VERMONT LABOR RELATIONS BOARD

MONTPELIER EDUCATION ASSOCIATION	)	
v.	)	DOCKET NO. 94-78
MONTPELIER SUPERVISORY DISTRICT BOARD OF SCHOOL COMMISSIONERS	)	

MEMORANDUM AND ORDER

At issue is whether the Labor Relations Board should grant the Motion For Summary Judgment filed by the Montpelier Supervisory District Board of School Commissioners ("Employer").

On December 16, 1994, the Montpelier Education Association ("Association") filed an unfair labor practice charge against the Employer. Therein, the Association alleged that the Employer, by refusing to submit resolution of a selected grievance filed on behalf of teacher William Rich to binding arbitration as provided by the collective bargaining agreement in effect between the parties, violated its duty to bargain in good faith with the Association under 21 V.S.A. Section 1726(a)(5).

The Association requested as a remedy that the Labor Relations Board order the Employer to restore William Rich to the employment status he had prior to the decision leading to his grievance, and order the Employer to negotiate in good faith with the Association regarding arbitration.

The Employer filed a response to the unfair labor practice charge on January 5, 1995. The Labor Relations Board issued an unfair labor practice complaint on May

5, 1995, and scheduled a hearing in this matter for June 15, 1995. On May 18, 1995, the Employer filed an answer to the unfair labor practice complaint.

On May 24, 1995, the Employer filed a Motion for Summary Judgment, with supporting memorandum of law, and a motion to continue the June 15 hearing. The Employer based its motion for summary judgment on the following grounds: 1) the Vermont Labor Relations Board lacks subject matter jurisdiction over the question of arbitrability raised in the unfair labor practice charge filed by the Association; and 2) the Association is barred by the doctrines of *res judicata* and collateral estoppel from relitigating the question of whether the Employer was obligated to arbitrate the dispute at issue.

The Labor Relations Board granted the Employer's motion for a continuance of the June 15 hearing. On June 29, 1995, the Association filed a motion in opposition to the Employer's Motion For Summary Judgment, and a supporting memorandum. The Association contended that the issues raised by the Association in the unfair labor practice charge were appropriately before the Labor Relations Board, and the doctrines of *res judicata* and collateral estoppel did not bar the adjudication by the Labor Relations Board of issues raised in the charge. The Employer filed a reply memorandum on August 3, 1995.

Summary judgment may be granted only if there exists "no genuine issue as to any material fact and . . . any party is entitled to judgment as a matter of law". V.R.C.P. 56 (c) (3). The moving party has the burden of the proving that there is no genuine issue as to any material fact, and the non-moving party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine

issue of material fact exists. Hodgdon v. Mount Mansfield Co., 160 Vt. 150, 158-59 (1992). Price v. Leland, 149 Vt. 518, 521 (1988). Grievances of Choudhary, 15 VLRB 118,179-180 (1992).

Once the moving party meets its initial burden of showing an absence of uncontroverted material fact, the burden shifts to the non-moving party which must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for hearing, and demonstrate sufficient evidence to support a *prima facie* case. V.R.C.P. 56 (c). State of Vermont v. G.S. Blodgett Co., ___ Vt. ___ (1995) (slip op. at p.5). Kelly v. Town of Barnard, 155 Vt. 296, 299-300 (1990). Choudhary, 15 VLRB at 180. If the nonmoving party fails to establish an essential element of their case on which they have the burden of proof at hearing, the moving party is entitled to summary judgment as a matter of law. Blodgett, slip op. at p.5. Choudhary, 15 VLRB at 180.

Material Facts

In this section, we set forth the material facts necessary to decide the Motion For Summary Judgment. These material facts are gleaned from the unfair labor practice charge and attachments, the Employer's answer to the unfair labor practice complaint, the Employer's Motion For Summary Judgment and attachments, and the Association's motion in opposition to the Employer's Motion For Summary Judgment. The following facts which we conclude are material to deciding the Motion For Summary Judgment are uncontroverted.

The Association has been the exclusive bargaining representative of the teachers of the Employer since 1969. The Association and the Employer have entered into many successive collective bargaining agreements since that time. The existing collective bargaining agreement between the parties covers the period 1993-1995. The agreement provides for a grievance procedure culminating in binding arbitration.

In Spring, 1994, the Association filed a grievance on behalf of one of its members, William Rich, due to the Employer's decision not to renew Mr. Rich's teaching contract. The Association and Mr. Rich took the position that the question of Mr. Rich's nonrenewal could be grieved and arbitrated pursuant to the collective bargaining agreement. The Employer took the position that the question of Mr. Rich's nonrenewal was not arbitrable or otherwise grievable under the collective bargaining agreement.

The Association and Mr. Rich filed a civil action in Washington Superior Court against the Employer, which suit included a Motion to Compel Arbitration. The Employer responded by seeking a stay of arbitration pursuant to 12 V.S.A. Section 5674. The two stated grounds for a stay of arbitration were: 1) the lack of proper acknowledgment of arbitration as required under 12 V.S.A. Section 5652 (b); and 2) the absence of grievance rights for probationary teachers such as Mr. Rich.

The Vermont Arbitration Act, 12 V.S.A. Section 5651-5681, has been in effect since July 1, 1985. Section 5652 of the Act has provided since the enactment of the Act as follows:

> (a) **General rule.** Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable and irrevocable, except upon such grounds as exist for the revocation of a contract.
> (b) **Required provision.** No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgment shall be displayed prominently. The acknowledgment shall provide substantially as follows:
>
> "ACKNOWLEDGMENT OF ARBITRATION.
>
> I understand that (this agreement/my agreement with of) contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator."

