Queensborough Public Library v. DC 37 & L. 1321, 15 OCB 12 (BCB 1975) [Decision No. B-12-75 (Scope)]

BOARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING
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In the Matter of

QUEENS BOROUGH PUBLIC LIBRARY

Petitioner, DECISION NO. B-12-75

- and - DOCKET NO. BCB-208-74

DISTRICT COUNCIL 37, AFSCME
AFL-CIO

- and -

LOCAL 1321, AFSCME, AFL-CIO,

Respondents.
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DECISION AND ORDER

On December 12, 1974, the City filed its petition herein pursuant to Sections 1173-5.0a (1), 1173-8.0, and 1173-4.3 of the NYCCBL and Section 7.3 of the Board's Rules. The petition requests this Board to determine that "supper allowance benefits" are not within the scope of bargaining, and that the Library by its unilateral withdrawal of such benefits did not violate its contract or its obligation to maintain the status quo during a "period of negotiations." The City further maintains that if "supper allowance benefits" are found to be within the scope of collective bargaining, the issue of whether the Library's contract obligated such benefits should be referred to arbitration and that its request for arbitration he granted.[1]

[1] The Board of Collective Bargaining (BCB) heard oral argument in all procedural and substantive issues Presented by this case on January 20, 1975.

BACKGROUND

On July 1, 1960, Procedure 3963 of the Queens Borough Public Library Manual of Procedure was instituted which provided for one-half hour of paid supper time for employees during work schedules ending at 9:00 P.M. (hereinafter referred to as a "supper allowance benefit"). Such benefits, in effect, reduced the work week by up to 2½ hours. Procedure 3963 was maintained until April 22, 1974.

The Procedure reads as follows:

"Full time employees scheduled to work a minimum of seven hours ending at 9:00 P.M. are allowed one-half hour of Library time for supper. If you are scheduled to work in the afternoon and evening, you may at the convenience of the Library work:"

40 hour schedule	35 hour schedule
(1) "From 12:30 till 9 and take one hour for supper, or	(1) "From 1:30 till 9 and take one hour for supper, for
(2) From 1 till 9 and take one half hour for supper."	(2) From 2 till 9 and take one-half hour for supper"
"Both these schedules are considered 8-hour work days"	"Both of these schedules are considered 7-hour work days."

On July 10, 1973, the Library and D.C. 37 and its affiliated Local 1321 entered into a collective bargaining agreement effective February 1, 1971 to August 31, 1973. The parties are presently negotiating for a successor contract. During the period of negotiations under Section 1173-7.0d of the NYCCBL and the decisions construing that section,[2] the terms and conditions of the

[2] Decisions Nos. B-1-72 and B-7-72.

Library contract are in full force and effect by operation of the status quo provision of the law. The relevant articles of the Library contract, in pertinent part, read:

> "Article XIV
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> "Personnel Rules and Regulations
>
> The Queens Borough Public Library Manual of Procedure shall be incorporated by reference into this Agreement.[3]
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> * * *
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> "Article III
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> Management Clause
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> 2. The Library, except as expressly limited by the written terms of this Agreement, is vested with and reserves to itself ... the right to establish and promulgate rules and regulations; and from time to time add to, change or modify such rules and regulations ...
>
> "Article XII
>
> Overtime and Shift Differential
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> The Library will pay employees for overtime and will make payment for a shift differential. Payments for overtime and shift differential will be made only for such groups and classes of employees as the City of New York has deemed are eligible for overtime and shift differential, and only as such terms and conditions as the City of New York has specified."

On May 6, 1974, the City and D.C. 37 entered into a City-Wide Contract effective July 1, 1973 to June 30, 1976. The contract specifically covers the Library's employees involved here in and provides for the length of the employees work week and for

[3] The City admits that the Manual of Procedure Includes "supper allowance benefits."

a shift differential. The relevant articles, in the City-Wide Contract, in pertinent part, read:

> "Article II - Work Week
>
> The normal work week for employees in each of the titles covered by this Contract shall be as listed in the attached Appendix A [Appendix A includes Library employees]. If a title covered by this Contract is inadvertently omitted from the attached list, the number of hours in the normal work week for employees in such title shall be determined by the parties in accordance with the number of hours being worked by a majority of employees in the affected title and added to the Contract Appendix A."
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> * * *
>
> "Article III - Shift Differential and Holiday Premium
>
> There shall be a shift differential of 10% for all employees covered by this Contract for all scheduled hours of work between 6:00 P.m. and 8:00 A.M. with more than one hour of work between 6:00 P.M. and 8:00 A.M."

Thus, it may not be said with positive assurance that there is no arbitrable dispute between the parties.[4] For it may be argued that the Library contract obligates the granting of "supper allowance benefits," allows the Library to unilaterally rescind its "supper allowance benefits", and prohibits a duplication of benefits by the City-Wide Contract and the Library Contract.

