Matter of Heritage Mech. Servs., Inc. v International Assn. of Sheet Metal, Air, Rail & Transp. Workers' Local Union No. 28, AFL-CIO

2024 NY Slip Op 34892(U)

September 24, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 609253/2024

Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 609253/2024
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION SUBMIT DATE: 05/14/24
MOT. SEQ. #1 - MG;CASEDISP

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In the Matter of the Application of
HERITAGE MECHANICAL SERVICES, INC.,

Petitioner,

- against -

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS' LOCAL UNION NO. 28, AFL-CIO,

Respondent.

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Upon the following papers e-filed (documents # 1 through # 13); it is

ORDERED that the application by petitioner Heritage Mechanical Services, Inc. ("Heritage") for an order permanently staying arbitration is **GRANTED,** and the petition is dismissed; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

On April 11, 2024 petitioner commenced this special proceeding pursuant to CPLR § 7503 (c) to permanently stay arbitration based upon respondent alleged improper referral to the Joint Adjustment Board ("JAB") with demand for arbitration for failing to comply with the

parties' collective bargaining agreement ("CBA"). It is alleged that on February 29, 2024 petitioner employer emailed respondent union notifying it that one of its union members, a shop steward, was being discharged. Respondent replied to such email on the same date. Then, on March 22, 2024 respondent sent a further email and letter to petitioner for referral to the JAB with demand for arbitration.

In order for this Court to determine whether or not to grant petitioner's application for a permanent stay of arbitration, the Court must analyze the notices provided by both petitioner and respondent, specifically, petitioner's February 29, 2024 email and respondent's February 29, 2024 reply, as well as respondent's March 22, 2024 referral to the JAB with demand for arbitration. These notices must be analyzed to evaluate their compliance or lack of compliance with relevant law and the parties' CBA.

In support of the instant application, petitioner employer submits its verified petition, a copy of respondent's CBA, a copy of the February 29, 2024 email notice from petitioner to respondent (e-filed document # 3), a copy of the February 29, 2024 email reply from respondent to petitioner (e-filed document # 12), and a copy of the March 22, 2024 email and letter by respondent to petitioner for referral to the JAB with demand for arbitration pursuant to CPLR § 7503(c) (e-filed document # 4).

In opposition, respondent union submits its amended answer which claims that petitioner did not provide discharge notice to respondent in compliance with the CBA and that pursuant to the CBA, the Court lacks subject matter jurisdiction to determine complaints, disputes, claims, differences, and grievances.

Here, there are two significant issues in this matter: 1) whether petitioner's February 29, 2024 email notice was sent to a proper person in compliance with relevant law and the CBA regarding the discharge of respondent's shop steward Brian Tierno, and 2) whether respondent's notice of disagreement regarding the discharge was timely and in compliance with relevant law and the CBA.

In a proceeding to stay arbitration, the court, and not an arbitrator determines whether there has been compliance with any condition precedent in a collective bargaining agreement to access the arbitration forum, including the condition precedent of a timely filing of a grievance and its completion (***Matter of the Town of Greenburgh***, 125 AD2d 315, 508 NYS2d 599 [2d Dept 1986]; *see also* ***Matter of the Arbitration between the County of Rockland (Primiano Constr. Co.)***, 51 NY2d 1, 431 NYS2d 478 [1980]).

Before resorting to arbitration, a union must proceed through the initial steps laid out in the collective bargaining agreement in an attempt to resolve the dispute (***In the Matter of Suffolk Regional Off Track Betting Corp. v Local 517S***, 270 AD2d 351, 704 NYS2d 136 [2d Dept 2000]).

Turning to the CBA, Article X, Section 3 of the CBA lays out the procedure for notice from the employer petitioner to respondent union and the respondent union's reply regarding a disagreement with the discharge of a shop steward, as follows:

> SECTION 3. ... Neither shall the Shop Steward be discharged or laid off for any reason prior to the Employer notifying the Business Agent seventy-two (72) hours prior to said proposed layoff or discharge. *If the Business Agent disagrees with the discharge, then the Union may, within forty-eight (48) hours, refer the matter to the Joint Adjustment Board,* and if not settled there, then the Union may continue its grievance according to the procedures set forth in Article [XVII] of this Agreement (emphasis added).

