City v. L. 371, SSEU, 7 OCB 9 (BCB 1971) [Decision No. B-9-71 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-9-71

Petitioner,

vs. DOCKET NO. BCB-94-71

LOCAL 371. -SOCIAL SERVICE EMPLOYEES UNION, AFSCME, AFL-CIO

DECISION AND ORDER

During the pendency of an arbitration proceeding to which the City is a party, the City now moves to challenge arbitrability of an employee's alleged grievance on the ground that the City has offered the grievant to transfer him back to his prior work location from which he had been transferred, and by reason of such offer the grievant has obtained full remedial redress and no longer has a grievance. The City contends that it has fully complied with the contract and, as a result, the party seeking arbitration lacks standing under the law to institute the arbitration proceeding.

In support of its contention, the City states that the retransfer offer was made at the hearings held before the arbitrator and was rejected by the grievant. Therefore, upon the grievant's rejection of the City's offer, the City made an oral motion, addressed to the arbitrator, similar to the instant notion addressed to the Board. The arbitrator has reserved decision on the City's motion

The hearings before the arbitrator have thus far consumed three days and are not concluded and an award has not been rendered.

The Union, by an affidavit of its attorney dated June 9, 1971, urges the Board not to take jurisdiction, opposing the City's application on several grounds, inter alia, that the simultaneous use of forums is clearly a disservice to the arbitration process and for the Board to take jurisdiction could only serve to undermine both the arbitrator and the arbitration process as well; and that whether the offer made by the City is sufficient to satisfy the grievance is for the arbitrator to determine. The issue, states the Union in its opposing affidavit, is the application of seniority to the transfer of employees and the Union is entitled to an interpretation of the collective bargaining agreement so that the issue, once resolved, may "avoid multiplicity of similar grievances."

For the reasons hereinafter stated, the City's motion is denied.

The City and the Union are signatories to a valid collective bargaining agreement which provides for the arbitration of employees' grievances. At the time request was made by the Union for arbitration no issue was raised by the City with respect to the obligation to proceed to arbitration. Thus, the City not only participated in the designation of an arbitrator but, in addition, participated in hearings before the arbitrator on three separate occasions. Under the circumstances, the City's objection to arbitrability a threshold question despite the attempt to seek an interpretation of the full faith compliance section (§1173-5.0.a(1) -- comes too late. To grant the City's motion would establish a precedent permitting a party to apply to the Board to stay arbitration even though

that party has, pursuant to an agreement, agreed to arbitration as a remedy for the resolution of a grievance, did in fact acquiesce in the designation of an arbitrator and, further, participated in the arbitration proceedings. The instability that such a procedure would engender, if sanctioned, is obvious. Suffice it to say that, under similar and apposite circumstances, principles of arbitration law in the private sector, reject similar applications as made herein. Matter of Leonard (Heinermann), 35 Misc. 2d. 421, 231 NYS 2d 198: ("In my view, the petitioner, having taken part in the proceedings for the designation of arbitrators, is thereby precluded from seeking a stay of arbitration"); Matter of Classic Togs, Inc., (Joint Board of Cloak Suit, etc.), 27 Misc. 2d 598, 211 NYS 2d 653: (". . . too late to raise question that it never agreed to arbitrate on motion to vacate award"); Junior Miss Dress Corp. v. H. J. Stotter, inc., 100 NYS 2d 273: (upon motion to vacate award "petitioner having participated in the selection of the arbitrators may not now stay the proceedings and litigate the existence of a contract"); Weinstein-Korn-Miller Manual, CPLR, Chapter 13, Arbitration, C. Enforcing Arbitration (1)Notice of Intention to Arbitrate ("Notwithstanding the insufficiency of the notice of intention to arbitrate, if a party participates in the arbitration, he will be precluded from raising these issues.").

It is the view of this Board, supported by pertinent precedent, that a dispute, once submitted to the arbirtrator solution, is peculiarly within his province

and that his authority under the Consolidated Rules (§6.6. Hearing - Powers of Arbitrator) are virtually plenary, including the power to modify an award. The Consolidated Rule 6.6. and pertinent sections of the CPLR (7505, Powers of Arbitrator; 7506, Hearing; 7507, Award; form; time; delivery; and 7509, Modification of Award by Arbitrator) and §1173-8.0.b. NYCCBL (An Arbitrator's award "shall be final and binding and enforceable in any appropriate tribunal in accordance with the applicable law governing arbitration") persuades the adoption of the following Board policy:

With exceptions which the Board will determine on a case-by-case basis all matters submitted to an arbitrator for resolution by the parties lie exclusively within his jurisdiction. (c.f. Leonard (Heinermann), supra). In the instant case, the issue of the propriety of the involuntary transfer of the grievant is, concededly, arbitrable and resolution of the issue should be made by the adjudicator and in the forum selected by the parties.

Whether the City's offer to retransfer the grievant to his prior work location constitutes an adequate remedy and by reason thereof results in mooting the issue, is a question for the arbitrator. The arbitrator, who is in possession of all the facts, including the sufficiency of the City's offer and the validity of the grievant's rejection of the offer, is in the unique position to evaluate and adjudge the conflicting alternatives arising from those facts..

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 City's motion, dated May 19, 1971, be, and the same hereby is, denied; and it is further

0 R D E R E D , that a copy of this decision and order be served upon Walter L. Eisenberg, the arbitrator designated by the Union and the City in case No. A-96-69 and that service by mail upon the said arbitrator shall be deemed good and sufficient service.

DATED: New York, N.Y.
August 6 , 1971

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

TIMOTHY W. COSTELLO
M e m b e r

EDWARD SILVER
M e m b e r

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