[4] The Supreme Court in Steelworkers, v. Warrior Navigation Co., §63 U.S. 574, 46 LRRM 2416, P. 2419-2420, (1960) stated: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

As previously noted, on April 22, 1974, during the status quo period of the Library contract the Library unilaterally rescinded the "supper allowance benefit" as provided in Procedure 3963. The Library did so because it argued that there was a duplication of benefits resulting from the Library contract and City-Wide Contract; that is, that employees received both a "supper allowance benefit" and a differential of 10%.[5]

On July 19, 1974, D.C. 37 and its affiliated Local 1321 filed with the PERB an improper practice charge (PERB U-1234) alleging a violation of Section 209(a), Subsection 1(d), Article 14 of the Civil Service Law. Their charge alleges, inter alia, that:

> "Supper [allowance benefits] constitute a mandatory subject of collective negotiations and the unilateral rescinding of [such] an allowance] constitutes a deliberate refusal [by the Library] to negotiate in good faith with respect to said item and a breach of the obligation to maintain status quo during collective negotiations for a successor contract as is required both under Section 1173-7.0 of the(NYCCBL)and under Section 209-a subsection 1(d) ....

Hearings have been held before the PERB in the above matter and a decision is pending.

POSITIONS OF THE PARTIES

The City maintains that the jurisdiction to determine scope of bargaining and status quo issues rests exclusively with

[5] While the City-Wide Contract was executed subsequent to the decision of "supper allowance benefits" the contract, because of its retroactive effect, governs the rights of the parties at the time of the decision. Moreover, the terms of the City-Wide Contract were known to the parties at the time of the decision.

the Board of Collective Bargaining under Section 1173-5.0 and CSL Section 212.

The City, moreover, maintains that "supper allowance benefits" are proper subjects for bargaining only on either a title-wide or City-wide basis and that the claim involved herein and the contract on which it is based are on a departmental level.[6]

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[6] The various levels referred to are created by and defined in Sec. 1173-4.3 of the NYCCBL, which reads, in pertinent part, as follows: "

> a. Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wages rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:
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> * * *
>
> "(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the Board of Certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation of a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining

(continued)

[6] (continued from page 8.)

The City also asserts that Article III, the management rights clause, of the Library contract allows the Library unilaterally to rescind its "supper allowance benefits." At the oral argument, the City indicated that it requests arbitration of its grievance concerning its contractual rights regardless of this Board's determination as to the scope of bargaining. The grievance reads:

> "Did the [Library) violate Article XIV of the [Library contract] when it changed its supper allowance policy"

Respondents D.C. 37 and its affiliated Local 1321 deny that a scope of bargaining disagreement exists for this Board to resolve, inasmuch as no question has arisen in the course of collective bargaining concerning the purported issue of whether "supper allowance benefits" are within the scope of collective bargaining. However, the City argues that such a disagreement exists by reason of the Unions' improper practice charge. D.C. 37 and its affiliated Local 1321 further maintain that the allegation that such

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unit are involved;
"(3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department."

disagreement exists is sham and frivolous, and raised with the sole purpose of interfering with and delaying the processes of the PERB in its consideration of U-1234. Therefore, they assert that the petition should be dismissed.

Respondents maintain that "supper allowance benefits" are within the scope of bargaining as between themselves and the Library. They also assert that Article XIV of the Library contract entitles unit employees to "supper allowances benefits" and that the unilateral withdrawal of such benefits violated the Library's obligation to maintain the status quo as required by both §1173-7.0d of the NYCCBL and §209-a 1(d) of the Civil Service Law.

Furthermore, D.C. 37 and its affiliated Local 1321 argue that the City improperly brought its request for arbitration to the OCB, but they do not challenge the arbitrability of the grievance.

DISCUSSION

Jurisdiction

The Board may rule on a scope of bargaining question even though no dispute has arisen in the course of collective bargaining. The pendency of an improper practice proceeding before the PERB alleging a refusal to bargain on a particular subject is no bar to consideration by this Board of the bargainability of the same subject.

The Board's recent decision B-5-75 is singularly apposite. In that case the City sought a scope of bargaining determination and

the union asserted that since no question as to the scope of, bargaining had arisen in the course of collective bargaining, there was no disagreement for the Board to resolve. The Board held that it had the jurisdiction to make a scope of bargaining determination upon the request of a public employer. The Board said:

> "Subparagraph (2) of 1173-5.0a, the provision at issue in the instant case empowers the Board 'to make a final determination as to whether a matter is within the scope of collective bargaining' upon 'the request of a public employer.' Unlike the language in subparagraphs (1), (3) and (8), which require that there be, respectively, a request by 'a party to a disagreement', a request by a 'party to a grievance', or a rejection by a 'party to collective bargaining negotiations, 'subparagraph (2) calls for Board action simply upon 'the request' of a public employer or public employee organization. It is manifest that §1173-5.0a (2) of the NYCCBL does not require a formal bargaining demand and a formal refusal to bargain nor does it require that one party have resorted to claimed unlawful unilateral action as a prerequisite to the Board's jurisdiction to make a final determination. Nowhere in the cited section does any requirement appear that a 'case or controversy' exist in the form which the PBA alleges is necessary to confer jurisdiction on the Board in the instant case."

