HHC v. L.2507, DC37, 31 OCB 12 (BCB 1983) [Decision No. B-12-83] (Arb)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

DECISION NO. B-12-83

DOCKET NO. BCB-590-82
(A-1389-81)

-and-

LOCAL 2507, DISTRICT COUNCIL 37, AFSCME,

Respondent.

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DECISION AND ORDER

On April 28, 1983, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a group grievance that is the subject of a request for arbitration filed by Local 2507, District Council 37, AFSCME ("DC 37") on December 25, 1981. An answer was submitted on May 18, 1982, in response to which a reply was filed on June 4, 1982. Additional submissions were received from George Engstrom, a member of the group, on January 4, 1983, consisting of an Audit Report on Vehicle Maintenance, EMS, NYC, HHC, No. 1-80-905; an Analysis of the Performance and Design of the Emergency Medical Service 40 New Ambulances; and various court papers in connection with a lawsuit involving the New York City Health and Hospitals Corporation, as plaintiff,

and Prestige Vehicles, Incorporated; Exception, Inc.; Emergency Fire and Rescue Supply, Inc.; and Amtech Group, Ltd., formerly known as Modular Ambulance Corporation International, as defendants.

Request for Arbitration

Step IV of the grievance procedure was originally initiated by the filing of a request for arbitration on December 28, 1982, three months after the Step III hearing had failed to produce a determination. Since a decision had not issued within 15 days of the Step III appeal, DC 37 invoked the next step of the grievance procedure, as it was entitled to do pursuant to Article XV, Section 2 of the collective bargaining agreement ("Agreement"). Approximately one week after the request for arbitration had been filed, the New York City Office of Municipal Labor Relations ("OMLR") issued an interim Step III decision in which it directed that the matter be submitted to HHC's Occupational Safety and Health Coordinator ("OSHC") for a full investigation of the claim. In a letter dated January 21, 1982, Joel Giller, Assistant General Counsel, DC 37, advised the office of Collective Bargaining ("OCB") that DC 37 would agree to hold its request for arbitration in abeyance, pending said investigation provided that it would retain the

right to arbitration and could reinstitute its demand therefor. On April 1983, DC 37 so reinstituted its request for arbitration.

The request states the grievance to be the failure of the employer "to provide safe emergency ambulances wh ch are in compliance with standards of applicable law and contract provisions," and cites Article XIV, Section 2(b), as the provision of the Agreement allegedly violated.

> Motor vehicles and power equipment which are in compliance with minimum standards of applicable law shall be provided to employees who are required to use such devices.

As a remedy, grievants seek "immediate modification of all EMS ambulances to comply with safety standards."

Positions of the Parties

HHC's Position

HHC contends that DC 37 failed to comply with Article XV of the Agreement by reinstituting its request for arbitration before completing Step III of the grievance procedure. Specifically, HHC maintains that the Union's dissatisfaction with the findings of the OSHC investigation should have been raised

before OMLR prior to recommencing Step IV. By sidestepping OMLR and reinstituting its request for arbitration, DC 37 failed to comply with the disputes adjustment provision of the Agreement.

As a further basis for opposing arbitrability, HHC contends that the demand for arbitration lacks the requisite specificity, depriving it of the opportunity to formulate a suitable response and appropriate defenses. Specifically, HHC argues that the failure by DC 37 to identify the dates, for example, on which employees rode non-conforming vehicles, denied it "the opportunity to evaluate the claims and to raise appropriate challenges to the arbitrability of the claims, such as laches."[1]

In its reply, HHC both reiterates and expands its objection based on the lack of specificity by stating that:

> Respondent has not alleged which laws are not being complied with, in what way there is non-compliance, which vehicles are not in compliance with what laws, on what dates the vehicles have been in non-compliance with what laws, and who has been required to use vehicles that do not comply with applicable law.

As an additional ground for opposing arbitrability,

[1] §20 of the Petition Challenging Arbitrability.

HHC maintains, in its reply, that the remedy sought by respondent "completely ignores the two step arbitral process stated in the parties agreement." Article XIV, Section 2(f) limits the power of the arbitrator to initially decide only "whether the subject facilities meet the standards of subsection (b) of this Section 2 but may not affirmatively direct how the employer should comply with this Section." The remedy sought by DC 37, therefore, would itself violate the clear intent expressed in the Agreement that an employer first be afforded an opportunity to undertake unilateral rectification before a course of action is imposed upon it by the arbitrator.

For all these reasons, the City maintains that its petition challenging arbitrability should be granted and the request for arbitration accordingly denied.

DC 37's Position

The Union states the facts to be as follows. In November, 1980, and July 1981, DC 37 filed two group grievances by which the instant claim was instituted. The employer's denial of the claim first came in a letter from James Kerr, EMS Acting Executive Director, dated March 18, 1981, and addressed to Eric Mitchell, Local 2507 President. A formal second step

response issued on July 10, 1981. Subsequently, pursuant to the City-wide contract, an appeal to Step III was taken and a hearing was held on September 19, 1981. After three months had lapsed with no Step III decision forthcoming, the Union exercised its right under Article XV, Section 6 of the Agreement to proceed to the next step of the grievance procedure.

DC 37 stresses that it filed its request for arbitration more than three months after the Step III hearing, and that the interim Step III decision which issued on January 6, 1982 issued after the request for arbitration had already been filed. DC 37 maintains that while it is true that it agreed to hold the arbitral process in abeyance "pending the review of the grievance by Health and Safety Coordinator," it did so with the express reservation of its right to reinstate its request for arbitration. Thus, it properly reinstituted its request following the issuance of the report on March 24, 1982. DC 37 urges that any departure from its course to arbitration was made as an accommodation and did not constitute an election.

