CEU, L.237, IBT, et. Al v. City, 20 OCB 12 (BOC 1977) [Decision No. 12-77 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter

CITY EMPLOYEES UNION,
LOCAL 237, I.B.T.

DECISION NO. 12-77

-and-

DOCKET NO. RU-596-77

ELEVATORS CONSTRUCTORS UNION
LOCAL NO. 1 of the INTERNATIONAL
UNION OF ELEVATOR CONSTRUCTORS,
AFL-CIO

-and-

THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYERS
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DECISION AND
DIRECTION OF ELECTION

Oil March 10, 1977, City Employees Union, Local 237, I.B.T., filed its petition herein, accompanied by an appropriate showing of interest, seeking to add Elevator Mechanic's Helpers, Elevator Mechanics, and Foremen Elevator Mechanics to its Certification No. 62B-75.[1] Elevator Constructors Union Local No.1 (Intervenor), which is certified (Decision No.5-71.) for the petitioned employees, intervened in timely manner.

The City's Office of Municipal Labor Relations informed this Board, by letter dated April 11, 1977, that it takes "no position" on the petition or the intervention.

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[1] Certification No. 62B-75(as amended) was later successively consolidated with other certification to from Certification No 9-77. This unit is represented by Local 237.

On April 25, 1977, this office received a letter from Local 237 responding to the arguments presented by Intervenor in the latter's Application to Intervene and Motion to Dismiss. By letters dated May 9 and May 17, 1977, Intervenor supplemented its position on the merits of the case and also objected to the form and timeliness of Local 237's above-noted response.

The Board, with respect to Intervenor's procedural objections to Local 237's submission, reads Sections 2.9[2] and 15.1[3] of the Revised Consolidated Rules of the Office of Collective Bargaining as providing the authority for the Board to accept and consider all communications addressed to it which serve to clarify the facts and positions of the parties in any representational dispute (see Decision No. 97-73, p.2). Therefore, while noting the objections of Intervenor, the Board will, nevertheless, consider the arguments presented by Local 237 in its letter of April 25, 1977.

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§2.9 "Investigation. In its investigation of a question or controversy concerning representation, the Board may conduct informal conferences or hearings, may direct an election or elections, or-use any other suitable method to ascertain the wishes of the employees."

§15.1 "Construction. a. These rules shall be liberally construed and shall not be deemed to limit any powers conferred by the statute.

Contract Bar

Intervenor moves to dismiss Local 237's petition for certification, on the ground that said petition was untimely filed. Section, 2.7 of the Revised Consolidated Rules of the OCB provides, in part, as follows:

> "A valid contract between a public employer and a public employee organization shall bar the filing of a, petition for certification during a contract term not exceeding three (3) years. A petition for certification . . . shall be filed not less than five (5) or more than six (6) months before the expiration date of the contract, or, if the contract is for more than three (3) years, before the third anniversary date thereof . . . . No petition, for certification . . . filed after the expiration of a contract."

Intervenor contends that the determination by the Comptroller of the City of New York pursuant to Section 2.20: of the New York State Labor Law, fixing the compensation of the involved employees, together with a related welfare fund agreement, constitutes a contract within the meaning of Section 2.7 Therefore, Intervenor concludes, the Board of Certification should apply the precedent established by Decision No. 35-73 and dismiss the instant petition on the basis of "contract bar."

Local 237 takes the position that the contract bar doctrine is inapplicable because a Comptroller's determination is not a contract as contemplated by the New York City Collective Bargaining Law (NYCCBL) and, therefore, the Board should order an election as expeditiously as possible.

Board of Certification Decision No. 35-73, on which Intervenor places great reliance for its contract bar argument, involved a petition for certification filed by a rival union during a period of negotiations between the City and the incumbent union for a successor contract. In that case, the Board, relying on the contract bar rule, dismissed the certification petition, stating:

> "To entertain a representation petition at this time (after expiration of a contract) would constitute an unwarranted intrusion upon the collective bargaining process. . . ." (Decision No. 35-73, p. 6).

The Board went on to refer in Decision No. 35-73 to an earlier case involving the application of the contract bar theory, Decision No. 27-72, wherein it stated at page 7:

> "In applying the contract bar rule as we do, we have set no time limitations on negotiations or on the right of the parties to invoke impasse procedures. on the other hand, we do not believe that the contract bar rule should be use as an indefinite or unreasonable bar to the representation rights of employees. Hence, it is conceivable that there will be circumstances in which the contract bar rule may not apply."

The Board notes that it has been nearly two years since the expiration of the above-referred-to Comptroller's Determination on June 30, 1975; however, we are not now declaring that such a length of time constitutes an "unreasonable bar" as contemplated by Decision No. 27-72. The Board will not address itself to that question in light of our finding that any precedents concerning contract bar, established by Decisions Nos. 27-72 and 35-73, are not applicable to the facts of the instant case.

