City v. UFA, 15 OCB 20 (BCB 1975) [Decision No. B-20-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-20-75

Petitioner, DOCKET NO. A-479-75
BCB-227-75

- and -

UNIFORMED FIREFIGHTERS ASSOCIATION
LOCAL 84, I.A.F.F.,

Respondent

DECISION AND ORDER

The issue herein involves a challenge to arbitrability filed by the City of New York in response to a demand by the Uniformed Firefighters Association to submit to arbitration a grievance alleging that the City of New York has violated the current collective bargaining agreement by its announced intention to reduce fire department manning below contract minimums.

Background

On June 20, 1975 the Uniformed Firefighters Association served upon the City and filed with the OCB a request for arbitration which alleges that the City had violated Article XXVII and Section 3 of Article XXVII-A of the collective bargaining agreement between the parties. The grievance and subsequent arbitration request was filed in response to an announcement by Fire Commissioner John T. O'Hagan that on or about July 1, 1975, the

level of manning in the Fire Department would be reduced. Thereafter, on June 30, 1975, the Fire Department promulgated Departmental Order No. 116. The Union alleges that the new manning levels set forth in the Order would be below those required by the terms of the collective bargaining agreement.

The City's petition challenging arbitrability, filed on June 30th, states that the City's line budget for the title of Firefighter had been cut by at least 474 men as of midnight June 30, 1975, which would necessitate the reduction of minimum manning standards in certain companies and units, as well as the disbanding of 26 fire companies, 4 battalions and 1 division. The City's petition further stated that Possibly an additional 1,817 Firefighters might be laid off as of June 30, 1975.

Position of the Parties

The City claims that the collective bargaining agreement allows the City to institute the manning reductions which had been noticed to the Union on June 20th. The City declares that its petition herein is based on the City Council's action on the 1975-76 budget.

The City advances the novel argument that the 1975-76 budget of the City Council reducing the funds available for Fire Department manpower effectively nullifies and makes inoperative the

contract clauses grieved by the Union herein and, therefore, that there is no grievance for the OCB to refer to arbitration. In support of its position, the City argues that bargaining procedures in New York City must be substantially equivalent to those prescribed in the Taylor Law. Section 204-a.1 of the Taylor Law mandates that any provision of a collective bargaining agreement, which requires budgetary approval or other legislative action, cannot go into effect until such budget approval is granted or legislation enacted. Though the City acknowledges that this provision is not directly applicable to New York City, it asserts that "the NYCCBL is designed to achieve virtually the same objective by providing that any impasse panel recommendation or Board of Collective Bargaining decision requiring the enactment of a law cannot be implemented until such law is enacted."

We interpret the City's argument to be that the City Council is empowered under the Taylor Law to review and approve those provisions of labor contracts that require budgetary amendments or other changes in local law and may do so each budget year regardless of the term of any collective bargaining agreement. Applying this argument to the instant case, the City maintains that "all of the requisites for legal nullification of Article XXVII, Section 1, and Article XXVII-A, Section 3,

of the 1973-1974 UFA collective agreement are met" since the City Council has failed to provide the funds in 1975-1976 budget to implement the manning provisions of the agreement.

The Union rejects the City's theory of contract nullification stating that the City has misconstrued the provisions of the Taylor Law and the NYCCBL as to the power of a legislative body over the implementation of the terms of an effective and continuing collective bargaining agreement. The Union argues that Section 204a.1 of the Taylor Law concerns implementation of newly negotiated benefits or changes which require legislative action, but does not pertain to the continuation of terms in an ongoing collective bargaining agreement, which have been in force and effect as in this case for the past four years.

The Union argues that the City cannot "legislate away" its contractual obligations and cites the Court of Appeals decision in Patrolmen's Benevolent Association vs. the City of New York,[1] to the effect that mere financial hardship, however burdensome, does not constitute grounds to excuse performance of a collective bargaining agreement.

It is the Union's position that once a collective bargaining agreement has been implemented, including any steps

[1] Patrolmen's Benevolent Association v. City of New York (n.o.r.), Sup. Ct., New York Co., July 16, 1970; aff'd. 35 A.D. 2d 697, App. Div., 1st Dept. (1970); mod. on other grounds and aff'd. 27 N.Y. 2d 410, 318 N.Y.S. 2d 477, Ct. App.(1971).

required by the City Council to make it initially effective, that the City cannot thereafter, "by legislative fiat," relieve itself of its obligation because of a subsequent fiscal crisis. The Union emphasizes that the collective bargaining agreement and the clauses in issue thereunder are continued in full force and effect by operation of the status quo Provisions of the NYCCBL until a new written agreement between the parties is executed.

The UFA also contends that the City's petition challenging arbitrability is dilatory and designed to frustrate the proper legal resolution of the UFA's claimed violations of the collective bargaining agreement in the circumstance where the City has terminated more than 20% of its active firefighting force. The Union argues that the City's petition is barred by the doctrines of res judicata and collateral estoppel in that 'Prior arbitrations, A-260-72 and A-408-74, involved the same type of issues raised in this proceeding, namely alleged violations of Articles XXVII and XXVII-A as to manning in the Fire Department. The City raised no objections to arbitrability in those proceedings. Therefore, the-Union concludes that the City should be estopped from attempting to challenge the arbitrability

of the same type of issue in this proceedings.

Discussion

The City's argument as to contract nullification is erroneous. It is obvious that the collective bargaining agreements, impasse panel awards or Board of Collective Bargaining decisions involving impasse panel awards are not self-implementing. Sufficient funding under the general City budget or other legislative authority is required for the initial implementation of the terms of a collective bargaining agreement or the implementation of an impasse panel award or Board of Collective Bargaining decision upholding the impasse award. But with reference to the instant matter, we find no authority for the argument advanced by the City that after the initial approval by the City of contract settlements or after the acceptance of an impasse panel award that the City Council may subsequently nullify the contract during its term by failing to provide the sums necessary for implementation. Such a theory would permit subsequent City Council nullification of all public employee bargaining settlements. In our opinion, such a negative result certainly is not intended by the Taylor Law or by the NYCCBL. Section 201.12 of the Taylor Law provides:

> "The term 'agreement' means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval." (emphasis added)

Thus, legislative approval is contemplated initially to implement some agreements. After initial implementation, an agreement becomes binding for its term and may hot thereafter be negated in whole or in part by the City Council's simply adopting an annual budget during the term of a multi-year contract that fails to provide the sums necessary to fulfill the contract.

In Patrolmen's Benevolent Association v. City of New York, supra,[2] the Court of Appeals ruled on the validity of a collective bargaining agreement, which the City challenged on the ground that it was financially unable to meet the contractual obligations. The Court's language is applicable to the instant case:

[2] Patrolmen's Benevolent Association v. City of New York (n.o.r.) Sup. Ct., New York Co., July 16, 1970; aff'd. 35 A.D. 2d 697, App. Div., 1st Dept. (1970); mod. on other grounds and aff'd. 27 N.Y. 2d 410, 318 N.Y.S. 2d 477, Ct. App. (1971).

> "At best, the dilemma of the City can only be fitted into a claim of financial difficulty in meeting the obligations which it has undertaken. No extensive citation of authority is required to establish that mere financial hardship, however burdensome, does not constitute sufficient ground to excuse performance (407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp. 23 N.Y. 2d 275 .... At the time the contract was made there was no aspect of the agreement that was then impossible of performance ... Yet the field of labor relations is one in which contracts ground through the process of hard collective bargaining must be respected, and when agreements are reached, the Courts cannot be expected to rewrite provisions which on reflection prove to be onerous, expensive and sometimes the result of miscalculation."

The City can decide what level of services are needed and what it can afford; but in making that decision, the City must honor the applicable terms of the labor contract it previously agreed to for its duration. Again, we find no authority which would permit the City by budget actions to unilaterally change contract terms once an agreement is in force. As the provisions of the collective bargaining agreement alleged to be violated are continued in force and effect by operation of the status quo provisions in the NYCCBL, it is entirely appropriate that any alleged

violation thereof be considered under the grievance arbitration procedure of the labor contract.

In this case, the Union has grieved the City's action in reducing the Fire Department's manpower and fire services, contending the reductions are not in accord with the terms of the collective bargaining agreement. Articles XXVII and XXVII-A specifically deal with the subject of manning. Thus, there is clearly a proper question for arbitration. The arbitrator can decide whether or not the collective bargaining agreement provides any limitation on the City's statutory authority to reduce Fire Department manpower and firefighting services, and if so, whether or not the reduction in manpower and services has been carried out in the manner contemplated by the collective bargaining agreement.

We reject the Union's argument in this case that the failure of the City to raise the question of arbitrability in prior analogous cases constitutes a waiver under doctrines of res judicata or collateral estoppel.

O 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 Union's request for arbitration be, and the same hereby is, granted; and it is further

ORDERED, that the City's petition be, and the same hereby is, denied

DATED: New York, N.Y.
July 16, 1975.

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

JOSEPH J. SOLAR
MEMBER

DANIEL J. PERSONS
MEMBER

N.B. Mr. Schmertz did not participate in this decision.

Dissenting Opinion of Board Member Thomas Herlihy

I must dissent from my colleagues' opinion in this matter. While noting the applicability of the Taylor Law. requirement of §204a(1), my colleagues believe that it is only the initial implementation of the terms of a collective bargaining agreement or the implementation of an impasse panel award or a Board of Collective Bargaining decision upholding the im.-passe award which may be passed by the City Council. That view is blind to the fact that in each year appropriations must be raised by the City Council to provide for collective agreements and the Taylor Law contemplates that precise situation in the language of §201.12 noted on page 7 of the majority opinion. That: section does define an agreement as the exchange of mutual promises "which becomes a binding contract for the periods set forth therein," as emphasized by the majority, but it goes on to say "except as to any provisions therein which require approval by the legislative body, and as to those provisions, shall become binding when the appropriate legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval."

The plain meaning governing this provision is that the legislative body must give its approval for each budget year in which the contract has life and the City Council". has undisputedly not done so here. Accordingly, I cannot agree with my colleagues' opinion that where there has not been City. Council approval for subsequent fiscal years of the fiscal terms of a collective agreement, the terms of such a collective agreement may be operative and binding by simple approval or lack of action by the City Council during the initial year of the contract's term.

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