Section 5674 (b) of the Vermont Arbitration Act has provided since the enactment of the Act as follows:

> On application to compel or stay arbitration, and on a showing that there is no agreement to arbitrate, the (superior) court may stay a commenced or threatened arbitration proceeding. When in substantial and bonafide dispute, the issue of whether there is an agreement to arbitrate shall be forthwith and summarily tried. The court shall order the stay if it finds no enforceable agreement to arbitrate. Otherwise, the court shall order the parties to proceed to arbitration.

The "acknowledgment of arbitration" provision required by Section 5652 (b) of the Arbitration Act is not contained in the collective bargaining agreement between the parties, and has not been contained in collective bargaining agreements between the parties since the Act went into effect in 1985. Since 1985, the Employer has agreed to arbitrate other grievances filed by the Association under the collective

bargaining agreement even though the "acknowledgment of arbitration" clause was absent from the agreement.

On August 15, 1994, Judge Alan Cheever of the Washington Superior Court denied the Association's Motion to Compel Arbitration. Judge Cheever concluded that the Association and Mr. Rich had failed to demonstrate that probationary teachers such as Mr. Rich had the right to arbitrate or otherwise grieve a non-renewal decision. The Association and Mr. Rich subsequently moved for reconsideration of the decision, and Judge Cheever denied the motion on October 14, 1994.

Discussion

The Employer, in support of its Motion For Summary Judgment, first contends that the Labor Relations Board lacks subject matter jurisdiction over the issues raised in the Association's unfair labor practice charge. In its unfair labor practice charge, the Association alleges that the Employer demonstrated a refusal to bargain in good faith in applying for a stay of arbitration of a specific grievance. This is because, the Association alleged, the Employer relied upon the statutory requirement, set forth in 12 V.S.A. Section 5652 (b), of the need to include a specific acknowledgment of arbitration clause in a collective bargaining agreement before an arbitration agreement will be found enforceable. The Employer contends that this allegation by the Association, when fairly considered, is simply a question of arbitrability which is outside the scope of the Board's statutorily-defined jurisdiction. The Employer contends that the authority to determine whether arbitration is mandated or should be stayed is expressly and exclusively vested in the superior

court, and the Association is inappropriately engaging in forum shopping by essentially repackaging the motion to compel arbitration, which it unsuccessfully pursued in court, as an unfair labor practice charge.

The Association responds that it is not requesting the Board to rule on the issue of arbitrability. Instead, the Association contends that it is requesting that the Board find that the Employer committed an unfair labor practice when it agreed to binding grievance arbitration in the collective bargaining agreement and then selectively chose to refuse to arbitrate.

We agree with the Employer that we lack jurisdiction in this matter. The Board has recognized that our jurisdiction over unfair labor practices does not extend to determining the arbitrability of grievances; that the question of arbitrability of a specific claim under a valid general agreement to arbitrate is a question for arbitrators and, ultimately, the courts. Union District 32 High School Association, AFT Local 3333, and Danziger v. Union District 32 Board of School Directors, 4 VLRB 254, 255 (1981). The Vermont Arbitration Act, effective since 1985, expressly provides that a party to an arbitration clause has a right to seek a superior court order compelling or staying arbitration. 12 V.S.A. Section 5671, 5674. We have previously held that a union has not selected the proper forum to resolve a dispute when it files an unfair labor practice charge, alleging refusal to bargain in good faith, because the employer refuses to proceed to arbitration under the collective bargaining agreement. AFSCME Local 1201, Council 93, AFL-CIO v. Town of Middlebury, 16 VLRB 396 (1993).

We do not find persuasive the Association's reasoning in this case that we are not being asked to rule on the issue of arbitrability, but instead on the Employer's alleged bad faith actions of selectively choosing to refuse to arbitrate. We cannot find that the Employer's lawful reliance upon an affirmative statutory requirement in place since 1985 constitutes a refusal to bargain in good faith.

Section 5652 (b) of the Vermont Arbitration Act has provided since 1985 that parties needed to include a specific acknowledgment of arbitration clause in agreements to arbitrate, and that failure to do so would mean that an agreement to arbitrate was not enforceable. The Employer relied on this statutory provision, and the absence of such an acknowledgment of arbitration clause from the collective bargaining agreement between the Association and the Employer, as one ground to stay arbitration of a dispute between the parties. The Employer had a lawful right to assert such a claim, and we cannot see how lawful assertion of this right constitutes refusal to bargain in good faith. The fact that the Employer selectively may be choosing to refuse to arbitrate particular claims does not diminish its ability to rely upon the clear statutory requirement regarding acknowledgment of an agreement to arbitrate.

The Association essentially is seeking to do an end-run around the enforceability of agreement to arbitrate provisions of the Vermont Arbitration Act by alleging a refusal to bargain in good faith. If the Association wished to ensure that an agreement to arbitrate was enforceable, it needed to negotiate the inclusion of the required acknowledgment of arbitration clause in the collective bargaining agreement. The failure to do so does not result in our unfair labor practice jurisdiction

being an appropriate avenue for the Association to pursue the claims asserted in this matter.

Our determination to grant the Employer's Motion to Dismiss based on the above reasons means it is unnecessary for us to consider the Employer's additional argument that the Association's claims are barred by the doctrines of *res judicata* and collateral estoppel.

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Montpelier Supervisory District Board of School Commissioner's Motion to Dismiss is GRANTED, and the unfair labor practice charged fil ed by the Montpelier Education Association in this matter is DISMISSED.

Dated this 12th day of September, 1995, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Louis A. Toepfer
Louis A. Toepfer, Acting Chairman

/s/ Catherine L. Frank
Catherine L. Frank

/s/ Leslie G. Seaver
Leslie G. Seaver