The contract bar doctrine has a long and firmly established history in the field of labor-management relations. Its purpose is to accommodate two sometimes conflicting objectives: first, the freedom of employees to select or change bargaining representatives; and, second, to give continuity and stability to an established bargaining relationship. The essential stability, as this Board stated in Decision No. 11-71, is achieved by protecting the established relationship from challenge during the term of a valid contract of reasonable duration. To provide such stability, the contract must contain sufficient substantive terms "to chart with adequate precision the course of the bargaining relationship, [so that] the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems." [Appalachian Shale Products Co., 121 NLRB 149, 42 LRRM 1506 (1958)].

The wages and supplements of the prevailing rate employees here concerned are set by the City Comptroller pursuant to §220 and are expressly excluded from the scope of collective bargaining by §1173-4.3a(1) of the NYCCBL. It necessarily follows that a Comptroller's determination on these subjects is outside the boundaries of his Board's certification of a union representing "220 employees" and not a contract within the meaning of §2.7. Intervenor's varied arguments concerning testimony by Housing Authority officials at arbitration hearings and the significance of sections of Executive Order 83 to prove that proceedings preliminary to a Comptrollers determination constitute collective bargaining do not address the fact that the subjects of a Comptroller's determination are statutorily removed from the scope of negotiations between the City and an employee organization certified by this Board. The exclusion of wages and supplements from bargaining would not, however, render an agreement on non-economic matters insubstantial or unimportant. To the contrary, many non-economic provisions in collective bargaining agreements are essential to the maintenance of a continuing stable relationship. It is, in fact, because significant collective bargaining may be conducted with regard to non-economic demands of "220 employees" that this Board has jurisdiction to certify bargaining units of such employees.

A review of the record and exhibits in the instant matter reveals that the evidence in support of Intervenor's claim that a contract exists consists of a welfare fund agreement signed by Intervenor and a representative of the comptroller on January 21, 1976, and Intervenor's argument that its reliance on the grievance procedure provided in Executive Order No. 83 constitutes an incorporation by reference of the said grievance procedure.

Local 237 argues that this agreement is simply a guarantee by Intervenor that the money paid to its welfare fund by the Comptroller will be used to provide certain benefits. This contention by Local 237 does not differ too greatly from Intervenor's own characterization of the agreement as one which serves to implement the Comptroller's determination.

Even if the Board were to view this welfare fund agreement as a contract to which the grievance procedure provided by Executive order No. 83 is incorporated by reference, it would not serve as a bar to the filing of a certification petition by a rival union. In the private sector, the NLRB has held:

> ". . .to serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining ,relationship; it will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial." (Appalachian Shale Products Co. supra; see also Bethlehem Steel Co., 95 NLRB 212, 28 LRRM 1468).

This conclusion is not in any way inconsistent with our prior ruling in Decision No. 11-71. In that case, where we held that an agreement existed for contract bar purposes, the incumbent union's agreement contained substantial non-economic provisions concerning such mandatory subjects of bargaining as grievance-arbitration procedures, seniority, released time for union representatives, and check-off of union dues. In that case, we dealt, specifically, with the substantial nature of the agreement between the parties and grounded our decision upon the fact that the significant extent to which the contract defined and stabilized the parties' relationship constituted a sound basis for barring representation challenges during its term.

Intervenor has failed to produce such strong evidence of an existing contract and, therefore, we find that Local 237's petition for certification cannot be dismissed on grounds of contract bar.

Appropriate Unit

Intervenor requests that, if its Motion to Dismiss is denied, a hearing be held on the question of "appropriateness of the unit" requested by Local 237. We find that the current certified unit is appropriate at this time and, therefore, we will not order a hearing on this question. This finding is without prejudice to the filing of a motion

for consolidation if Petitioner is certified for the unit herein. Accordingly, we-shall direct an election among the Elevator Mechanic's Helpers, Elevator Mechanics, and Foremen Elevator Mechanics.

DIRECTION OF ELECTION

By virtue of and pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

DIRECTED that, as part of the investigation authorized by the Board, an election by secret ballot shall be conducted under the supervision of the Board of Certification or its agents, at a time, place, and during hours to be fixed by the Board, among the Elevator Mechanic's Helpers, Elevator Mechanics, and Foremen Elevator Mechanics, employed by the City of New York and related public employers subject to the jurisdiction of the Board of Certification during the payroll period immediately preceding this Direction of Election, other than those employees who have voluntarily quit, retired, or who have been discharged for cause, before the date of the election, to determine whether they desire to be represented for the purposes of collective bargaining by City Employees Union, Local 237, I.B.T.; by Elevator Constructors Union Local No. 1 of the International Union of Elevator Constructors, AFL-CIO; or by neither.

DATED: New York New York.
May 18, 1977.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r