Unformed Firefighters Ass'n, 15 OCB 16 (BCB 1975) [Decision No. B-16-75], aff'd, City of New York v. Anderson, N.Y.L.J., Jan. 29, 1976, at 8 (Sup. Ct. N.Y. Co.).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

The City of New York,

Petitioner — DECISION NO. B-16-75

- and - — DOCKET NO. BCB-174-74

Unformed Firefighters Association,

Respondent

DECISION AND ORDER

The issue herein is whether a prior arbitration proceeding bars Respondent Union from seeking arbitration of a dispute arising out of the same incident which gave rise to the earlier arbitration case.

Background

On January 4, 1974, the New York City Fire Department (herein after called the Fire Department promulgated Fire Department order No. 3, which resulted in the transfer of various employees from one unit of the Fire Department, to another. Thereafter, Respondent UFA, along with the Uniformed Fire Officers Association, filed a grievance (Case No. A-345-74) alleging that Order No. 3 constituted a of Article XXVII-A, Section 4D(1) of the parties' collective bargaining agreement This Article provides in substance that the City may make unilateral changes and install programs unilaterally subject to a two-week notice provision.

The arbitration award in Case No. A-345-74, dated January 14, 1974, stated in relevant part:

> "The Unions have not offered or adduced sufficient evidence to show that the transfers set forth in Departmental order No. 3 dated January 4, 1974 were for the reason or reasons for which two weeks notice is required under Article xxv section 4D 1 of the UFOA contract and Article XXVII-A Section 4D 1 of the UFA contract Therefore the grievance is denied. (Impartial Chairman, Eric J. Schmertz)

In Case No. A-345-74, pursuant to Section 1173-8.0(d) of the New York City Collective Bargaining Law, Respondent UFA executed and filed a waiver of its-right, if any, "to submit the underlying dispute to any other administrative or judicial tribunal except for the purposes of enforcing the arbitrator's award." Such waiver was executed by the UFA subsequent to January 4, 1974 and prior to January 9, 1974.

On April 26, 1974, the UFA filed with the Board a Request for Arbitration, alleging that Fire Department Order No. 3 violated the existing policy and practice of the Fire Department with respect to involuntary transfers in that the transfers set forth in the Order were made as punishment for Union activity.[1] Petitioner City of New York thereupon filed a Petition Challenging Arbitrability of the Union's Request for Arbitration, alleging that the waiver executed by the UFA in Case No. A-345-74, which the City claimed involved the same underlying dispute, barred the Respondent from seeking arbitration of the instant dispute.

Thereafter the UFA filed improper practice changes against the City at the New York State Public Employment Relations Board (hereinafter "PERB), alleging, inter alia, that the transfers effected by Department Order No. 3 constituted discrimination, reprisal, and punishment for union

[1] The agreement between the parties defines grievance in Article XXII, Section I as follows:

> A grievance is defined as a complaint arising out of a claimed violation misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department, affecting the terms and conditions of employment.

activity in violation of Sections 209(a) (1) and (c) of the Civil Service Law.[2]

On July 29, 1974, the Board issued its Decision and order B-10-74, finding that the UFA's Request for Arbitration and its improper practice charge before PERB both stemmed from and challenged the involuntary transfers made pursuant to Department Order No. 3 and, therefore involved "the same underlying dispute." The Board found that the Union violated the waiver provision of the NYCCBL and could "not avail itself of arbitration while simultaneously pressing an improper practice charge with PERB." The Board directed the City's Petition to be held in abeyance pending either a ruling by PERB or withdrawal by the UFA of the improper practice charges lodged before PERB.

By letter dated September 30, 1974, the UFA withdrew its charges before PERB. By submission of its Memorandum on November 1, 1974, the Union reinstituted the proceedings held a in abeyance pursuant to the Board's Decision No. B-10-74.

[2] The charge was based, in part, on the fact that since the New York City firefighters strike of November 5, 1973, members and delegates of the UFA had been "involuntarily transferred in unprecedented numbers by Fire Department Orders Nos. 225/72, 3/74, and 12/74 ..." in reprisal for the strike. The Union charged that these actions on the part of the City "constituted[d] a threat to the continued existence of the UFA" and violated the rights of Union members to engage in concerted activity.

