City v. L.3, Inter. Brotherhood of Elec. Workers, 45 OCB 7 (BCB 1990) [Decision No. B-7-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE ARBITRATION

-between-

THE CITY OF NEW YORK,
Petitioners,
-and-

Decision No. B-7-90
Docket No. BCB-1092-88
(A-2887-88)

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.
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DECISION AND ORDER

On September 22, 1988, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a grievance that was the subject of a request for arbitration filed by Local 3 of the International Brotherhood of Electrical Workers on September 12, 1988. The Union filed its answer on October 12, 1988. The City subsequently withdrew its petition challenging arbitrability, with prejudice, on November 29, 1988. Thereafter, the case file maintained by the Board of Collective Bargaining ("the Board") in this matter, which was docketed as BCB-1092-88, was closed.

During the ensuing arbitration hearing which took place on or about July 24, 1989, the City raised a motion to dismiss on the ground that the Union had not properly complied with the waiver requirement established in Section 12-312(d) of the New

York City Collective Bargaining Law ("the NYCCBL").[1] The Union opposed this motion.

In a letter dated January 9, 1990, Steven DeCosta, Deputy Chairman and General Counsel of the Board, advised the parties that the determination of the validity of the disputed waiver is within the Board's exclusive jurisdiction pursuant to its non-delegable authority to interpret and apply the NYCCBL. Consequently, he informed the parties that BCB-1092-88 would be reopened, and he directed that they file written statements of their positions regarding the disputed waiver issue with the Office of Collective Bargaining.

On January 22, 1990, the City filed a statement setting forth its position in this matter. The Union filed a statement of its position on January 23, 1990. Thereafter, on February 13, 1990, the Union filed a reply statement. The City did not file a reply statement.

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[1] Section 12-312(d) of the NYCCBL provides that:

> As a condition to the right of the municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrators award.

Background

Mr. Bernard P. Goldstein ("the grievant") is employed as an electrician by the Department of Social Services ("the Department"). On March 23, 1988, he filed a Step I grievance which, in relevant part, complained of the fact that the City had improperly deducted his wages for New Year's Day 1988 from his paycheck.

The City never responded to the grievant's Step I grievance, and on April 12, 1988, the grievant filed a grievance at Step II of the grievance procedure. The Hearing Officer at Step II found that although the grievant had been on an approved annual leave from December 12, 1987 to January 6, 1988, he had only accumulated enough annual leave credits to last through 2 1/4 hours of December 28, 1987. Consequently, she determined that the grievant had not been in "pay status" for the remainder of his annual leave which included New Year's Day, and denied the grievance. Thereafter, on May 3, 1988, the grievant filed a grievance at Step III. The Step III grievance was denied on August 10, 1988.

No satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration on September 12, 1988, alleging that the City violated a 1984-1987 New York City Comptroller's Determination by deducting payment for New Year's Day from the grievant's wages. The waiver submitted in conjunction with that request for arbitration was dated September

12, 1988. The Union sought full payment for New Year's Day 1988 as a remedy.

Although the City initially filed a petition challenging the arbitrability of this matter, it withdrew the petition with prejudice on November 29, 1988. However, before testimony was taken at an arbitration hearing convened to resolve this dispute, the City raised a motion to dismiss on the ground that the grievant had violated the waiver requirement established in NYCCBL, §12-312(d). In support of its position, the City asserted that it had just learned that the issue to be presented before the arbitrator had been addressed in an action before the Civil Court of the City of New York, and that this action had been withdrawn pursuant to a "Stipulation of Settlement and Discontinuance With Prejudice" dated September 6, 1988 ("the Stipulation").[2] The Union opposed the City's motion to dismiss

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[2] The Stipulation, which was executed by the grievant and the Corporation Counsel, provides in relevant part as follows:

> WHEREAS, plaintiff . . . is subject to the Comptroller's Determination entered February 19, 1987 . . . ; and, . . .
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> WHEREAS, plaintiff commenced this proceeding to collect monies owed to him under the Comptroller's Determination
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> IT IS HEREBY STIPULATED AND AGREED by plaintiff, pro se, and defendant, as represented by its attorney below, that this proceeding is discontinued and withdrawn with prejudice and settled upon the following conditions:
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> 1. The above-captioned Civil Court proceeding shall be and hereby is discontinued and withdrawn with prejudice . . . other than as provided below;

(continued...)

the grievance.

The Board thereafter reopened BCB-1092-88 for the sole purpose of determining whether the Union had complied with the requirements set forth in NYCCBL, §12-312(d).

City Position

The City argues that the waiver filed by the Union is invalid. It maintains that the instant dispute was disposed of pursuant to the terms of the Stipulation, and that the Board has recognized that a grievance involving issues that have been addressed in a prior litigation cannot be presented in the arbitral forum. Thus, the City contends that arbitration of the grievance presented herein "would be injurious to the concept of

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[2](...continued)

> 2. Plaintiff hereby waives any and all future claims for back-pay and damages accruing under this Determination, for all payroll periods through January 1, 1988, (inclusive), . . . and it is agreed by both parties that all wage-related disputes through January 1, 1988 are to be deemed resolved pursuant to the terms herein; . . .
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> 7. An amount of $164.50, which sum represents wages for New Year's Day , January 1, 1988, and accrued interest thereon, at a rate of 3% per annum, remains in dispute. It is agreed that in the event plaintiff can establish, through documentation, his claim that pursuant to a negotiated contract he is of a class of employees entitled to payment for holidays . . ., he shall be paid said $164.50 and 3% accrued interest thereon . . .

the [statutory] waiver [requirement] . . . ."