As to HHC's contention that its request lacked specificity, DC 37 notes that Article XIV only provides limited prospective relief for health and safety violations and that, at any event, the very assertion that Local 2507 members are

not routinely provided with safe motor vehicles "clearly meets this standard" of requisite specificity. Further, as to its alleged failure to specify dates and the consequent inability of HHC to invoke the defense of laches, or any other defense, DC 37 maintains that "the grievant is under no obligation to allege the facts necessary to raise such a defense."[2] Finally, DC 37 urges that HHC's apparent ability to respond to the grievance at the preceding levels of the grievance procedure undermines its assertion that the request for arbitration is too vague.

Since the request amply demonstrates a prima facie relationship between the act complained of and the source of the alleged right, it satisfies the limited test of arbitrability and should accordingly be granted.

Discussion

Article XV of the Agreement provides, in pertinent part, as follows:

[2] ¶20 of the Answer to Petition Challenging arbitrability.

Section 2.

The grievance procedure shall be as follows:

* * *

Step III

An appeal from an unsatisfactory determination at Step II shall be presented by the employee and/or the Union to the City Director of Municipal Labor Relations in writing, within ten (10) working days of the receipt of the Step II determination. Copies of such appeals shall be sent to the agency head. The City Director of Municipal Labor Relations, or his/her designee shall review all such appeals from Step II determinations and shall make and issue a written determination within fifteen (15) working days following the date on which the appeal was filed.

and,

Section 6.

If the Employer exceeds any time limit prescribed at any step in the grievance procedure, the grievant and/or the Union may invoke the next step of the procedure, except, however, that only the Union may invoke impartial arbitration under Step IV.

There can be no question that the failure of OMLR to issue a timely Step III determination entitled DC 37 to "invoke the next step of the grievance procedure," as provided in Section 6.

The questions remains, however, as to what effect the submission of the claim to the OSHC for an investigation had on the parties and their respective rights.

The interim Step III decision issued on January 6, 1982, more than a week after the Request for Arbitration had been filed. The Un'.on alleges that subsequent discussions between DC 37 and HHC yielded an agreement by DC 37 to hold in abeyance the arbitral process pending the outcome of the OSHC investigation. As Exhibit G to its answer to the petition challenging arbitrability, DC 37 annexes a letter dated January 21, l982, from its Assistant General Counsel, Joel Giller, addressed to Thomas Laura, Deputy Chairman, OCB, wherein he states that:

> Following discussions with John O'Reilly, Health and Hospitals Corporation's Labor Counsel, I am requesting that your office hold in abeyance the arbitral process in the above-captioned matter for a reasonable time pending review of the grievance by the Health and Hospitals Corporation's Health and Safety Coordinator.
>
> The Union shall notify your office if the matter is resolved or if it wishes the arbitral process to be reinstituted. The Union has agreed with HHC that, in case of the latter, the ten day period to challenge arbitrability shall commence one week after the request to reinstate proceedings is made.

While it is true that the interim Step III decision contains language by which OMLR expressed its intent to retain jurisdiction over the matter until after the investigation, it cannot be presumed that it was pursuant to this decision that

the claim was submitted to the OSHC for an investigation. At the time the interim Step III decision issued, DC 37 had already opted to invoke Step IV of the grievance procedure and clearly was not obligated to abide by a belated Step III decision. Based on the uncontroverted assertion of DC 37 that discussions took place between DC 37 and HHC pursuant to which the Union agreed to hold off on its request for arbitration, and the letter to Deputy Chairman Laura which supports this assertion, it appears to this Board that t-he claim was submitted to the OSHC voluntarily as an accommodation and a final effort to resolve the matter short of arbitration. We further conclude that it does not appear that DC 37 agreed to anything beyond the suspension of Step IV "for a reasonable time pending review of the grievance by HHC's Health and Safety Coordinator." Nowhere is it evidenced that DC 37 additionally agreed to appeal the investigator's report to OMLR before reinstating its request. for arbitration. Thus, we do not find that the Union failed to complete the steps of the grievance procedure.

As to the objection to arbitration based on the lack of specificity, we find that given (1) the extensive attention paid to this claim prior to the reinstatement of the request

for arbitration; (2) the investigation itself; and (3) the nature of the relief sought - i.e. prospective only, HHC had sufficient information both as to the nature of the claim against it and the relevant area of inquiry.

With respect to the objection to arbitrability based on the kind of relief sought by the grievants, we note that Section 7.9 of the Revised Consolidated Rules of the Office of Collective Bargaining ("Rules") states that after the service of respondent's answer, petitioner may file a reply "which shall contain admissions and denials of any additional facts or new matter alleged in the answer." A reply, therefore, is not the proper mechanism by which to raise new objections. Since the objection to the remedy sought in the demand for arbitration was not presented in the original petition challenging arbitrability, we are constrained by the Rules to limit accordingly our scope of inquiry. In any event, we have repeatedly held that the mere possibility that an arbitrator might render a proscribed remedy is not a basis for denying an otherwise valid request for arbitration.

Lastly, we note that since in a proceeding challenging arbitrability we do not consider the merits of the claim itself, the additional submissions filed by grievant George Engstrom, pertaining as they do to the merits of the dispute, were not considered by this Board in reaching the decision on

the issue of arbitrability.

For the foregoing reasons, and since the arbitrability of the claim is not otherwise contested, we find no basis for denying the request for arbitration.

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 District Council 37's request for arbitration be, and the same hereby is, granted, provided however that the union shall furnish additional specifications as to the precise violations to be arbitrated; and it is further

ORDERED, that the petition challenging arbitrability be, and the same hereby is denied.

Dated: New York, New York
April 20, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD SILVER
MEMBER

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MEMBER