On November 61 1974, the City submitted its Reply Memorandum urging that the Union's Request for Arbitration be denied "on the grounds that it is barred by the Arbitrator's award in Case A-345-74 under the doctrines of res judicata and collateral estoppel, or alternatively, on the ground that Respondent has waived its right to bring this matter to arbitration by the operation of its Waiver in Case A-345-74."

On December 13, 1974, the Board of Collective Bargaining issued Decision B-21-74 wherein it stated:

> Having reviewed case law on res judicata and collateral estoppel and the record before us in the instant matter, we conclude that we .need not reach, at least at this time, the question of the applicability of those legal doctrines to the issue herein. In our opinion, before we can rule on the City's Petition Challenging Arbitrability, we need to ascertain the extent of the Union's knowledge about the nature and potential effects of the transfers mandated by Department Order No. 3 at the time it arbitrated its grievance in Case No. A-345-74. A proper judgment as to the applicability of the doctrines of res judicata and/or collateral estoppel to the instant matter and to the question of the effect of the UFA's waiver in Case No. A-345-74 may rest upon our ascertaining whether or not the Union might have brought forward in its initial arbitration information within its possession or reasonably available to it.

Board, therefore, ordered a hearing on the question of "whether the contention herein could have been raised by the Union in its original grievance which was the subject of an arbitration decision and award in Case No. A-345-74."

Pursuant to Decision No. B-21-74, a hearing as held on

January 3, 1975 before Trial Examiner Joan Weitzman.[3] On January 17, 1975, the Union moved to reopen the hearing for the purpose of amending and correcting the record therein on the basis of, newly-discovered evidence. The Board granted the Union's motion on January 28, 1975, over the City's objection, and the reopened hearing was held before Joan Weitzman on February 14, 1975.

Contentions of the Parties

The specific issues to which the parties have addressed themselves in their briefs are as follows:

1. Whether the arbitration award in Case A-345-74 bars the Union from submitting the instant matter to arbitration, under the doctrines of res judicata and/or collateral estoppel and;

2. Whether the Union had sufficient knowledge about the transfers at t-he time it executed its waiver in Case A-345-74 so as to establish that waiver as a bar to arbitration in the instant matter.

The Applicability of the Legal Doctrines

The City argues that Case A-345-74 and the instant matter involve the same cause of action: the Fire Department's alleged breach of the collective bargaining agreement based upon the identical facts. Case law, contends the City, dictates that if two actions are based upon identical evidence, res Judicata

[3] The City objected strenuously at the hearing to any evidence being admitted and to the convening of the hearing itself. The City argued that the issue of knowledge is "totally irrelevant" to the application of the doctrines of res judicata and collateral estoppel and that our Decision No. B-21-741. by ordering a hearing on the extent of the Union's knowledge, misinterpreted the doctrines.

applies even though the-remedies sought are different. The City cites Perry v. Dickerson, 85 N.Y. 345 (1881), wherein the New York Court of Appeals held:

> "In order to establish an identity between the causes of action in the two suits, it is not necessary that the claim made in the first action, embraced the same items sought to be recovered in the second. It is sufficient to bring the second action within the estoppel of the former judgment, that the cause of action in the former suit was the same, and that the damages or right claimed in the second suit, were items or parts of the same single cause of action, upon which the first action was founded. The law, to prevent vexatious or oppressive litigation, forbids the splitting up on one single or entire cause of action into parts, and the bringing of . separate actions for each; and neither in this way nor by withholding proof of particular items on the trial, or by formally withdrawing them from the consideration of the jury, can the effect of the judgment, as a complete adjudication of the entire cause of action, be prevented. There can be but one recovery for an injury from a single wrong, however numerous the items of damage may be, and but one action for a single breach of contract."

The City also cites the U.S. Supreme Court decision in Baltimore Steamship Company v. Phillips, 274 U.S. 316 (1927), wherein the Court explained that the effect of a judgment or decree as res judicata depends upon whether the second action or sui-t is upon the same or different cause of action. Continuing, the Court concluded:

> "If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect to every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented.