The City also asserts that having been unaware of the existence of an issue with respect to the validity of the Union's waiver at the time its petition challenging arbitrability was withdrawn, it cannot be deemed to have waived its right to dispute the Union's compliance with the statutory waiver requirement. The City notes that the sole question addressed in the petition was whether there was a nexus between the collective bargaining agreement and the grievance. Consequently, it maintains that it acted properly in raising its challenge to the Union's waiver at the arbitration hearing convened to resolve the merits of this dispute.

Union Position

The Union argues that the waiver signed by the grievant is valid in every respect. It contends that there has been no court proceeding involving the instant dispute, and notes that pursuant to the terms of the Stipulation, the case which had been pending in Civil Court was settled prior to the date upon which the waiver was executed. The Union also asserts that the prohibitions set forth in the waiver do not apply retroactively, but rather, refer only to the initiation of future litigations. Therefore, the Union maintains that the waiver which it filed with the Office of Collective Bargaining is valid pursuant to the requirements of Section 12-312(d), and that the merits of the

instant grievance should be resolved in arbitration.

Discussion

This Board has the power and duty to resolve controversies concerning the interpretation or application of the provisions of the NYCCBL.[3] Accordingly, we assert our jurisdiction over the instant matter for the sole purpose of determining whether the waiver filed by the Union is valid within the meaning and intent of Section 12-312(d) of the NYCCBL.

The statutory waiver requirement is a jurisdictional condition precedent to the Board's authority to order a case to arbitration.[4] Therefore, our consideration of whether the waiver requirement has been satisfied in a particular situation is not dependant upon a timely objection to the arbitrability of the grievance in question. Since arguments involving compliance with Section 12-312(d) relate directly to the arbitrator's jurisdiction over a dispute, they cannot be waived.

It is well established that the purpose of the waiver requirement is to prevent multiple litigation of the same dispute, and to insure that a grievant who elects to seek redress through the arbitration process will not attempt to relitigate

[3] Decision No. B-12-71.

[4] Decision No. B-7-76. See also, Decision Nos. B-72-89; B-35-88; B-31-80; B-8-79.

the same matter in another forum.[5] A union is deemed to have submitted an underlying dispute in two forums, and thus to have rendered itself incapable of executing an effective waiver under Section 12-312(d) where the proceedings in both forums arise out of the same factual circumstances, involve the same parties, and seek the determination of common issues of law.[6]

In applying Section 12-312(d), we have generally denied arbitration where the proponent of arbitration has commenced another proceeding seeking a remedy for the same underlying dispute in another forum.[7] However, in light of our clear policy favoring the arbitration of disputes, we have consistently examined disputed waivers "with consideration of the process of which they are a part, and with due regard to the protection which the waivers are intended to afford."[8] Applying these principles to this case, we reject the City's argument that the Union filed an invalid waiver with the Office of Collective Bargaining.

In addressing the arguments raised in the dispute herein, we note that contrary to the Union's contention, the burden imposed by the statutory waiver requirement is not merely a prospective one. This Board has held that:

[5] Decision Nos. B-35-88; B-10-85; B-13-76.

[6] Decision Nos. B-50-89; B-54-88; B-35-88; B-28-87.

[7] Decision Nos. B-50-89; B-28-87; B-19-86; B-21-85; B-10-82.

[8] Decision No. B-72-89.

> it would be senseless to interpret the statutory waiver requirement as barring the submission of a matter to the courts subsequent to an arbitration, while permitting a matter that has already been adjudicated on the merits by a court to be submitted to arbitration. . . . [S]uch a construction would ascribe to the law, at least by implication, the intent to give superior status to arbitral awards over court judgments, which is clearly not the purpose of the law.[9]

Therefore, we have determined that a party seeking arbitration of an issue that was previously litigated on its merits lacks the capacity to comply with the statutory waiver requirement.[10]

However, we have also ruled that the commencement of a court proceeding for adjudication of a dispute underlying a grievance constitutes only a provisional election to present that dispute in the judicial forum.[11] It is only upon the rendering of a judgment on the merits of a dispute that the election of the judicial forum becomes irreversible for purposes of Section 12-312(d) .[12] Thus, the withdrawal of a court action will restore the capacity of a party to execute a waiver which is in compliance with the specifications of Section 12-312(d).[13]

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[9] Decision No. B-8-79; See also, Decision No. B-50-89.

[10] See, Decision Nos. B-72-89; B-60-89; B-54-88; B-35-88; B 39-80; B-13-76.

[11] Decision No. B-8-79.

[12] See, Decision Nos. B-72-89; B-35-88; B-19-86; B-22-85 request for reconsideration denied, B-22A-85.

[13] See, Decision Nos. B-28-87; B-28A-87.

In the instant case, the merits of the grievance presented herein were withdrawn from the judicial forum pursuant to the terms of the Stipulation. moreover, we observe that pursuant to Part 7 of the Stipulation, the parties agreed that the issue of payment for New Year's Day 1988 remains in dispute. Thus, the merits of the instant grievance were never fully litigated.

Therefore, we hold that the Union's capacity to comply with the statutory waiver requirement was restored upon the withdrawal of the action which had been commenced in Civil Court. Accordingly, we find that the Union has satisfied the waiver requirement established in Section 12-312(d), and we direct that the merits of the instant grievance be resolved in arbitration.

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

0 R D E R E D, that the challenge to arbitrability raised herein by the City of New York be, and the same is hereby denied and it is further

O R D E R E D, that the request for arbitration filed herein by the Union be, and the same is hereby granted.

Dated: February 26, 1990
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

DEAN L. SILVERBERG
MEMBER