

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

CHAPIN HILL AT REDBANK,

22-CA-067608

Respondent,

And

LOCAL 707, HEART,

Charging Party.

RESPONDENT'S EXCEPTIONS MEMORANDUM

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INTRODUCTION

This memorandum is filed in support of the Respondent Chapin Hill at Redbank (“employer”, “facility”, “respondent”) and urges that the instant complaint be dismissed in its entirety.¹

STATEMENT OF THE CASE

The charge in this case, filed by the Charging Party, asserts a refusal to bargain for a “replacement fund for the pension fund, which is necessary because Local 707 members’ cannot participate in the Local 74 Pension Fund, *as originally negotiated.*” In fact, the letter requesting bargaining (GC ex 6) that triggered this case, reflects on the need to negotiate a “replacement” plan *for the one agreed to.*

This is, of course, starkly different from the rendition of the claim by General Counsel (“GC”) in this case. The GC in his opening statement asserted that there was a failure “...to bargain about a pension issue *expressly* left open in the parties’ collective bargaining agreement”. (tr 6)

¹ In filing this request, the respondent does not waive, and specifically asserts, that President Obama unconstitutionally appointed 3 board members by recess appointment on January 4th 2012, since the Senate was then actually in session.

The GC continued in his opening statement to make the following assertions. Respondent, he alleged, ignored a “clear term and condition of employment” bargaining demand (tr 8).

While recognizing that the employer raised 1) deferral to arbitration and a time bar (tr 8), the GC then argued that this case is not arbitrable, in GC’s eyes, because “...what fund those contributions will be made into...cannot be defined by an arbitrator” (tr 8) He also argued that “an arbitrator cannot decide which funds to send the money to as it is outside of the contract and he is not charged with the ability to fashion a pension fund” (tr 8) The GC continued that “only the parties can bargain over how to properly *distribute* pension funds” (tr 8).

In speaking to the time bar issue, the GC argued, however, “the union’s demand to bargain was made on October 11, 2011, ...and sought negotiations on the *application and enforcement of a term of the current contract*” (tr 9) Thus, this was an item particularly arbitrable (as events actually worked out).

Similarly, the GC mis-spoke (repeatedly) in his opening statement by asserting that a “merger” was contemplated between Local 74 and Local 707. In the opening statement, the GC asserted that there was “...contemplated that Local 707 would *merge* with Local 74 and that pension contributions would be made to a fund administered by Local 74” (tr 7) However when questioning Shlanger, the

GC referred to a “merger or *an affiliation*” (tr 12) Macchado noted *only* a “prospective affiliation” with Local 74. She never mentioned a merger possibility. (Tr 50) As will be seen, this affiliation was solely to “buy” the various “funds” from Local 74.

An MOA was signed by the parties in 2008. It used the predecessor 1199 language and modified it in a separate MOA. The 1199 contract with Chapin is GC ex 2 (tr 14). The October ‘08 moa is GC ex 4 (tr 15).

At the time that the MOA was signed in 2008, the prospect of affiliation with Local 74 was still open. (tr 54) Local 74 provided the health insurance and that was the “relationship” that Local 74 had with the employees. (tr 50) The basis of the affiliation contemplated, therefore, was to use the Local 74 established funds while regular “union” issues would be left to Local 707. The facility made contributions month in and month out to the Local 74 health fund. Dues were paid, by check off, to Local 707.

The MOA also specifically took out reference to the SEIU pension and noted that there should be inserted the “correct one for this cba”, (tr 7) in the full draft contract between the parties. When referencing health coverage, the 2008 MOA similarly replaced the previous “Greater New York/1199” plan with “the health

plan”. Contributions for health care were made to the Local 74 health fund pursuant to this language in the MOA (tr 26-27)

Sal Alladeen was president of Local 74 (tr 26) Alladeen of Local 74 (tr 14) signed the July moa (GC ex 3). That MOA, for the most part implemented the Local 74 health plan. He was the lead negotiator for it. (tr 26) Machado also agreed that he was the lead negotiator. (tr 55)

Yet, Machado asserted that the parties had not reached agreement on which fund was the “correct” fund for pension contributions (tr 54). Shlanger testified that the rate of contribution, and date of implementation were agreed upon in the GC 4 MOA (tr 15) Significantly, he did not agree that there was “no final agreement reached on the identity of the actual pension fund” (tr 15) Machado never mentioned pension placement as an open issue discussed before the 2008 moa was signed. (tr 55) The first issue was whether the pension monies at 1199 could be rolled over to the *Local 74 pension fund*. (tr 55-6) Another issue was the effective date of the pension. (tr 55) What was finalized “...was the amount and that it would be between Local 74 and 707 HEART”. (tr 57)

Shlanger agreed that the 2008 MOA said that, after deleting language referring to the SEIU pension fund, contributions would be made for the “correct fund for the” agreement. (tr 16) However he did not agree that “...there was no

final agreement as to the correct name of the pension fund” (tr 16) In fact, Shlanger testified that there *was* an agreement to contribute to the Local 74 pension fund “...at the time of the signing of the memorandum of agreement, or predecessor of the current contract”. (tr 18) There were extensive contract negotiations and in the October 15, 2008 moa, Shlanger believed, agreement was finally reached about, *inter alia*, pension contributions to be submitted to the Local 74 pension fund. (tr 19-20) That agreement came about between August and October of 2008. (tr 20) Shlanger, *and Machado* (tr 67), both contemplated making payments to the Local 74 pension plan when the 2008 moa was agreed upon. (tr 27)

In his opening, the GC asserted that on 10/11/11 Machado asked for bargaining “over the identity of the correct plan to solve the pension problem” (tr 7) He went on to say that respondent “...did not bargain, they did not answer the letter”. (tr 7)

Macchado agreed that when she made the bargaining request, the contract, (and thus its arbitration clause) was still in effect. (tr 48) The GC continued that after the union requested bargaining, “... the employer received the demand and then *failed* to bargain.” (tr 9)

The facts, again do not support this assertion. Shlanger found out “before” the pension contributions were due that there was to be no affiliation with Local

74. (tr 28) Since that information came to light there has been ongoing discussion about the pension fund and what to do about the pension. (tr 29) As early as 2010 the issues remained the same; “those are pretty much the two issues is what fund and what money we do owe, or don’t owe”. (The employer was arguing that there was nothing due since there was not available the agreed to pension fund to make contributions into).²

Machaddo asserted that she already requested bargaining in 2010 “because I wanted to be sure that the facility knew where the money was going to end up” (tr 60) Macchado spoke to Respondent in August 2010 “regarding pension contributions” (tr 58-9) However, Shlanger noted that if the money problem was solved, *where* the money would go would not remain an issue. (tr 44) Respondent never acknowledged, for instance, that it owed *any* money for pension once the Local 74 fund was no longer viable. (tr 46) Machado first tried to talk to Shlanger on August 26, 2010 “regarding the specifics on the pension fund, so that we can set up a 401k, or an IRA or discuss where the contributions that he’s supposed to give us, where it would go.”(tr 59) Ultimately a grievance was filed by Machado (tr

² Whether this argument is sound or not is beside the point. It was actively made in a pending arbitration before the arbitrator. Courts cannot inquire into the merits of arbitrable disputes.

59). Finally, as noted, the issue was submitted to arbitration. (Shlanger tr 33, Machaddo (tr 61)

That arbitration was to continue two days after the instant trial before the ALJ. (tr 34, 37) (see respondent's ex 1 and 2 (tr 34) regarding these arbitration hearings.) The arbitration notices reflect that an issue to be determined was the pension. (Tr 36) At an August 15, 2011 arbitration hearing the issue of the pension again came up. (Tr 63) At that arbitration hearing, charging party's counsel, Machaddo testified, asserted that "...we have to negotiate a **replacement** fund for the pension. That would come up with either an IRA or a 401K...and we have to set it up in a specific fund". (tr 64) Shlanger testified that it was "incorrect" to say that Respondent was not interested in a 401 (k) plan. (Tr 23)

The arbitrator advised the parties to "try to reach an agreement and if we didn't then we could bring back the case. You know bring the case forward to arbitration" (tr 64) Machaddo noted that Respondent "...didn't say no to it [the arbitrator's suggestion] and it seems they were in agreement..." (Tr 64) Counsel for Respondent "agreed... if we couldn't reach an agreement that we would arbitrate the pension fund". (tr 65)

It wasn't until 10/11 that the GC ex 6 bargaining demand was served on Respondent. (Tr 65) The letter, moreover, specifically referred to the need to establish, again, a “**replacement**” pension fund. (Tr 65)

After receiving the 10/11/11 letter from Machado, Respondent made no *formal* response to it. (Tr 24) However, proposals and counter proposals, as well as the continuing arbitration proceeding, concerning, *inter alia*, the pension issue, were exchanged by the parties thereafter. (Tr 39, 41)

The remedy sought is a “bargaining order”...over this particular issue” (tr 9)

POINT 1

THE MATTER MUST BE DEFERRED TO ARBITRATION

Under both the *Collyer* 192 NLRB 837 (1971) and *Dubo* doctrines, *Dubo Manufacturing Corporation*, 142 NLRB 431 (1963) this case should have been left at arbitration (where it is).

It is ridiculous to argue, as the GC did, that the arbitrator does not have the power to determine disputes under the *express* terms of the *extant* contract on issues already *sub judice* before him. Whether there was liability to contribute to an agreed upon fund when that fund was no longer available, how much to contribute, where to pay any monies (directly to the employees? Or to another fund?, or IRA? or 401k?) are all issues particularly within the province of the

arbitrator's jurisdiction and are the very issues presently *sub judice* before him. Moreover, the issues are directly impacted upon by the arbitrator's findings of intent in the negotiation and execution of the contract. In fact, Machaddo alluded to all of these issues as being (properly) before the arbitrator (and put there by the union.)

The ALJ utterly misconstrues the arbitrator's authority in this case. (ALJD at 8 lines 21-30.) The arbitrator could direct that the pension payments be made directly to the employees as additional wages since the agreed to pension plan was no longer available. There is, therefore, extant an issue as to *whether there was a delinquency due to a pension fund* or whether these monies would be re-directed to the employees. Machado did not doubt that the arbitrator could order a diversion to wages or order the establishment of a IRA or 401K pension. She wanted the arbitrator to do just that. (See Machado letter referred to at ALJD 5 at line 13)

As such, whether there would even be a pension fund and, of course, if there was one, where the pension contributions would be sent, was squarely before the arbitrator where the union had put the issue. To then say that the employer had to bargain over a replacement fund designation when the issue of whether there would be a replacement fund was being *sub judice* at arbitration seems myopic. It could also clash with the arbitrator's award if he decided to merely re-direct these

monies to the employees. As such, there was a 3rd issue being arbitrated; 1) failure to remit 2) diversion of pension “delinquency” to another pension arrangement and 3) diversion to wages. As the ALJ notes, attorney Weiss stated that the employer would negotiate “what plan the Employer would contribute to” (ALJD at 13 line 48) and he stated “that if the parties could not reach agreement then they would arbitrate the pension fund” (ALJD at 4 line 29)

The forgoing negates the ALJ’s long recital of respondent failings at ALJD 11 lines 16-24. The employer in contrast to the ALJ’s assertions, has, therefore, indicated an affirmative indication of a genuine intent to proceed to arbitration over this matter, it advised the union that the matter could or would be appropriately dealt with in arbitration, it always assumed that the arbitrator would resolve the matter (absent agreement) and it never raised a time bar defense to the arbitration.