With respect to petitioner's notice of discharge of respondent's shop steward Brian Tierno, on February 29, 2024, petitioner sent to Ms. Millie Tirado, the alleged business agent for respondent, email notice of such discharge. It is undisputed that such email notice was sent seventy-two (72) hours prior to respondent's shop steward Brian Tierno's discharge. However, it is in dispute as to whether sending such notice to Ms. Millie Tirado, the alleged business agent for respondent, constitutes the required notice to respondent. Petitioner argues that it does, and respondent argues that it does not. The affirmation of petitioner's President and CEO Jeffrey Porrello (e-filed document #13) states that providing notice to Ms. Millie Tirado as the alleged business agent for respondent was the accepted custom and practice between petitioner and respondent, as such was done previously numerous times.

With respect to whether by accepted custom and practice Ms. Tirado is a business agent for respondent, ***Melfe v Roman Catholic Diocese of Albany***, 196 AD3d 811, 814, 151 NYS3d 233, 237 (3d Dept 2021) states, as follows:

> … precedent makes clear that, 'where the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence…' (***Halloran v. Virginia Chems.***, 41 N.Y.2d at 392, 393 N.Y.S.2d 341, 361 N.E.2d 91; see ***Martin v. Timmins***, 178 A.D.3d 107, 109–110, 110 N.Y.S.3d 707 [2019]). 'Custom and practice evidence draws its probative value from repetition and unvarying uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation' (citations omitted).

Here, the affirmation (e-filed document #13) of petitioner's President and CEO Jeffrey Porrello states that numerous times in the past notice was sent to Ms. Millie Tirado as the business agent for respondent. Such was the accepted custom and practice between petitioner and respondent and such practice was never previously contested. In its amended answer,

respondent only provides affirmative defenses and denials from its attorneys and fails to include evidentiary support for these affirmative defenses and denials from someone with knowledge of the facts. Such submissions by respondent's attorneys cannot serve to defeat the affirmation of Mr. Porrello regarding this issue. Thus, the Court finds that Ms. Millie Tirado is the business agent for respondent and the notice of discharge was sent to the proper person in compliance with relevant law and the CBA.

The Court further finds that petitioner's February 29, 2024 email notice to the business agent, Ms. Millie Tirado, was sent timely - seventy-two (72) hours prior to respondent's shop steward Brian Tierno's discharge, and, therefore, constitutes proper notice pursuant to Article X, Section 3 of the CBA.

With respect to whether respondent's notice of disagreement regarding such discharge was timely pursuant to the CBA, the CBA sets forth the notice required and the steps to be taken for any disagreement regarding discharge of a shop steward. Specifically, and as is relevant here, the CBA requires that within 48 hours' notice of discharge, the respondent union may refer any disagreement with such discharge to the JAB and demand arbitration.

Here, respondent's March 22, 2024 email and letter is an untimely notice of disagreement of respondent union's shop steward Brian Tierno's discharge, as it was not sent within the required 48 hours. The only timely response from respondent union was the February 29, 2024 email reply which did not constitute a disagreement with such discharge as it only stated, "Hope all is well with you. I have received your email, and it will be documented."

With respect to the condition precedent set forth in the parties' CBA to submit the matter to JAB and demand arbitration, petitioner has demonstrated that respondent failed to comply with such condition precedent.

Respondent also argues that Article XVII of the CBA is applicable. However, the Court finds that argument unavailing because respondent sets forth no facts supporting its position that warrants its applicability.

Considering all of the above, petitioner's application to permanently stay arbitration is granted, and the petition is dismissed.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the decision and **Order** of the Court.

LINDA KEVINS, JSC

Dated: 9.24.24

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION