

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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AFSCME COUNCIL 5, LOCAL 3558

and

Case No: 18-CB-149410

ST. LUKE'S HOSPITAL OF DULUTH, INC. d/b/a

ST. LUKE'S HOME CARE

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**INITIAL BRIEF OF AFSCME COUNCIL 5, LOCAL 3558**

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**INTRODUCTION**

Respondent AFSCME Council 5, Local 3558 (hereinafter "AFSCME") files this brief in the above captioned matter, pursuant to the Board's February 5, 2016 Order. Charging Party St. Luke's Hospital of Duluth, Inc. d/b/a/ St. Luke's Home Care (hereinafter "St. Luke's" or "Employer") filed a Charge alleging that AFSCME's instance on adhering to the language previously agreed to by the Parties constituted an unfair labor practice. That Charge should be dismissed by the Board. AFSCME committed no unfair labor practice by invoking the interest arbitration clause found in the Parties' Agreement. The interest arbitration provision in question is valid and enforceable under the Act. AFSCME seeks to have the Board issue a decision dismissing St. Luke's Charge in order to preserve the ability of individual parties to agree, and be bound by, their agreed upon contract language.

**FACTUAL SUMMARY**

AFSCME is the exclusive representative for a number of Employee's employed by St. Luke's. Specifically, the Local Union in question, AFSCME Local 3558, comprises:

All homemakers and technicians employed by the Employer at or out of its 810 East 4th Street, Duluth, Minnesota facility who work an average or are anticipated to work an average of four or more hours per week over a 13 week period

excluding RNs and LPs, Office Clerical Employees, Therapists, Therapist Assistants, Guards and Supervisors, as defined in the National Labor Relations Act.

*Joint Motion and Stipulation of Facts* at ¶ 10(a).

This dispute arises out of the Parties' bargaining over the terms of their successor collective bargaining agreement, specifically AFSCME's evocation of Section 21 of the predecessor Collective Bargaining Agreement.

Section 21 of the Parties' preceding collective bargaining agreement pertains to the arbitration of contract disputes. Specifically, Section 21.1 "Interest Arbitration" states that

In the event the parties are unable to reach agreement as to the terms of a succeeding Labor Agreement, any unsettled issue shall, upon the request of either party, be submitted to the determination of a board of arbitrators, whose determination shall be final and binding upon the parties.

*Joint Motion and Stipulation of Facts* Ex. G at p. 21.

In the immediately following subsection, Section 21.2 "Selection of Arbitrators" the Parties expressly noted that:

The parties recognize that by custom an arbitrator is not ordinarily given power to add to or vary from the previously written contract of the parties. In this case, however, the parties expect the arbitrator to supply agreement and language of agreement in a new contract in those areas where the parties themselves have been unable to come to express agreement.

*Joint Motion and Stipulation of Facts* Ex. G at p. 21.

Finally, Section 21.3 of the Parties' Agreement "Continuation of Interest Arbitration" states that:

"the provisions of this Article (XXI) shall be in full force and effect during the entire term of this agreement and shall apply and be utilized by the parties to reach agreement as to the terms of a succeeding Labor Agreement in the event the parties are otherwise unable to reach agreement through negotiations. The arbitration panel in rendering its decision shall incorporate therein a provision that this arbitration clause (Article XXI) shall be a part of the succeeding contract, unmodified, except the arbitration panel may impose an expiration date on the

provisions of this Article XXI for any Labor Agreement expiring during or after the calendar year 2005.

*Joint Motion and Stipulation of Facts* Ex. G at p. 21–22.

The agreement included the above cited language was contained was executed by both the Union and the Employer, and had a term running between January 1, 2012 and December 31, 2014. *Joint Motion and Stipulation of Facts* Ex. G at p. 1. While negotiating the terms of the successor collective bargaining agreement in 2015, the Parties were unable to come to a consensus regarding the inclusion of an Interest Arbitration Provision in the successor contract.<sup>1</sup> Based on the agreed upon language of the Parties, AFSCME invoked Section 21 of the preceding agreement and requested that the Parties submit to arbitration on the remaining issue, that being the inclusion of an interest arbitration provision. St. Luke's refused to honor the bargained for language contained in the preceding collective bargaining agreement, instead insisting that the language it agreed to previously was unenforceable. St. Luke's subsequently brought this Unfair Labor Practice Charge against AFSCME.

