City v. L.3, IBEW, 35 OCB 20 (BCB 1985) [Decision No. B-20-85 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-20-85

-and- DOCKET NO. BCB-762-85
(A-2047-85)

LOCAL UNION NO. 3 I.B.E.W.,
AFL-CIO,

Respondent.

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DECISION AND ORDER

On January 21, 1985, the City of New York, appearing by its office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local Union No. 3, I.B.E.W., AFL-CIO (hereinafter "the Union" or "Local 3"). The Union filed an answer on January 31, 1985, to which the City replied on February 6, 1985. On February 21, 1985, the Union submitted a sur-reply. [1] The parties were invited by the Board to submit additional comments and materials,

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[1] While the OCB Rules do not provide for the filing of pleadings subsequent to the reply, and while we discourage such additional pleadings, no objection is raised in this proceeding to the Union's filing of a sur-reply. For the additional reason that the sur-reply is responsive to material in petitioner's reply, we shall consider the arguments raised in the sur-reply. This is also consistent with our policy of eschewing an overly technical application of rules of pleading. Decision Nos. B-23-82, B-15-83.

which they both did on June 7, 1985.

REQUEST FOR ARBITRATION

The Union states the grievance as follows:

> Referral to the Building Department of certain tasks performed by the Bureau of Fire Preventions Electrical Inspectors, namely, the review, approval, inspection and sign off procedures for certain interior fire alarms and signal systems.

Local 3 alleges that the City's referral of bargaining unit work to another department violates three provisions of the parties' collective bargaining agreement ("the Agreement"): Article I, Union Recognition and Unit Designation; Article V, Productivity and Performance; and Article XV, Contracting-Out Clause.

Article I states, in pertinent part:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below, consisting of employees of the Employer, wherever employed, whether full-time, part-time, per annum, hourly or per diem, in the below listed title(s), and in any successor title(s) ...
>
> Apprentice Inspector (Electrical)
> Inspector (Electrical)
> Associate Inspector (Electrical)
> Principal Electrical Inspector
> Inspector of Fire Alarm Boxes
> Senior Inspector of Fire Alarm Boxes.

Article V deals with the delivery of municipal services.

In it, the Union "recognizes the Employer's riqht under the New York City Collective Bargaining Law to establish and/or revise performance standards or norms..." Questions concerning the practical impact of related management decisions are deemed to be within the scope of collective bargaining.

Article XV reads as follows:

> The problem of "Contracting Out" or "Farming Out" of work normally performed by personnel covered by this Agreement shall be referred to the Labor-Management Committee as provided for in Article XI of this Agreement.

Article XI, referred to in Article XV, is entitled "Labor-Management Committee" and states that "matters subject to the Grievance Procedure shall not be appropriate items for consideration by the labor-management committee."

As a remedy, the Union seeks the

> Assignment by the Fire Department to the Electrical Inspectors of all work required by Local Law #41/78 which was transferred to Building Department personnel pursuant to Departmental Memorandum of March 9, 1984. [2]

[2] Local Law 41-78 covers applications and final sign-off procedures for internal fire alarm systems.

POSITIONS OF THE PARTIES

The City's Position

OMLR asserts that the Union has failed to demonstrate any substantive relationship between the right claimed to have been violated and the cited provisions of the Agreement. The City states that the Union is incorrectly claiming exclusive jurisdiction over specific job duties. OMLR argues that an employer may unilaterally assign employees specific duties and that the exercise of this right is not subject to challenge in the arbitral forum. Absent a clear and explicit waiver, contends OMLR, which it states is lacking herein, a decision by the City regarding "methods, means and personnel" by which government operations are to be conducted" is within the realm of management prerogatives established-in Section-1-173v4.3b of the New York City Collective Bargaining Law ("NYCCBL").

With regard to the specific contractual provisions allegedly violated OMLR argues that: (a) Articles I and V are totally unrelated to specific job duties or any claim of exclusive work jurisdiction; (b) Article V acknowledges the right of the employer to set performance levels and supervisory standards; (c) questions concerning impact raised pursuant to Article V must be raised in a forum other than arbitration; and

(d) Article XV, dealing with Contracting-Out, does not refer to matters which can be arbitrated and, in any event, the City has not engaged in contracting out or farming out herein.

The Union's Positionf

The Union asserts that it has established a sufficient nexus between management's actions and the Agreement so as to proceed to arbitration. Local 3 maintains that the City is arguing, in effect, that it may permanently take away, all bargaining unit work, regardless of the recognition clause and any practical impact upon terms and conditions of employment. Such action, contends the Union, renders Article I meaningless.

Local 3 challenges the City's interpretation of Articles V and XV and submits that questions such as whether the permanent reassignment of employees' work constitutes contracting out or farming out is a matter of contract interpretation within the arbitrator's domain.

DISCUSSION

This Board has repeatedly held that in determining disputes concerning arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies and if so, whether the dispute presented falls within the category

of issues the parties have agreed to submit for arbitral resolution. [3]

The gravamen of the union's grievance herein relates to the referral of traditional bargaining unit work outside the unit. The parties to this proceeding have stipulated, at Article XV of the Agreement, that "contracting out" or "farming out" of "work normally performed by personnel covered by this Agreement" shall be referred to a joint labor-management committee. The parties have further stipulated, in Article XI of the Agreement, that matters subject to the grievance procedure are not appropriate items for consideration by the joint labor-management committee. Thus, the parties, by their own definition of the terms "contracting out" and "farming out", and their consensus to exclude issues related thereto from the contractual grievance procedure-arbitration machinery, have rendered the instant dispute nonarbitrable. It is beyond the powers of this Board to create a duty to arbitrate where none exists or to enlarge a duty to arbitrate beyond the scope established by the parties by contract or otherwise. A party may be required to submit to arbitration only to the extent that it has previously consented and agreed to do so.[4]

[3]Decision Nos. B-2-69, B-18-74, B-1-76, B-15-79, B-11-81, B-3-82, B-28-82, B-22-83, B-5-84, B-27-84.

[4]Decision Nos. B-12-77, B-15-82, B-41-82, B-30-84.

The matter having been found not to be arbitrable, we need not consider any other issues raised by the parties in their pleadings. Accordingly, we shall grant the instant petition challenging arbitrability and deny the request for arbitration.

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

DATED New York, N.Y.
July 29, 1985

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

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