City v. L. 246, SEIU, 7 OCB 12 (BCB 1971) [Decision No. B-12-71 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-12-71

Petitioner, DOCKET NO. BCB-90-71

v.

NEW YORK CITY LOCAL 246,
S.E.I.U., AFL-CIO,

Respondent.

DECISION AND ORDER

S.E.I.U. (the union) seeks arbitration of a controversy in which the Union alleges that 2 Foreman of Mechanics in the Fire Department has been assigned to the out-of-title performance of duties properly assignable only to Machinists, Auto Machinists or Auto Mechanics in a bargaining unit represented by the Union. The Union cites as having been violated: "Civil Service Law, §61, the rules thereunder; New York State constitution Art. 5, and the Executive Order No. 52 "Definition of Grievance"; and demands that "a cease and desist order be given to the Foreman and that a man in the appropriate title be employed to perform these duties."

The City's petition urges denial of the Union's request for arbitration on the ground that the Union has failed to file waivers signed by the individual grievants affected by the alleged out-of-title assignment. The City cites the NYCCBL §1173-8.0(d); Executive Order 52, §8(a) (4); and Rule 6.3(b) of the Rules of the Office of Collective Bargaining, contending that the failure to comply with the waiver requirements is "fatal to the demand for arbitration."

Section 1173-8.0d of the New York City Collective Bargaining Law provides as follows:

> "d. As a condition to the right of a 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 under lying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

Executive Order 52, Section 8a(4), in pertinent part, reads as follows:

> "(4) An employee organization certified for the unit of which the grievant is a member shall have the right, to bring grievances unresolved at Step 3 of the general procedure . . . to impartial arbitration by an arbitrator on the register of the Board of Collective Bargaining, under procedures established by such board. As a condition to such right the grievant and such organization shall be required to file with the Director of the Office of Collective Bargaining a written waiver of the right, if any, of said grievant and of said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

Rule 6.3 of the Consolidated Rules of the Office of Collective Bargaining reads as follows:

> "6.3 Request-Contents; Waiver.
>
> a. A request for arbitration shall contain a concise statement of the grievance to be arbitrated.
>
> b. If the request for-arbitration is served by a public employee organization, there shall be attached thereto a waiver, signed by the grievant or grievants and the public employee organization, waiving their rights, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."
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> (Underscoring supplied)

We have made substantive dispositions of similar union complaints of out-of-title work involving more than one employee and the issue of arbitrability in prior cases. Our holdings in those cases have been that a union may "arbitrate a claim that employees outside the unit have been assigned to duties pertaining to employees represented by the grieving union" (emphasis ours). (Decisions B-2-70, City of New York and D.C. 37; B-7-70, City of New York and N.Y.C. Local 246, S.E.I.U.,; B-1-71, City of New York and Local 704, I.B.F.O.)

In the first of the cited cases (Decision No. B-2-70), the Union and an individual employee grievant executed waivers. In the latter two cases (Decisions Nos. B-7-70 and B-1-71), waivers were executed solely by the unions and not by any individual and no objection was interposed whatever. In those cases, the Board decided arbitrability on grounds other than waiver. The issue, as presented by the parties, therefore is one of, novel impression and involves a resolution of the question whether the absence of written waivers by individual grievants bars arbitration under the facts of this case.

In the specific matter before us, the Union contends that a non-unit employee allegedly is-performing work of a bargaining unit employee in one of the shops and is therefore engaged in out-of-title work, to the detriment of bargaining unit employees and of the Union. The City contention is that waivers must be signed by the nine bargaining unit members in the shop who might ox could be affected by out-of-title work being performed by non-unit employees. The City's contention is that the nine employees are identifiable as potential beneficiaries of the remedy sought by the Union and therefore must waive recourse to any other forums before the arbitration case may be processed and heard. The Union's contention is that a claim of out-of-title work, being performed by non-unit employees, is a Union grievance and a waiver signed by the Union is ample protection for the City.

Grievances generally fall into several distinct categories. There are, of course, union grievances disputing a contract interpretation or application, in which the union clearly is the only identifiable "grievant" and in .. which only the union properly could be asked to file a waiver. The likelihood is that such a grievance applies to all employees in the applicable bargaining unit and probably to future employees as well.

"Group" grievances do not necessarily apply to all employees in a bargaining unit, but rather to a number of employees in a unit who are similarly affected by an alleged violation. There may be instances in which processing of a group grievance requires, by its very nature, individual waivers signed by individual employees in addition to a waiver signed by-the union. There may be other situations of group grievances in which only a union waiver will be required. The Board will decide these on a case-by-case basis, as questions arise, placing substantial weight on the philosophy and evaluations described in this opinion.

