

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

-between-

DECISION NO. B-25-87

THE CITY OF NEW YORK,

DOCKET NO. BCB-910-86
(A-2447-86)

Petitioner,

-and-

LOCAL 924, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On October 10, 1986, petitioner, the City of New York, appearing by its office of Municipal Labor Relations (hereinafter "the City"), filed a petition challenging the arbitrability of a request for arbitration filed by respondent, Local 924, District Council 37, AFSCME, AFL-CIO (hereinafter "the Union"), dated September 3, 1986. The Union filed a verified answer on November 10, 1986 in response to the City's petition. The City replied on November 15, 1986.

Background

The gravamen of the Union's grievance is that Associate Park Service Workers are performing the duties

of Laborers when assigned to bench crews to do bench work; and that this constitutes the performance of out-of-title work. The Union, which represents the affected Laborers, alleges that the performance of such out-of-title work by non-unit employees is in violation of Article XII, Section 2, of the Department of Parks Contract covering the period February 1, 1972 to June 30, 1974 as extended by a Working Conditions Memorandum of Understanding covering the period July 1, 1974 to December 31, 1983. However, a subsequent agreement was reached by the parties on September 12, 1985, and reduced to writing in the form of a memorandum dated May 15, 1986, which presently covers the parties. This current agreement contains an out-of-title work provision which is substantially similar to that contained in the prior contract. The parties agree that the grievance alleges only a violation of the earlier contract; that the grievance was filed in March 1986 after the expiration of the old contract; and that the parties are presently covered by a new collective bargaining agreement.

Positions of the Parties

City's Position

The City contends that the contract under which the

Union is grieving was no longer in existence at the time the grievance was filed. It is the City's position that a grievance filed pursuant to an expired collective bargaining agreement cannot be submitted to arbitration and that the request for arbitration, therefore, must be denied.

The City also asserts that even though the current contract contains a similar out-of-title work clause, the Union did not file its grievance pursuant to this contract. The City submits that the Union may not rely upon the existence of the new contract at the point of going to arbitration, where it declined to do so throughout the lower steps of the grievance procedure.

Union's Position

Respondent Union acknowledges the sequence of collective bargaining agreements as alleged by the City. However, the Union maintains that since the current agreement contains an out-of-title work clause under which the grievance would appear to fall, the Union has the "right" to have the grievance arbitrated, notwithstanding the fact that it was brought and presented at each step of the grievance procedure as a claimed violation of the expired contract.

Discussion

The issue presented for determination here is whether, because the same type of provision is contained in both the old contract and new contract, this Board may find the grievance to be arbitrable based upon the present contract, notwithstanding the fact that it was filed pursuant to an expired contract. Under the circumstances of this case, we answer this question in the negative.

We note that this is not a case in which the grieving party mistakenly has cited the wrong contractual provision in its request for arbitration. Rather, the Union's recitation of the history of the applicable agreements in its answer demonstrates that the Union was aware of the expiration of the contract relied upon and of its replacement by a new agreement. The Union also acknowledges that the grievance arose at a time when the successor agreement was in effect. Yet, no explanation is offered for the Union's continuing reliance upon a contract which expired more than two years before the grievance was filed.

The record further shows that in a Review Officer's decision issued at Step III of the contractual grievance procedure, the City informed the Union that it was not considering the merits of the grievance because it had been filed under an expired agreement. The City advised the

Union to re-file the grievance under the provisions of the current agreement. Nevertheless, the Union filed its request for arbitration based upon the expired agreement. Under these circumstances, it is apparent that the request for arbitration's reliance on the expired agreement was not an inadvertent error, but was the result of a conscious decision by the Union to pursue its claim on that particular basis.

It is well established that where a contract has been superseded by a subsequently executed and currently effective agreement, which was also in force and effect at all times relevant to the grievance at issue, the former contract can provide no basis for the assertion of an arbitrable grievance.¹ The fact that the current contract contains language substantially similar to the provision of the expired contract relied upon by the Union does not render the matter arbitrable, under circumstances present here, in which the Union has declined the City's invitation to recast the grievance under the current contract, and the City rightfully has refused to consider the merits of the grievance under an expired contract at the lower steps of the grievance procedure.

¹Decision No. B-9-79.

To permit this grievance to proceed to arbitration, on the basis that the current agreement contains a substantially similar out-of-title work provision, would be to permit an amendment of the grievance at the point of submission to arbitration, which would deprive the City of its right to consider and attempt to resolve the merits of the grievance at the lower steps of the parties' contractual grievance procedure. It also would condone the Union's refusal to amend its grievance at the lower steps where the City called its attention to the expiration of the cited contract. While this Board has not permitted technical rules of pleading to stand in the way of the New York City Collective Bargaining Law's express policy of favoring the arbitration of grievances,² we also may not ignore the essential purpose of a multi-level grievance procedure, which is to permit management an opportunity to resolve the matter in dispute voluntarily.³ In the present case, the City was under no obligation to consider the merits of the Union's grievance under the provisions of the expired and superseded contract upon which the Union insisted on relying. If this matter is to be deemed to be a grievance under the current contract, the City

²NYCCBL §1173-2.0.

³ See, e.g., Decision Nos. B-12-77; B-27-75; B-22-74.

is entitled to an opportunity to consider it on that basis. Accordingly, we will deny arbitration of the grievance, without prejudice to the Union's right to re-file the grievance under the current collective bargaining agreement.⁴

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

⁴In this regard, we note that since the grievance appears to complain of continuing out-of-title assignments, a new grievance filed alleging a continuing violation of the current agreement would not seem to be barred by the grievance procedure's time limitations.

ORDERED, that the petition challenging arbitrability filed by the City of New York herein be, and the same hereby is, granted.

DATED: New York, N.Y.
June 22, 1987

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CHAIRMAN

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