The City urges that it is irrelevant that the Union at the time it instituted its first action might not have been aware of other alleged claims arising from the same set of facts. Thus, in the City's view, "the Board committed serious error by directing a hearing on the issue of the Union's knowledge." In support of this view, the City cites Guettel et. al. v. United States, 95, F.2d 229 (CA .8, 1938). In that case, the English Circuit specifically dealt with the question of whether res judicata applies in an action where a party claims "justifiable lack of knowledge" as to rights or claims it might have presented in an earlier proceeding. The court held:

> The rule of res judicata is based upon that public policy which requires that a single controversy which is capable of being completely determined in one suit shall be ended by the judgment in that suit, and shall not become the subject matter of subsequent litigation. The same public policy which gives rise to the rule should, we think, prevent its applicability being made dependent upon the knowledge or lack of knowledge of the parties as to their legal rights.... 'To hold, therefore, that the conclusive effect of a judgment either as an estoppel or as a merger or bar may be escaped by showing even justifiable ignorance of the existance of facts or evidence which might otherwise have been presented, or of other grounds upon which an omitted or rejected claim might have been sustained, is a clear violation of the fundamental policy and purpose of the doctrines of res judicata and collateral attack.0 (citations omitted)

In the light of these cases, the City urges that the Board reconsider its decision that the applicability of res judicata

may rest on the extent of the Union's knowledge at the time of the initial arbitration, and affirmatively rule that the award in Case No. A-345-74 bars the-request for arbitration herein.

In its brief, Cie Union states that it does no~ contest the existence of the doctrines of res judicata and collateral estoppel, "nor the extent of their application to arbitration awards, nor the validity of the holdings cited by petitioner City...." The Union contends, however, that the doctrines do not apply to the question of arbitrability in the instant matter.

The Union argues that res judicata is "only applicable when a party seeks to litigate a cause of action and/or an issue against another party and where he has already litigated the identical cause of action and/or identical issue against the same party in a prior action or proceeding ... or where such party had a full and fair opportunity to litigate such cause of action and/or issue against such party at such prior proceeding or action." Collateral estoppel applies when a party attempts to re-litigate an issue which "he himself litigated, or which he had a full and fair opportunity to litigate at a prior proceeding or action, although not necessarily against the same party." The Union concludes, therefore:

> The minimum requirements for applicability of the doctrine of res judicata ... is identity of parties and identity of cause of action and/or issues which were or could have been litigated in the prior action ...; the minimum requirements for the applicability of collateral estoppel are identity of issue and a prior full and fair opportunity for that issue to have been litigated.

With respect to the applicability of res judicata to the instant matter, the Union argues that there is neither complete identity of parties nor identity of cause of action.

The Union claims that in Case A-345-74, it sought to enforce what it believed to be its contractual right to two weeks notice before implementation of a "program of reassignments." But in the instant case, the UFA is seeking to enforce the rights of its individual members who may have been wrongfully transferred and who-are, therefore, the real parties in interest. Thus, the UFA contends-that there is a "question" as to whether there exists such identity of parties here as to meet the requirements for applicability of res judicata.

The Union also claims that no identity of cause of action exists here. The Union cites Schuykill Fuel Corp. v. B & C Nieberg Realty Corp. , 250 N.Y. 304, 55 N.Y.S. 2d118 (1929), wherein Justice Cardozo, . writing for the New York Court of Appeals, stated that in determining whether a judgment in one action is conclusive in a later one, the decisive test "is whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second."

The Union argues that the rights established by the City in Case No. A-345-74, namely the right to institute a "program of reassignments" without giving the UFA two weeks' notice cannot be affected by any determination in the instant case. The cause of action here, tile Union maintains, "is to establish the wrong fulness of individual transfers as a substantive violation

Fire Department policy, in contrast to the procedural violation, which was the subject of the first grievance.[4]

The Union also claims that there is no identity of issue between Case No. A-345-74 and the matter herein, which is necessary for the application of the doctrine of collateral estoppel. In the prior proceeding, the issue was whether the implementation of the transfers violated the two-week notice provision of the parties contract; in the instant proceeding, the issue is whether the-transfer of individual Union members violated existing Fire Department policy. The Union points out that in considering whether identity of issue exists between two actions, the courts consider the relief sought by the moving party. Applying that test to the instant matter, there is no identity of issue, argues the Union, "since the relief sought by the UFA in the prior proceeding was injunctive in nature and limited to a prospective two-week delay of implementation of a program, whereas the relief sought in this is an absolute revocation of those transfers which may be determined to have been violative of Fire Dept. policy."

Finally; the Union maintains that the doctrines of res judicata and collateral estoppel are not applicable because the Union cannot be said to have had a full and fair opportunity to litigate

[4] Moreover, the fact that Case No. A-345-74 and the instant matter share "common elements," "does not establish that the actions arose out-of identical facts." The Union cites Union Trust Co. of Rochester v. Sarachan, 249 A.D. 280, 292 N.Y.S. 152, App. Div. 4th Dept. (1936), wherein the court stated: "the mere fact that different cause of action spring from the same contract, does not, in and of itself, render a suit on one a bar to an action on the other."

a cause of action where it had no actual or constructive knowledge of such cause of action. As will be discussed below, the Union claims it did not have sufficient knowledge to have arbitrated the instant grievance in Case No. A-345-74 and that the City has not met its burden of proof of showing such knowledge on the Union's part.

The Extent of the Union's Knowledge and the Waiver Issue

The City claims that even if the issue of knowledge were relevant, "it is clear that the Union had at the initial arbirtration information within its possession or reasonably available to it relating to the instant claim." Furthermore, argues the City, the Union intended to use the initial arbitration as a device to enhance its chances for success in the already contemplated second action.

The City emphasizes the testimony of Murray Gordon, Esq., attorney for the Uniformed Fire Officers Association (UFOA), with whom Respondent joined in the initial arbitration. At the reopened heating, Mr. Gordon stated that immediately upon the issuance of Department Order No. 3, he believed that the transfers were involuntary and retaliatory because of strike activity. He stated that the purpose of the January 7th, arbitration before Mr. Schmertz was to "smoke out" the Fire Department's policy and

> "... develop a record in such a way that the Department would say it was not retaliatory and our policy was not to transfer for reasons of discipline. once that was done, we were then in a position to go forward with individual grievances to show that in an individual case, the action taken was retaliatory....That was the reason I proceeded [on January 7th]. I wanted a quick hearing and to 'develop the position of the Department with which, I hoped to nail them in the individual cases."

The City notes that Richard O'Hara, Esq., attorney for the UFA, and Mr. Gordon conferred over the weekend of January 4-6, 1974 and points to the telegrams sent by both attorneys to Herbert Haber, then director of the OLR, and to Eric Schmertz, protesting the "new involuntary transfer policy" and requesting an immediate nearing and stay of the Order. The City argues that "it is inconceivable" that Messrs. O'Hara and Gordon did not, in their phone conversations, discuss the latter's theory of proceeding as set forth in his above-quoted testimony.

Additionally, the City notes that at the arbitration hearing held before Mr. Schmertz in Case A-345-74 (January 7 and 8), Mr. Gordon announced that he was speaking at the proceedings on behalf of both the UFA and UFOA.[5] At that hearing, Mr. Gordon specifically attempted to reserve the right of the Unions "to process such other further grievances that we may have under the contract" arising out of the promulgation of Department Order No. 3,.

The City also relies heavily on the fact that three weeks following the issuance on November 2 3, 1973 of Department Order No. 225, which implemented a large number of*transfers of both firemen and fire officers, the Union filed a Step III grievance. That grievance alleged, inter alia, that D.O. 225 violated the

[5] Mr. O'Hara was ill at home, and although a member of his law firm, Robert A. Kennedy, Esq. attended the arbitration, Mr. Gordon presented virtually all of the arguments on behalf of both Unions.

parties, contract because the transfers were made as punishment for the union's strike activity in early November. Inasmuch as D.O. 3 was strikingly similar to D.O. 225, the City argues that the Union should have realized that a pattern might exist between the alleged contract breach caused by D.O. 225 and that resulting from D.O. 3.

The City urges the Board to give no weight to Union president Richard Vizzini's testimony at the reopened hearing concerning the date on which he first saw D.O. 3. Originally, Vizzini stated repeatedly that he saw the order on Friday afternoon, January 4, 1974. In his subsequent testimony, he asserted that he did not see D.O. 3 until January 7, 1974 although he admitted that he "could very well have discussed" the Order over the weekend with UFOA President David McCormack and Mr. O'Hara.

The City also points to the instant grievance filed by the Union on February 27, 1974, following the award against the Union in Case A-345-74, alleging a violation of existing Fire Department policy based on Department Order No. 3 and Department Order 12 (issued on January 17, 197 4). The wording of this grievance was identical to that protesting D.O. 225 except for names and dates. Vizzini stated that the reason for waiting until February 27, 1974 to file the grievance was because the Union needed time to learn the results of a survey it had conducted among the transferees. The City attacks Vizzini's credibility on this point, noting:

> In fact, the grievance concerning D.O. 12 was filed even though the Order has directed no involuntary transfers. In other words, Respondent

> had proceeded to file its grievance on D.O. 12 although it lacked the very same information which it claimed it did not have a month or so earlier thereby justifying its failure to proceed on D.O. 3 Vizzini conceded this fact, thereby conceding the information was never necessary....[6]

With respect to the issue of the waiver which the UFA executed in Case No. A-345-74, the City makes no argument in its brief of March 13, 1974. In its Reply Memorandum of November 6, 1974, however, the city argues that this waive acts as a bar to the arbitration requested herein. The City contends that the NYCCBL's waiver provision, particularly its use of the term "underlying dispute" it designed to prevent repeated litigation of arbitrated disputes and to finalize arbitration awards based on alleged contract violations originating from one action of an employer. In the City's view, the "underlying dispute" in both A-345-74 and the instant case is the alleged contract violation(s) resulting from. the issuance of D.O. 3.

The UFA contends that the waiver it executed in Case No. A-345-74 is not a bar because the "underlying dispute" in the instant matter is not the same as that which gave rise to the prior arbitration. As previously set forth, the Union argues that in Case A-345-74, the underlying dispute pertained to a procedural violation o~ the contract ane relief sought was injunctive

[6] The City points to other alleged inconsistencies and weaknesses in Vizzini's testimony which, in the City's view, provide additional reasons for discrediting his testimony as to his lack of knowledge on January 4, 1974 about the nature of the transfers under D.O. 3.

in nature; in the instant case, the grievance pertains to an alleged substantive contract violation, and the remedy sought is revocation of transfers which may be found to-have been violative of Department policy.

The UFA insists that as of January 7, 1974 it had insufficient knowledge about the transfers to have properly raised the instant grievance. According to the Union, before the UFA could determine whether or not any of the individuals affected by Dept. Order 3 were subjects of grievance, it was necessary to ascertain which transfers were involuntary, whether a transferee was a UFA delegate or UFA committee member,,whether each transferee knew why he was transferred and-whether he wished to return to his former assignment. The Union's Executive Board, therefore, prepared and distributed a questionnaire, which eventually supplied sufficient information for the Union to file its formal grievance on February 27, 1974.

The Union argues, furthermore, that as a matter of law it could not have waived (in Case No. A-345-74) the rights which it now seeks to vindicate. The Union cites New York State court decisions defining a waiver as an intentional abandonment of a known right or advantage which, but for such waiver, a party would have enjoyed. A waiver "must be predicated upon full knowledge of all the facts upon which the existence of the right depends."

S.& E. Motor Hire Corn. v. N.Y. Indemnity Co., 225 N.Y. 69, at 72, 174 N.E. 65, at 66. The Union asserts:

> "...it was impossible for the UFA to possess full knowledge of its right to grieve individual wrongful transfers until well after an award had been issued in such prior proceeding

> [Case A-345-741. The City attempts to prove that the UFA has a suspicion that a grievance might lie or that-the UFA should have had such a suspicion. But a 'suspicion' does not amount to full knowledge, either actual or constructive, of the UFA's rights or of the facts on which they depend'...."

Finally, the UFA maintains that no authority supports the City's claim that the knowledge or motives of the UFOA or any of its representatives can be imputed in any way to the UFA. Counsel for the UFOA and counsel for the UFA "processed separate states of knowledge and possibly even different motives for proceeding to arbitration...; there is not a single indication that there was such an exchange of knowledge between these representatives that could even remotely cause to be imputed to one, even constructively, the knowledge of the other." Thus, the Union asserts that the "City has not met its burden of proof with respect to the possession of full knowledge by the UFA of the rights it allegedly relinquished."

D I S C U S S I 0 N

This case presents unique questions, and to a large extent, our determination herein is based solely on the facts of this particular situation.

In Decision B-21-74, we stated that a proper judgment in this matter might rest upon the extent of the Union's knowledge about the transfers at the time it arbitrated its grievance in Case No. A-345-74. The Union had vigorously argued that as of January 7, 1974, it lacked adequate knowledge about the nature and potential effects of the transfers mandated by Department Order No. 3 to have raised the instant grievance n Case No. A-345-74. Because the pleadings and briefs of the parties did not provide us with sufficient information to evaluate this Union contention, we ordered a hearing on the question of whether the Union could have arbitrated the instant grievance in Case No. A-345-74.

We conclude-that while the Union had some knowledge of the facts of the 'case and certain suspicions as to their significance, the totality of information available to the Union on January 7.,1974, the date on which it was forced to go forward in order to protect its claimed rights under the notice provision of the contract, was not sufficient to enable ft to argue the instant grievance on the merits. Although the testimony of Mr. Gordon; the telegrams sent by attorneys O'Hara and Gordon; and the weekend telephone conversations between Messrs. Vizzini and McCormack, Vizzini and O'Hara, and O'Hara and Gordon indicate that the Union knew that the transfers were involuntary, the weekend interval between January and January 7th did not afford the Union enough time to ascertain whether

a transferee was a UFA delegate or committee member, whether he knew why he was transferred and whether he desired reinstatement to his former position. This information was significant because, as the Union admits, not every involuntary transfer constitutes a violation of existing Fire Department policy.

Although the Impartial Chairman ruled against the Union on its claim under the contract's two-week notice provision, the Union should not be penalized for having grieved under this language in an effort to stay the implementation of Department Order No. 3. In a written statement that was issued on January 3,1974, the Fire Commissioner stated:

> If there had not been a strike, we would have embarked on a program of reassignment for two other reasons. First, to equalize the work load in the department and to avoid over-exposure to the effects of firefighting to the detriment of a man's health and welfare. Secondly, to provide each man an opportunity to work part of his career in one of the active areas of the City where he can develop the highly specialized skills of a firefighter and to optimize his performance.

While this statement implies that the transfers were, at least in part, related to the November strike, there were other reasons behind them, as well. Apparently, the UFA believed that the "program of reassignments" was the kind of action contemplated by the contract's two-seek notice provision. Relying on that provision, although in error, it

moved quickly, hoping to stop the implementation of the transfers until the two-week period of notice and discussion with the Department had transpired.

Both the City and Union cite relevant judicial decisions dealing with the doctrines of res judicata and collateral estoppel. Although there is no doubt that these legal doctrines may apply to arbitration awards, we agree with the Union that they do not apply to the question of arbitrability in the instant matter. Although the Union's grievance herein and that which it arbitrated in Case No. A-345-74 both stemmed from the promulgation of Department Order No. 3, the issues and remedies sought in each case are clearly distinct. In the first arbitration proceeding, the question was whether the implementation of the transfers violated the two-week notice provision of the parties' contract. In the instant proceeding, the question is whether the transfer of individual Union members violated existing Fire Department policy. We believe that the Union's effort in Case No. A-345-74 to remedy quickly an alleged procedural contract violation by stopping the implementation of Department Order No. 3 until the City complied with the contract's two-week notice Provision should not now bar the Union from grieving an alleged substantial Violation of Fire Department policy. As the Union asserts, arbitration of the instant grievance will in no way destroy or diminish the right which the City established in Case No. A-345-74, namely the right to institute a program of transfers without giving the Union two-weeks notice Whereas the remedy sought by the Union in Case No. A-345-74 was injunctive in nature, the remedy sought herein is-the reinstatement of firemen to

their former positions if their transfers are found io have been violations of Department policy.

In studying this case, we considered the question of whether the Union could have Pursued the instant grievance had it won the arbitration in Case No. A-345-74. If the Union had succeeded in enjoining the City from implementing Department Order No. 3 until it had complied with the two-week notice requirement, and if the transfers had subsequently been effectuated, surely the Union would not have been barred from grieving at that point that the transfers violated existing Department policy. This is true especially in 14-ht of Article XXVII-A, Section 4D (the two-week notice provision), which states:

> 1. No less than two weeks notice of the change is to be given to the Union.
>
> 2. Within the two weeks, the Union is to be given an opportunity to discuss the changes with the City.
>
> 3. If no agreement is reached as a result of such discussion, the City may install the program and the Union reserves all rights it has to oppose the same. (emphasis added.)

We are persuaded that the Union's right to grieve the alleged substantive violation of, the contract should not hinge upon whether the Union was upheld in the prior arbitration on its procedural grievance. Our conclusion is supported by the fact that the UFA and UFOA at the outset of the hearing in Case No. A-345-74 expressly reserved the Tight to bring other grievances pertaining to Department Order No. 3. The City objected to this reservation, but it did participate in the arbitration proceeding, merely having reserved its right to protest any grievance which the UFA or UFOA might later file with-respect to Department Order No.

