City v. L. 371, SSEU, 9 OCB 4 (BCB 1972) [Decision No. B-4-72 (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-4-72

Petitioner

DOCKET NO. BCB-95-71

-and

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.
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DECISION AND ORDER

On May 25, 1971, Social Service Employees Union, Local 371 (the Union) filed with the Office of Collective Bargaining a request for arbitration (Case No. A-163-71), claiming alleged violations of a contract. On June 7, 1971, the City filed a petition contesting atbitrability. The Union's answer to the petition was filed on June 21, 1971.

The controversy centers upon the layoff of 266 provisional Caseworkers in the Department of Social Services which the Union maintains were in violation of a collective bargaining agreement ("contract") between the parties and of a supplemental agreement entered into as the result of the recommendations of a Reorganization and Workload Committee which was established, pursuant to the terms of the contract, to deal with problems relating to the reorganization of the Department of Social Services. Both the contract and the supplemental agreement had a terminal date of December 31, 1970.

The City's challenge to arbitrability is based on three main points:

> 1. that the union relies in whole or in part on contract provisions relating to the departmental reorganization whereas the layoffs complained of had nothing to do with reorganization but were caused solely by general budget reductions;

2. that the actions complained of occurred subsequent to termination of the agreement containing the provisions relied upon by the union;

3. that no waivers other than that of the union were filed.

In support of the first main point the City contends that since the contract provisions cited by the union were not intended to deal with the type of condition the union complains of, those provisions were not violated. In response, the Union alleges that specified acts of the City violated cited sections of the contract dealing with the subject matter of the controversy proposed for arbitration and that the contract provides for the arbitration of controversies relating to the application or interpretation of the contract. The City does nor deny that there is a contract between the parties, or that a controversy relating to the interpretation of the contract exists, or that the contract requires that the parties submit controversies as to the application or interpretation of the contract to arbitration. Instead the City argues for an interpretation of the contract in its favor, namely, that the provisions cited by the Union relate only to reorganization of the departments and then proceeds to explain how and why the layoffs were made; i.e., that they were not connected with the reorganization but were necessitated by budget cutbacks. The interpretation of contract terms and the determination of their applicability in a given case is a function for the arbitrator and not for the forum dealing with the question of the arbitrability of the underlying dispute. We have defined the basis for the determination of questions of arbitrability in Matter of Office of Labor Relations and Social Service Employees Union, Decision No. B-2-69, as follows:

> "In determining arbitrability, the 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 presented."[1]

We find, accordingly, that the City's first point does not constitute a bar to arbitrability.

The second main point raised by the City's petition is that while the Union's request for arbitration is based, in part, upon the provisions of the supplemental agreement, the effective period of the supplemental agreement had terminated at the time when the acts complained of occurred and that those acts therefore could not have been in violation of the provisions of the supplemental agreement.

The supplemental agreement incorporate by reference the grievance and arbitration provisions of the major contract. Both agreements terminated on December 31, 1970. The record before us, as revealed by the pleadings, establishes the fact that both agreements are interrelated and intended by the parties to prescribe the union-employees relationship between them. We, therefore, read the two agreements together as constituting the collective bargaining agreement between the parties establishing a bargaining relationship for the period ending December 31, 1970.

The pleadings show that subsequent to that date and during the period in which the acts complained of occurred, the parties were engaged in negotiations for a new contract. Since, therefore, the acts complained of occurred during a

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[1] See also Matter of City of New York and D.C. 37, Decision No. B-8-69.

period governed by the status quo provision, of the NYCCBL, this matter is governed by the interpretation of that provision in the MEBA case (Decision No. B-1-72). In the cited case, we decided, with some reservation not pertinent here, that all of the terms and conditions of a prior contract are continued in effect by operation of law during the statutory status quo period and those disputes relating to alleged violations of such terms and conditions are subject to arbitration in accordance with the grievance and arbitration provisions of the prior contract. We hold, therefore, that the City's second point does not constitute a bar to arbitration.

The third main point of the City's challenge to arbitrability is that the Union has only filed a waiver on its behalf and that in the absence of waivers filed by employees arbitration is barred under the terms of §1173.8.0d of the NYCCBL. The specific issue regarding the circumstances controlling the need for union or employees' waivers was treated at length in Matter of the City of New York and New York City Local 246, S.E.I.U., AFL-CIO, (Decision No. B-12-71). That decision insofar as it is here pertinent, reads as follows:

> "When the grievants sought to be arbitrated is 'uniquely personal' to the grievant (Brown v. Sterling Aluminum Products 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. Textiles 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 the right.' (Cf. Brown v. Sterling Aluminum Products Corp., supra.)
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> "In sum, it is our view that under the NYCCBL, if a factual situation demonstrates that the issue involves an alleged violation or a right possessed by the bargaining unit as a whole, or by the union as exclusive representative, the union's waiver is sufficient to warrant proceeding to arbitration of the dispute."

The rights asserted by the union in this matter derive exclusively from the contract between the parties. The first asserted right is based upon the Job security provisions of the contract dealing with provisional Caseworkers. Since provisional employees have no job tenure rights under Civil Service Law,[2] it is our opinion that, in the absence of any challenge regarding the authority to enter into the agreement, the right being asserted here exists solely by virtue of the contract.

[2] Vaccaro v. Board of Education of City of New York, 282 N.Y. 2d, 881: "It is an established principle that provisional appointees acquire no vested rights or vested interests to permanent appointment by virtue of their temporary service as provisional employees.

As the Union complains of layoffs in violation of the agreement, the narrow issue appears to concern job rights. The questions whether or not such rights are tied to the term of the agreement or, by reason of the statutory status quo imposed on the City and the Union, survived the term of the agreement, are questions peculiarly adaptable to the province of an arbitrator and resolvable in that forum. The Union is seeking to enforce job rights it may have under the expired contract. Therefore, we require submission to arbitration of the general issue of whether the Union is entitled to stay any action violative of those rights under the expired agreement between the parties.

The second right asserted by the Union refers to the section of the supplemental agreement dealing with caseload. Any rights which may exist in this area, are, again, derived exclusively from the contract and a dispute arising there under is subject to arbitration.

In both instances it is factually demonstrated that the grievance is a union grievance affecting all or a substantial number of employees in the bargaining unit. Under such circumstances, as we said in the MEBA case, supra, the only waiver required is by the union and not by the employee. Therefore, we find that the City's third point challenging arbitrability does not constitute a bar to arbitration.

O R D E R

Pursuant to the Dowers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition filed by the City of New York be, and the same hereby is, dismissed; and it is further

ORDERED, that upon the filing of an appropriate waiver by the union, 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.
January 26, 1972.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WILLIAM MICHELSON
M e m b e r

THOMAS J. HERLIHY
M e m b e r (Alternate)

N.B. Dr. Walter L. Eisenberg did not participate herein.