Some group grievances, and some grievances processed on behalf of individual grievants and others similarly situated, may be treated as class actions. In Such cases, the Board will consider each case on its own merits and clearly will want such waivers as will avoid the possibility of recourse to other remedies concurrently with or subsequent to arbitration, in accordance with the .intent of the NYCCBL and Executive Order No. 52.

There are, in addition, individual grievances in which one or more identifiable individuals claims a violation of contractual rights. In such cases, both the union bud the individual(s) are expected to sign the waivers as a condition precedent to arbitration. The City claims that the instant matter is such a case in that there are only nine employees in the shop in which the alleged violation occurred; that they are identifiable; and that it represents no hardship to have them waive their rights, if any, to submit the underlying dispute (i.e. the grievance) to any other administrative or judicial tribunal.

For the reasons which we develop below, we do not accept the position urged upon us by the City. While we decide here only the issue before us in the instant case, some analysis is required of the entire problem of waiver as it appears in the NYCCBL, the Executive Order and the Consolidated Rules of the. O.C.B.

Section 1173-8.o(d)o of the NYCCBL, §8(a) (4) of Executive Order 52, and Rule 6.3(b) of the Consolidated Rules of the O.C.B. all treat with the same subject matter and are, therefore, in pari materia, to be construed together, so that a construction and interpretation of one section, as it applies to the issue before us, is dispositive of all.[1]

[1] McKinney's Statutes, §§ 979 221.

The Statute and Executive Order are designed to promote and encourage the arbitral process as the selected remedy to redress grievances. The statutory policy with respect to arbitration is set forth clearly in NYCCBL, 51173-2.o, as follows:

> "It is declared to be the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."
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> (Underscoring supplied)

Were we to accept the City's position, the statutory policy of encouraging arbitration of grievances would be destroyed except in those instances in which the grievance is clearly an individual grievance and in which an individual waiver is signed. But those grievances whose origins lie in the broad sweep of contract language, requiring construction or application could not be heard by an arbitrator unless the total union membership (in sone instances) signed waivers. We do not think the statute intended that the execution of waivers as a pre-condition to arbitration should turn solely on the number of employees who could be involved in the grievance. The dimensions of the problem posed by the City's position may be illustrated by a grievance which possibly applies to all employees in a large unit. In such a case, all the employees would be required to sign waivers and one employee's failure or refusal to sign a waiver could successfully thwart access to arbitration. It is clear that the City does not seek this result but seeks only to obtain the protection against use of several tribunals or administrative bodies as to the same issue, a result the waiver provision was devised to prevent.

The Board has the power and duty to resolve a controversy between parties concerning the interpretation or application of the provisions of the NYCCBL (§1173-5.0a(11). Therefore, the statutory language giving rise to the instant question must initially be determined by "the agency administering the statute." (Mounting & Fishing Co. V. McGoldrick, 294 N.Y.104, 109).

When it becomes necessary to construe a statute in terms of legislative intention, policy, and objective, "All laws should receive a sensible Construction: and literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." (Berg v. Muldoon, U.S.D.C. 1963, 54.LRRM 2642, citing with approval at 2647 from Sorrels v. United States, 287 U.S. 435 and United States v. Kirby, 7 Wall. 482). (See also McKinney's Statutes, §§145 and.147. "A sensible construction of a statute is preferred to one which is absurd," and "The Courts will not indulge in a presumption that the Legislature intended unwise or injurious results to flow from its action *** * ***." Accordingly, statutes must be so construed that mischief may be avoided.")

Particularly appropriate is the application of statutory canons of construction to labor legislation which occasioned emphasis by the United States Supreme Court when it said: "We have cautioned against a literal reading of Congressional labor legislation." (Cf. Wirtz v. Local 153, Glass Bottle Blowers, 1968, 67 LRRM 2129). Further, to avoid injustice or absurd consequences it "will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter *** * ***." (United States v. Kirby, supra.)

Thus, based upon the guidance of the cited authorities and upon the cl ear and unequivocal policy, stated in the NYCCBL and the Executive Order, to encourage the arbitration of grievances, we interpret the waiver provisions of Statute, Executive Order and Rules 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.