Although we find the Union's grievance arbitrable in light of the unique circumstances of this case, we agree with the City, that, as a general matter, vexatious and oppressive relitigation of previously arbitrated disputes is not to be tolerated. Repeated attempts to arbitrate one underlying dispute constitute an abuse of this Board's processes) discourage harmonious labor-management relations, and contravene the purpose of the NYCCBL's Waiver Provision. We believe, however, that the law's Waiver provision was not intended to bar a subsequent action by a union where the subject of its prior grievance was strictly Procedural and the remedy sought was limited to a temporary injunction. This is particularly true in a situation such as the instant one where the parties have the services of an impartial chairman, who is familiar with their collective agreement and who, by virtue of his office and because he heard the procedural aspects of this case, would undoubtedly be familiar with the entire dispute concerning Department Order No. 3, as well as other similar Fire Department Orders.. In recognition of this fact and under the particular circumstances of this case, the Union's effort to arbitrate the instant grievance does not represent an attempt to submit the underlying dispute to "any other administrative or judicial tribunal" but rather an effort to submit all aspects of this dispute to the same tribunal - the contractually agreed upon Impartial Chairman who initially ruled on one element of the case. Thus, we deem this proceeding as mere] a continuation of a contractual dispute that was arbitrated only in part in Case No. A-345-74.

Both the City and the Union have argued this case forcefully and have raised complex legal issues in their briefs. Having considered this matter carefully, we conclude that our decision should not be based on technical arguments. This entire case stems from a contractual dispute between the parties which should be settled through the means that they mutually selected to resolve grievances arising under their agreement. Sound labor-management relations are not fostered by allowing the parties to escape resolution of their differences through artful and technical argumentation. We do not question the validity of the judicial decisions cited by the City in its brief. In the interest of promoting harmonious contract administration in an ongoing relationship to which the services of an Impartial Chairman are readily available, however, we believe that he mutually agreed upon dispute settlement provisions of the contract are preferable to the formalistic ad hoc judgments of the court. Certain firemen who were transferred pursuant to Department Order No. 225 have already had their grievance arbitrated. We do not believe it would be just or equitable to deny other UFA members, transferred under Department Order No. 3, their right to an impartial arbitral hearing merely because the Union chose to go forward quickly on the procedural aspect of the grievance while reserving its right to raise the substantive aspect when it had sufficient information to support its contention that the transfers were retaliatory.

Thus we find and conclude that the instant grievance alleging that the transfers effectuated pursuant to Department Order No. 3 violate existing Fire Department policy is a proper subject for arbitration.

O R D E R

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

ORDERED, that the City's petition herein be, and the same hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted,

DATED: New York, New York
June 4, 1975

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

EDWARD F. GRAY
M e m b e r

JOSEPH J. SOLAR
M e m b e r

THOMAS J. HERLIHY I dissent
M e m b e r

THOMAS F. ROCHE I dissent
M e m b e r

NOTE: Mr. Schmertz did not participate in this decision.
Mr. Herlihy and Mr. Roche dissent.

We respectfully dissent.

The UFA has itself conceded the applicability of the doctrines of res judicata and collateral estoppel to the arbitration arena. The Supreme Court has enunciated that doctrine in Baltimore Steamship Company v. Phillips, 274 U.S. 316, 319, as follows:

> "If upon the same cause of action the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered, but also as to every ground of recovery which might have been presented"
>
> (Emphasis added)

Subsequently, the Federal Courts have-held in further application of the doctrine:

> "The same public policy which gives rise to the rule should, we think, prevent its applicability being made dependent upon the knowledge or lack of knowledge of the parties as to their legal rights. More over, while a judgment upon the merits may be set aside for equitable reasons in a direct proceeding brought for that purpose, it may not be impeached collaterally. To hold, therefore, that the conclusive effect of a judgment either as an estoppel or as a merger or bar may be escaped by showing even Justifiable ignorance of the existence of facts or evidence which might otherwise have been presented, or of other grounds upon which an omitted or rejected