Since the term “correct” pension fund is a term in the contract and since the interpretation of that clause in the current factual context was the very issue that was placed before the arbitrator by the union, the ALJ errs in finding fault with the employer’s not responding to the union’s (out of nowhere) negotiation demand on the narrow issue of a replacement fund. (ALJD at 10 lines 28-30). This is particularly so where the union squarely placed the issue into, and was actively litigating the matter at, arbitration. An extant term of the contract whose

interpretation was directly implicated by events is, after all, singularly ripe for the arbitration mechanism provided for, and utilized, by the parties. The ALJ's assertion, therefore, that any remedy of the arbitrator's would not be "within the scope of the arbitrator" and the query as to "how any interpretation of the collective bargaining agreement by the arbitrator could or would solve the instant dispute" is puzzling. (ALJD at 10 lines 31-34)³

There is little doubt that the GC argument would fail if a party here tried to avoid arbitration in court. The Supreme Court has counseled courts that so long as the dispute cannot be removed from arbitration with "positive assurance", arbitration must proceed. (See ALJD at 10 lines 15-18) Similarly, there is no doubt that an attack on the arbitrator's authority to fashion a remedy in this case, would fail. (ALJD at fn 7)

The ALJ is markedly off base in her assertions at 10 lines 2-9. Again, as earlier noted, the evidence is clear that there is a dispute over the identity of the "correct" pension fund, there is a dispute as to whether there is a contractual obligation to contribute to a pension fund for the employees *at all* any longer and the dispute is singularly contractual rather than statutory in nature.

³ The ALJ's reference to applying *Spielberg before* an award issues is equally puzzling. The ALJ apparently already assumes that the arbitrator's *in futuro* award will not survive review under *Spielberg*. (ALJD at fn 7)

POINT II

THE CLAIM IS TIME BARRED

It is clear that the issues in this case were raised by the union in August 2010. The union did not file charges when, on August 26, 2010, Shlanger purportedly did not meet with them on the pension issues. While this case is timely at arbitration, the union chose to pursue arbitration, not file a charge, in 2010 when the issue of bargaining was raised.

Although Schlanger purportedly said that he was “on top of” the pension issue, the union knew that there was a problem. It chose to arbitrate rather than file Board charges. It knew that there was a ripe dispute that it decided to remedy by arbitration, not the Board. As such, while the choice made was for arbitration, it was indisputably made with knowledge that there was an extant problem. The union was therefore on clear notice of the problem.

The ALJ’s rationale for excusing the filing within the 10(b) period is therefore infirm. (ALJD at 6 lines 20-45) Filing a new demand to negotiate, for the sole purpose of resurrecting a time barred issue, must fail.

POINT III

THERE IS NO VIOLATION ON THE MERITS

There is no showing that it was even necessary to respond to the 11/10 bargaining request. Section 8(d) of the Act does not require bargaining mid contract. The evidence amply reflects that the parties did not expressly leave open any issue for subsequent negotiations, as the GC's opening statement asserts. Rather all the evidence shows that the parties arrived at a full agreement to have pension contributions go into the Local 74 Pension Fund.

Moreover, there were ongoing negotiations and arbitration hearings on these issues during the entire period since 2010. In fact, as Respondent's exhibit 3 and 4 reflect, there were negotiations taking place between the parties shortly after the 11/10 letter was sent. The respondent has never been shown to have ever refused to bargain about anything concerning the pension.

The failure to specifically respond to a letter requesting bargaining over an issue, that there is active bargaining going on about, and that is *sub judice* at arbitration for one and a half years, hardly makes out a bargaining violation. In fact, it is self evident that the letter was sent *only* to resurrect a time barred charge. There was nothing new about the issues that bargaining was sought on as they were being dealt with at arbitration and negotiations between the parties for close to two years. Aside from stating that there was no answer to the *specific* letter sent by the

union, the ALJ does not deny that ongoing negotiations and arbitration was taking place on the pension issue for several years.

CONCLUSION

Based on the forgoing the complaint should be dismissed in its entirety.

Dated: New York, New York
November 6, 2012

Respectfully submitted,

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