City v. UFOA & UFA, 7 OCB 17 (BCB 1971) [Decision No. B-17-71 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

OFFICE OF LABOR RELATIONS OF
THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-17-71

-against-

UNIFORMED FIRE OFFICERS ASSOCIATION (UFOA), DOCKET NOS. BCB-98-71
BCB-103-71
UNIFORMED FIREFIGHTERS ASSOCIATION (UFA),

Respondents.

DECISION AND ORDER

The City has made two applications to this Board, one being a "new" petition challenging arbitrability of ten (10) union grievances and the other being a motion for reconsideration, nunc pro tunc, of this Board's recent decision (B-15-71). Both applications are interrelated, stemming from a prior petition challenging the union's request for arbitration and the present challenge to the validity of the status of a Memorandum of Understanding. Summarizing the pertinent contentions of the parties, we treat both applications of the City as one and we also treat as one the unions' pleadings, including the transcript of October 12, 1971, in answer to the City's applications.

The nature of the City's applications and the unions' responses thereto can best be understood against the background of an established bargaining relationship and certain events which involve the status of a Memorandum of Understanding, dated September 17, 1969, entered into between the City and the unions.

The City contends that the said Memorandum of Understanding cannot support the unions' claim for arbitration since the Memorandum, being coextensive with the term of the collective bargaining agreements expiring December 31, 1970, has expired and, moreover, Arbitrator Schmertz, having made an award, dated September 23, 1971, concerning workload and impact, based upon his interpretation of the said Memorandum, there is nothing to arbitrate since the City must, in accordance with the Board's decision on workload impact, first be granted the opportunity to remedy the impact either unilaterally or by collective bargaining with the unions (Decision No. B-9-68).

We are mindful of that portion of the record which refers to the meeting between the parties and their counsel on September 17, 1971, and the dispute concerning the City's alleged reservation of rights to further contest arbitrability on grounds other than those set forth in its prior petition. For the purposes of this decision we do not feel it necessary or material to deal with that dispute.

We believe that the City should have raised the threshold issue of arbitrability, namely, the validity of the Memorandum of Understanding at the time of the September 17, 1971 conference or prior thereto at the time the City filed its original petition challenging arbitrability. However, we do not stop the City for failing to raise, timely, the question of arbitrability. Instead, we choose to deal with the question on the merits.

The first question is the continued vitality of the Memorandum of Understanding of September 17, 1969. Did such Memorandum survive the contract expiration dates of December 31, 1970 We find that the Memorandum of Understanding is still in effect. The unions have documented the City's participation subsequent to December 30, 1970, in arbitration proceedings before Eric J. Schmertz, as arbitrator, and he rendered awards on disputes which arose under the Memorandum after December 30, 1970. These proceedings were based on the unions' claims that the City failed to comply with the Memorandum of Understanding. The City's conclusory denial of such facts, without more, is insufficient as a basis for challenging the continued vitality of the Memorandum of Understanding beyond December 31, 1970. Nowhere in the papers before us does the City aver, nor does it appear, that either party ever notified the other that the Memorandum of Understanding would terminate on December 31, 1970. The papers before us demonstrate that the parties, by their conduct and the transactions performed pursuant to the Memorandum, treated the Memorandum as a living and binding document subsequent to December 31, 1970. In effect, the parties consented to the continuance of the Memorandum of Understanding after December 31, 1970. We do not, at this time, pass upon the issue of when the Memorandum of Understanding terminates.

The Memorandum of Understanding and the workload decision both provide for review by Mr. Schmertz as to whether the workload standards or other standards have

been complied with. Mr. Schmertz' workload decision of September 23, 1971, provides that in the absence of an application for review the workload decision shall expire on July 10, 1973. Nothing in Mr. Schmertz' workload decision states, suggests, or infers that the rights and obligations created by the Memorandum of Understanding were terminated by said decision. Thus, that decision did not terminate the Memorandum but was in compliance with a particular provision of the Memorandum which provides the authority for that decision and for his subsequent review. We fail to see how the workload decision can raise new issues of arbitrability regarding the other sections of the Memorandum with which it does not deal.

In short, neither of the parties has given notice of the termination of the Memorandum of Understanding and, additionally, the parties have conducted themselves as if the Memorandum continued beyond the expiration date of the contracts .

We note the impact of this decision, namely, that while the unions have the right to grieve and arbitrate alleged violations of the Memorandum of Understanding, this should not, however, be understood as imposing upon either party any limitation on their bargaining positions with respect to their new agreements.

We have carefully considered the numerous pleadings of the parties and reject petitioner's request for a hearing since we consider that no substantial questions of fact have been raised which are material to the questions of arbitrability raised herein.

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 City's petition dated October. 12, 1971, be, and the same hereby is, denied; and it is further

ORDERED, that the City's motion for reconsideration (undated) of the Board's decision No. B-15-71, be, and the same hereby is denied, and the said Board's decision No. B-15-71, be, and the same hereby is, adhered to in all respects, and the parties are hereby directed to proceed to arbitration before Eric J. Schmertz, Esq., the arbitrator designated by the parties.

DATED: New York, N.Y.
October 22, 1971.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

WILLIAM MICHELSON
M e m b e r

EDWARD SILVER
M e m b e r

N.B. Member Schmertz did not participate in the decision and order herein.