> claim might have been sustained, is a clear violation of the fundamental policy and purpose of the doctrines of res judicata and collateral attack.
>
> (Citations omitted)
>
> "The rule of res judicata is based upon that public policy which requires that a single controversy which is capable of being completely determined (emphasis added) in one suit shall be ended by the judgment in that suit, and shall not become the subject matter of subsequent litigation . . . . We have been unable to find, however, that the Supreme Court of the United States has ever recognized ignorance or mistake as justifying a refusal to apply the rule that a prior judgment upon the merits is a bar to a second action upon the same claim or demand. That court, as already pointed out, has recently said, without any qualifying language, that such a judgment is an absolute bar to the subsequent action.'" Tait v. Western Maryland Railway Co., supra, 289 U.S. 620, 623, 53 S. Ct. 706, 707, 77 L. Ed. 1405 (P. 2,32). (Emphasis added.) Guettel v. United States, 95 F.2d 299 (C.A.8, 1938)[1]

[1] It is clear the UFA acted at its own risk-in filing the initial request for arbitration as quickly as it did. It concededly had 120 days in which to file. Moreover, by the start of the hearing, the Department Order had already gone into effect, thereby rendering any bid for an "injunction" moot.

Furthermore, the New York city collective Bargaining Law itself incorporates the policy enunciated above in §1173-8.0d, and broadens it, requiring a statement from the party requesting arbitration waiving "its right, if any, to submit the underlying dispute to any other administrative or judicial. tribunal except for the purpose of enforcing the arbitrator's award."

The key term in the waive is "underlying dispute." The meaning of this term must be understood to be different from simply seeking to prohibit the kind of subsequent actions which the doctrines of res judicata and collateral estoppel bar. For there would be no reed for the execution of such a waiver if that were all that were intended, since, as the UFA concedes, those principles do apply to arbitration awards. Rather, it is clear that the waiver using the term "underlying dispute," broadens the scope of the legal doctrines to prevent repeated litigation of once arbitrated disputes for the purpose of enforcing a strong public policy. This public policy seeks to promote the use of the arbitration machinery in collective bargaining agreements so as to promote harmony between labor and management and thereby avoid industrial strife injurious to the general public. Harmony cannot be achieved where a party is free

to relitigate issues or grievances based upon one set of facts in various forums. Thus, the waiver attempts to finalize arbitration awards based on the same "underlying dispute" - i.e., alleged violations of collective bargaining agreements originating from one action of an Employer, even if a second proceeding technically might be maintained under the doctrines of res judicata and collateral estoppel.

In spite of these clear legal principles, the Board majority has in the instant matter departed from them, and has even considered the issue of the UFA's knowledge relevant. We believe this to be serious error.

The action of the majority permits exactly what the legal principles seek to prevent - vexatious litigation designed to enable further actions based upon new theories arising from the identical set of facts. That this is clear can be seen from the testimony of Murray A. Gordon, the attorney who, in effect, represented both the UFA and UFOA at the initial arbitration. Gordon freely admitted at the reopening of the hearing directed by the Board in this matter that he believed at least as of the time that he spoke to

Arbitrator Schmertz on January 4th or 5th, 1974 that the involuntary transfers which had been directed through Department Order. No. 3 were retaliatory because of strike activity, and further testified that:

> "What I hoped that the.(January 7, 1974 initial arbitration) hearing would elicit, that we went forward on, was that as a matter of record, the Fire Department would take the position that it was not retaliatory and that if it is retaliatory it. would be contrary to the policy of the Department.
>
> "We succeeded in that. I think the purpose of the hearing was, in my judgment among other things, for the purpose of smoking out, if I can use that in reference to the Fire Department, to smoke out the policy of the Department and the purpose reason that . . . we had to be able to develop a record in such a way that the Department would say it was not retaliatory and our policy was not to transfer for reasons of discipline.
>
> "Once that was done, we were then in a position to go forward with individual grievances to show that in an individual case, the action taken was retaliatory. . . (the initial justification for the January 7, 1974 arbitration) gave me a handle to go forward very quickly on the 7th and at that hearing to develop the policy on the part of the Department that I have mentioned.
>
> "That was the reason that I proceeded. I wanted a quick hearing and to develop the position of the Department with which I hope to nail them in the individual cases."

For the reasons set forth above, we believe that the Board is bound under its own statutory mandate, as well as applicable law, to adhere to the specific legal principles and prevent the abuse arising from the failure to do so. We further believe that under similar circumstances, the New York courts would unflinchingly apply these legal principles.

We therefore must dissent.

Alternate City Members

S/ THOMAS J. HERLIHY
S/ THOMAS F. ROCHE

DATED: New York, New York
June 4. 1975.