City v. L.621, SEIU, 45 OCB 55 (BCB 1990) [Decision No. B-55-90 (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-55-90

Petitioner, Docket No. BCB-1290-90 (A-3436-90)

-and-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Respondent.
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DECISION AND ORDER

On June 8, 1990, the City of New York ("City"), appearing by its Office of Municipal Labor Relations ("OMLR")[1], filed a petition challenging the arbitrability of a grievance initiated by Local 621, Service Employees International Union, AFL-CIO ("SEIU" or "Union") on behalf of Supervisors of Auto Mechanics employed at numerous City agencies. The Union filed an answer to the petition on June 26, 1990. Thereafter, the City filed a reply on July 12, 1990.

Background

On March 16, 1990 SEIU filed a group grievance directly at Step III with OMLR. The issue raised by SEIU is as follows:

> failure of the City of New York to pay night-shift differential for tours worked by members of Local 621 between 4:00 P.M. and 8:00 A.M of less than four hours in violation of the applicable Comptroller's

[1] Pursuant to Executive Order #13, effective July 24, 1990, the name of this of f ice has been changed to the Of f ice of Labor Relations ("OLR").

> [Determination (dated December 21, 1988)] and in violation of Article IV of the contract between Local 621 and the City of New York.[2]

As a remedy, the Union seeks the "payment of night-shift differential as provided for in the Comptroller's Determination retroactive to 120 days before this grievance was filed (March 16, 1990)."

In a Step III decision dated April 30, 1990, OMLR denied the grievance. On May 9, 1990, SEIU filed the instant request for arbitration.

Positions of the Parties

City's Position

The City maintains that it is under no obligation to arbitrate this grievance since SEIU has failed to allege a violation of the applicable Comptroller's Determination. The Comptroller's Determination provides, in pertinent part:

> a shift differential is to be paid for the work performed between the hours of 4:00 P.M. to 8:00 A.M. Such differential shall be paid at the following rates per shift:
>
> Effective 7/1/87 through 6/30/88: $10.51
> Effective 7/1/88 through 6/30/89: $11.07
> Effective 7/1/89 through 6/30/90: $11.64
>
> The shift differential is interpreted as to be paid in addition to the normal weekday, Saturday, Sunday, and Holiday rates. Work of four (4) or more hours will entitle personnel

[2] The pertinent collective bargaining agreement is the July 1, 1982 through June 30, 1986 agreement between the parties ("Agreement").

to receive the entire shift differential.

The City claims that the Comptroller's Determination dated December 21, 1988 plainly states that members of Local 621 are entitled to the shift differential only after they work four or more hours between the hours of 4:00 P.M. to 8:00 A.M. The City maintains that because the language of the Comptroller's Determination is clear and unambiguous, the Union should not be afforded the opportunity to arbitrate this matter and, thereby, to renegotiate the terms of the Agreement.

Union's Position

SEIU claims that members of Local 621 covered by the applicable Comptroller's Determination are arguably entitled to recover partial night shift differential for tours of less than four hours worked between 4:00 P. M. and 8:00 A.M. If an employee works four or more hours, the Union asserts, he or she is entitled to the entire shift differential. According to SEIU:

> by providing first for payment of a shift differential and second for the circumstances in which the 'entire shift differential' shall be paid, the Comptroller's Determination[] necessarily impl[ies] that some differential payment shall be made for work of less than four hours between 4:00 P.M. and 8:00 A.M.

In further support of its interpretation of the language in dispute, the Union states that if the Comptroller's Determination provided "only for receipt of the entire shift differential",

then the Determination would be worded in such a way as to limit shift differentials to only entire shift differentials.

SEIU states that because this matter involves the application and interpretation of a Comptroller's Determination, it is arbitrable pursuant to Articles IV and V of the Agreement. Article IV states that:

> the wages and other supplements applicable to employees covered by this Agreement shall be in accordance with the respective Determinations of the Comptroller, subject to the terms and conditions thereof.

Articles V provides, in pertinent part:

> Section 1.
> Definition: The term "grievance" shall mean: (A) A dispute concerning the application or interpretation of the terms of this agreement, any supplement thereto, or of a Comptroller's Determination, or wage or other agreement in lieu thereof, applicable to titles covered in this Agreement; ....

The Union argues that Article IV of the Agreement obligates the petitioner to comply with the Comptroller's Determination and that, pursuant to Article V of the Agreement, disputes concerning the construction of the Comptroller's Determination are grievable.

Discussion

It is well established that in resolving disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies, and if so,

whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.[3] In resolving this question, it is the Board's responsibility to ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. It is well settled that the precise scope of the obligation to arbitrate is defined by the parties in their collective bargaining agreement and that we can neither create a duty to arbitrate where none exists nor enlarge a duty to arbitrate beyond the scope established by the parties.[4] In order to bring a matter to arbitration, the petitioner is required to show that an arguable nexus exists between the matter in dispute and the scope of arbitrable issues as defined by the parties' agreement.[5]

The City argues that the language of the Comptroller's Determination is "clear and unambiguous" and that "the affected employees are to receive the differential only after '[w]ork of four (4) or more hours' is performed." In contrast, the Union contends that "at the very least, the construction of the Comptroller's Determinations urged by Local 621 is sufficiently plausible to require dismissal of the petition."

We find that this matter involves a question of the

[3] Decision Nos. B-27-89; B-65-88; B-28-82.

[4] Decision Nos. B-35-89; B-26-88; B-14-87; B-24-86.

[5] Decision Nos. B-15-90; B-20-82; B-1-84.

interpretation of a Comptroller's Determination and that it, therefore, is within the scope of matters that the parties have agreed to arbitrate pursuant to Articles IV and V of the Agreement. Our finding here is consistent with the statutorily expressed and well-recognized policy in favor of arbitral determination of disputes.[6] It is not within the jurisdiction of this Board to act as interpreter of the intent or meaning of Comptroller's Determinations. Where, as here, there is a colorable basis to support the Union's claim, the matter should proceed to arbitration. Any further inquiry into the merits of the Union's claim should be conducted by an arbitrator and not by this Board. [7]

Accordingly, we shall grant the Union's request for arbitration insofar as the union has alleged, prima facie, a violation of Article IV of the Agreement, pertaining to wages and other supplements, and constituting a matter which is within the definition of a grievance, as set forth in Article V of the Agreement.

[6] NYCCBL Section 12-302; Decision Nos. B-25-83; B-41-82; B-15-82; B-10-81.

[7] Decision Nos. B-25-75; B-27-82; B-4-83; B-18-83; B-49-89.

0 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 Union's request for arbitration hereby is, granted; and it is further

ORDERED, that the City's petition challenging arbitrability hereby is, dismissed.

DATED: New York, New York
September 17, 1990

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