### ANALYSIS

The language of Section 21 represents the bargained for agreement of the Parties, wherein the Parties agreed that *any* unresolved issues, including, specifically, interest arbitration provisions, be submitted to an arbitration panel for resolution, in the event that the Parties themselves are unable to come to an agreement. Therefore, AFSCME's insistence that the Parties

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<sup>1</sup> During the negotiation of the successor collective bargaining agreement, the parties had different and varied positions regarding the inclusion of an interest arbitration provision. For example, during one of the bargaining sessions over the new contract, the Employer's proposal included the language found in Section 21. *Joint Motion and Stipulation of Facts* at ¶ 12(b). However, in later bargaining proposals, the Employer did not include an Interest Arbitration Provision. *Id.* AFSCME has consistently proposed the inclusion of an interest arbitration provision. *Id.*

respect and adhere to the valid, enforceable language that they agreed to does not constitute an unfair labor practice.

AFSCME recognizes that pursuant to Board precedent, under certain circumstances, using an interest arbitration provision to submit a dispute involving the inclusion of an interest arbitration provision in a successor contract is impermissible, if the provision relied upon is automatically self-perpetuating. However, when looking at the policy underlying the decisions disallowing interest arbitration over the inclusion of interest arbitration in a subsequent contract, the policy underlying the Board's previous aversion to interest arbitration provisions does not weigh against respecting and upholding of language bargained for by the Parties in this instance.

This dispute, in its entirety, turns on this issue. If the interest arbitration provision negotiated by AFSCME is found by the Board to be valid, AFSCME committed no unfair labor practice. For the following reasons, the Board should find that Section 21 of the Parties' Agreement is valid.

A. Current Board Precedent Prohibits Automatically Self-Perpetuating Interest Arbitration Provisions

AFSCME acknowledges that it is well established by Board precedent that interest arbitration is a non-mandatory subject of bargaining. *See, e.g., Columbus Printing Pressman Union No. 252 (R.W. Page Corp.)*, 218 NLRB 268, 287 (1975). However, a party may enforce an interest arbitration provision on a permissive subject of bargaining. If a Union has a reasonable basis in fact and law to bind the employer to an interest arbitration clause, the union may lawfully enforce its contract rights. *See Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989). This is true even if the party seeking to invoke an interest arbitration provision seeks resolution of a disagreement over a non-mandatory subject of bargaining. *See, e.g., Sheet Metal Workers' Intern. Ass'n, Local 14 v. Aldrich Air Conditioning*,

*Inc.*, 717 F.2d 456, 458 (8th Cir. 1983) (“Once included in a collective bargaining agreement, however, interest arbitration clauses generally are enforceable”). In fact, it has been noted that “nothing would be more out of step with our national labor policies than . . . to refuse to enforce a voluntary agreement to arbitrate differences.” See *Chattanooga Mailers Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1314 (6th Cir. 1975). Any doubt regarding the scope and enforceability of a bargained for contract provision should be “resolved in favor of coverage.” See *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

The Board has held that it will not “‘saddle’ the parties with ‘a perpetual cycle of binding interest arbitration.’” *Laidlaw Transit, Inc.*, 323 NLRB 867, 869 (1997) (citing *Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 706, 762 at fn. 4 (1990)). Specifically, “the Board has been unwilling to permit self-perpetuating interest arbitration clauses because they represent an irretrievable surrender of economic weapons in support of their bargaining positions.” *Id.* (citing *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1 (1973)).

Both Courts and the Board have been opposed to upholding interest arbitration provisions that are self-perpetuating; the fear being that “a party, having agreed to the [interest arbitration provision] may find itself locked into that procedure for as long as the bargaining relationship endures.” See *Sheet Metal Workers’ Intern. Ass’n, Local 14*, 717 F.2d at 458. However, because Section 21 of the Parties’ agreement is not self-perpetual, it should be found valid under the Act

B. Section 21 of the Parties’ Agreement Is Not Self-Perpetual, and Therefore is Valid Under the Act.

Section 21 of the parties preceding Collective Bargaining Agreement, the provision that AFSCME seeks to enforce, does not raise the same concerns as indefinitely self-perpetuating interest arbitration clauses that are invalid under current Board precedent. Because these factual

scenarios are different from those present in previous Board decisions, the Board should uphold the agreed to, bargained for language of the Parties.

