 375 has failed to explain the two year delay in filing. The contractual grievance procedure, however, provides for the filing of a grievance within 120 days after the date on which it arose. Therefore, in keeping with our discussion above and with past precedent, we find that that part of the instant claim which relates to out-of-title work from November 28, 1980 (120 days prior to the filing of the grievance) to the present is timely asserted and should not be barred from arbitral consideration. This determination, made on substantive grounds, does not preclude the City from raising contractual defenses before the arbitrator based on Article VI, Section 2, which places limitations on monetary awards in out-of-title claims unless the grievance was filed "within thirty (30) days of the assignment to alleged out-of-title work."

With regard to the City's objection to arbitrability based on the contractual and statutory limitations on the remedies requested, we adhere to the long established, consistently held Board policy that the possibility that an arbitrator might render a proscribed remedy is not a basis for denying an otherwise valid request for arbitration.⁵ It is

⁵ Decisions Nos. B-5-74; B-19-74; B-1-75; B-2-78; B-6-78; B-7-78; B-3-79; B-14-79; B-3-80; B-4-80; B-22-81.

inappropriate for the Board or the parties to assume that a arbitrator will fashion a remedy which amounts to either illegal or improper relief. We therefore decline to place constraints on the request for relief.

We find no merit to Local 375's contention that the City's petition challenging arbitrability should be dismissed because the petition was not verified in accordance with Rule 7.5. The original petition served upon OCB was in fact verified. Since the Rule, in essence, was complied with, and there's no showing of prejudice on the part of the Union, we will not allow a technical oversight to preclude adjudication of the merits of the claims raised in the petition.

In summary, based on the foregoing, we shall limit arbitral consideration of the merits of the instant claim to allegations of out-of-title work performed during the 120 day period prior to the filing of the grievance.

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 herein by the Union be, and the same hereby is, granted insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievant on and after November 28, 1980, and is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievant prior to November 28, 1980.

DATED: New York, N.Y.
August 24, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
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PATRICK F.X. MULHEARN
MEMBER