The NYCCBL recognize's that the processing of a grievance is a function which a labor organization performs or may perform. Section 1173-3.0j defines a "public employee organization" as one having as a primary purpose the representation of public employees concerning "wages, hours and working conditions." It is the City's duty (subject to certain limitations not pertinent hereto) to bargain in good faith with the representative of employees on "wages... hours . . . and working conditions" (E.O. 52, §5a(1))

When certified, the employee organization is the "exclusive bargaining representative" for collective bargaining purposes (NYCCBL, §1173-5.0b(2), and as such exclusive representative it is authorized to enter into "collective bargaining agreements" with the City concerning "grievance procedures" (E.O. 52, 58a(1), (2) and (3)). Further, only the exclusive representative may process a grievance to arbitration (E.O. 52 68a(4)). It is significant to note that the arbitrator's award is limited, inter alia. "to the application and interpretation of the collective bargaining agreement" mod that only the exclusive representative may under the provisions of the CPLR (Article 75) move to confirm the award and obtain judgment thereon.[2]

[2] The grievance procedure for uniformed members of the Police Department differs from the procedures applicable to all other City employees, but the sole authority of the union to arbitrate is the same (see E.O. 52 §8b).

It is plain that the statutory structures as outlined above, establishes that the advent of collective bargaining under the NYCCBL has established a permanent, organized relationship between the unions representing City employees and the City involving a day-to-day administration of the collective agreement and*the bargaining relationship. The grievance procedure is a part of that day-to-day administration. ("The adjustment of grievances, viewed in the larger aspect, constitutes, to a great degree, the actual administration of a collective bargaining contract." . (Hughes Tool Co., 104 NLRB 318, 326, 32 LRRM 1010) Under the NYCCBL, arbitration of grievances is a part of the collective bargaining process. The conduct of labor relations under the NYCCBL postulates an exclusive collective bargaining representative and obliges the City to deal with it. Correlatively, collective bargaining by its very nature tends to submerge the individual in a collective context.

Directly dispositive of the arbitrability issue before us is the nature of the grievance. As we have indicated, the Board, with respect to written waivers signed by individual grievants, will direct or deny arbitration depending upon the factual nature of the grievance alleged. When the grievance sought to be arbitrated is "uniquely personal" to the grievant (Brown v. Sterling Aluminum Product Corp., U.S.C.A. 8th Cir. 1966, 63 LRRM 2177, 2180), and involves "an ascertainable aggrieved employee" (Soho Chemical Co., 1963, 141 NLRB No. 72, 52 LRRM 1390), the Board will require that the grievant and the union sign the written waiver before the matter may be further processed. (Cf. Textile Workers v. Lincoln Mills, 353 U.S. 448, 40.LRRM 2113, concurring

opinion, "The District Court had jurisdiction over the action since it involved an obligation running to the union -- a union controversy -- and not uniquely personal rights of employees sought to be enforced by a union.") However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit..as a whole, only the-union as the sole representative of that unit would normally have-the standing to enforce. that right: .(Cf. Brown v. Sterling Aluminum Products Corp., supra.)

We apply the same reasoning to the arbitral forum; "In this respect, a distinction is made between a grievance directly affecting the individual rights of the grievant under the contract and one mainly concerning the union as the bargaining representative-of the employees collectively." (Kister Lumber Co., 37 LA 356, 358).

In sum, it is our view that under the NYCCBL if a factual situation demonstrates that the issue involves an alleged violation of a right possessed by the bargaining unit as a whole, or by the union as exclusive representative, the union's to waiver is sufficient to warrant proceeding to arbitration of the dispute.

We do not decide here the distinctions between a group grievance which involves a right possessed by the bargaining unit as a whole, and a group grievance uniquely personal to the individuals involved. Nor does our decision cover the many variations of grievances which can be decided only on a case-by-case basis in the future.

In the instant matter, the claim is that out-of-title work, performed by a non-unit employee, infringes on the work of bargaining unit employees. We consider this to be a union grievance, protesting an alleged invasion of the bargaining unit.

We, therefore, find and conclude that the failure to file an individual waiver or waivers is not a bar to arbitration; that the waiver filed by the Union satisfies the requirements of.§1173-8,0d of the NYCCBL as they apply in this case; and that the matter is arbitrable. Since we hold that individual waivers are not required we further conclude that neither this decision nor..the arbitrator's award shall have retroactive application.

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 this proceeding be, and the same hereby is, referred to an arbitrator to be agreed upon by the parties, or appointed pursuant to the Consolidated Rules of the Office of Collective Bargaining.

DATED: New York, N.Y.
August 23, 1971.

ARVID ANDERSON
C h a i r m a n

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M e m b e r

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