Under the terms of the Parties' agreement, "in the event the parties are unable to reach agreement as to the terms of a succeeding Labor Agreement, *any* unsettled issue shall, upon the request of either party, be submitted to the determination of a board of arbitrators." *See Joint Motion and Stipulation of Facts* Ex. G at p. 21 (emphasis added). The Agreement expressly delineates the arbitrators' authority to include an interest arbitration in the successor contract. An interest arbitration provision, while required to be included by the arbitration panel pursuant to Section 21.3 in the immediately succeeding collective bargaining agreement, does not automatically continue into perpetuity. Pursuant to Section 21.3, "The arbitration panel in rendering its decision . . . may impose an expiration date on the provisions of this Article XXI for any Labor Agreement expiring during or after the calendar year 2005." *Id.* at p. 21–22. The Parties agreed that should they fail to agree on the inclusion of an interest arbitration provision that they present that issue for resolution by an interest arbitrator. However, under the language of the agreement the arbitrator may place an expiration date on the new interest arbitration provision. There is no limit on the proximity of the expiration date. Plausibly, under the agreement, the arbitrator could impose an expiration date immediately following the effective date of the successor collective bargaining agreement.

Although that it has been noted that "parties may justly fear that the tendency of arbitrations would be to continue including [an interest arbitration clause]," *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161, 1169 (5th Cir. 1976), this presumption and fear is not justified in the instant case, especially in a manner sufficient to overcome the presumption of validity granted to bargained-for and agreed-upon language. The

language in Section 21.3 specifically delineating the ability to impose an expiration date on the interest arbitration provision in successor agreements shows that the Parties do not intend to have the arbitrator simply “stamp” the agreement and impose an unlimited interest arbitration clause in each successor agreement in perpetuity. In other words, here, there is virtually no risk of a perpetual interest arbitration provision. The arbitrators, through the express language of the Parties’ agreement, will be able to discern that the parties did not intend for this language to continue into perpetuity. This is further evident through the language found in Section 21.2 where the Parties expressly cede to the arbitrators’ the authority to “supply agreement and language of agreement in the new contract.” *See Joint Motion and Stipulation of Facts Ex. G* at p. 21.

The Employer’s and General Counsel’s assumed position that an arbitrator would *per se* ignore the language of the parties and impose a subsequent interest arbitration provision without consideration of the parties respective positions is out of accord with the strong public policy in favor of resolving differences through alternative dispute resolution processes. If the Board trusts the ability of arbitrators to fairly render decisions based upon parties’ respective positions on other issues, there is no strong reason to treat non-self-perpetuating interest arbitration provisions in a different manner.

It has been noted as well that “parties may find it mutually advantageous to delegate to a third party the task of determining the terms of a new contract. Promotion of such procedures for the peaceful settlement of disputes is unquestionably an important purpose of the Act.” *NLRB v. Columbus Printing Pressman & Assistants’ Union No. 252*, 543 F.2d 1161, 1170 (5th Cir. 1976) (citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964)). This is precisely what happened in the instant dispute. The Parties agreed to resolve any disputes that arose while

bargaining successor contracts through interest arbitration. Now, however, after receiving the benefits of the preceding collective bargaining agreement, the Employer wishes to go back on its agreement. Unlike the language involved in other cases where the Board has challenged the enforceability for interest arbitration provisions, Section 21 in the instant dispute does not run the risk of affronting the Act because it is not automatically self-perpetuating. Therefore, the Board should hold that it, and provisions like it, are valid.

C. AFSCME's Instance on Upholding the Parties' Agreement Does Not Constitute an Unfair Labor Practice

AFSCME simply seeks to invoke the agreement of the Parties, and therefore asks that the Board hold that absent some evidence contrary, interest arbitration provisions that are not automatically self-perpetual are valid under the Act. AFSCME's instance on enforcing a valid contract provision does not constitute an unfair labor practice under Section 8(b)(3).

**CONCLUSION**

AFSCME did not violate Section 8(b)(3) of the Act by seeking to enforce a contract provision that is binding on the Parties and valid under the Act.

Dated: February 26, 2016

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