The Board in that case also held that its determination of a scope of bargaining question would not interfere with the PERB's jurisdiction to find and remedy improper practices. The

Board added that:

> "Section 1173-5.0a empowers the Board 'on the request for a public employer ... to make final determination as to whether a matter is within the scope of bargaining. We have such a request before us in the instant matter. Although the failure of the State Legislature to continue OCB jurisdiction over improper practices has rendered impossible a proceeding under subparagraph (4) of §1173-5.0a, it has not affected our jurisdiction pursuant to subparagraph (2) which provides a separate and distinct type of proceeding. Similarly, §2C5.5 (d) of the Taylor Law establishes procedures to deal with improper practices as defined in §209-a including a refusal 'to negotiate in good faith.' We do not read this language as depriving this Board of jurisdiction in this case inasmuch as we have a request from one of the parties for a determination as to scope of bargaining. There is nothing in the state statute to indicate the OCB does not retain all of the powers conferred upon it by law except the power to deal with improper practices."

Scope of Bargaining -Level of Bargaining

A "supper allowance benefit" as contemplated by the Library contract may be considered as either a shift differential or a provision relating to hours. The BNA in its "Collective Bargaining Negotiations and Contracts" (p. 93:3 and P. 93:471) states that while most shift differentials are cents-per hour bonuses, in some agreements shift differentials are a full eight hours pay for a shift shorter than eight hours. However, since "supper allowance benefits," in effect, shorten the work week by up to 2½ hours, such benefits
may also be categorized as a matter relating to hours.

We find whether deemed as a form of shift differential or as a matter relating to hours, "supper allowance benefits" constitute a mandatory subject of bargaining. In this connection, we note that in addition to the incorporation by reference, in Article XIV of the Library contract, of the "supper allowance benefits" of the Library Manual of Procedure, Article XII of the Library contract deals specifically with the subject of shift differentials.

Under the NYCCBL, unlike the Taylor Law, various levels of bargaining are provided for. Thus, still at issue here is the proper level of bargaining of "supper allowance benefits" under §1173-4.3 of the NYCCBL. A sound labor relations policy for New York City requires uniformity in decisions both as to scope of bargaining and appropriate level of bargaining. Such uniformity can be maintained and assured only by confining the resolution of such issues to the agency charged with administration of the statute. Decisions interpreting the NYCCBL as to appropriate levels of bargaining are for the Board of Collective Bargaining.

The Board in Decisions Nos. B-11-68 and B-4-69 has held that shift differentials and generally the subject of hours, are matters which must be uniform for all employees subject to the career and salary plan and shall be negotiated only with the City-wide representative.[7]

[7] While a City-wide matter of bargaining may be bargained. for by a department or title representative "where considerations special and unique to the particular department, class of employees, or collective bargaining unit are involved" (§1173-4.3(2)) no such issue has been raised by the parties in this matter.

We, therefore, find that the "supper allowance benefit" whether as a form of shift differential or a matter of hours, is therefore a mandatory subject of bargaining and that the appropriate level of bargaining for this matter, generally, is the City-wide level. We note in this connection that the current City-Wide Contract makes specific provision for shift differentials of all types and the length of the work week in the Queens Borough Public Library as well as in other agencies.

However, the right here in question has existed as part of the "Manual of Procedure" since 1960. D.C. 37 and its affiliated Local 1321, on the basis of pre-act recognition by the Library bargained with the Library and included the said right by reference in its contracts. The most recent Library contract also included agreement, in Article XII, on shift differentials. That contract was executed on July 10, 1973, prior to the execution of the current City-Wide Contract which for the first time included specific coverage of the shift differentials and length of the work week in the Queens Borough Public Library. We find, therefore, that in the special circumstances of this case the contract between the Library and D.C. 37 and its affiliated Local 1321, including its arbitration provisions, was in full force and effect by operation of law for the period in question and was binding upon the parties.

The pendency of the improper practice proceeding before the PERB constitutes an additional problem. In prior cases, where allegations of status quo violations and allegations of contractual violations dealt with the same matter, the

Board decided such issues on the basis of deferral to arbitration. Now, however, the Board may not decide improper practice allegations.[8] We find, nevertheless, that this Board is not deprived of jurisdiction over a request for arbitration of a contractual question when a dispute arising out of the same facts is pending before the PERB in the form of an alleged improper practice. The function of the Board of Collective Bargaining is analogous to that of the federal courts in making arbitrability determinations. The federal courts have consistently ruled in private sector disputes that they maintain jurisdiction over actions involving the arbitration of contractual issues when the same issues are before the NLRB in the form of alleged unfair labor practices.

In United Aircraft, 436, F 2d 1, 76 LRRM 2111, Ct. of Appeals, 2nd Cir., 1970, the union filed an unfair labor practice charge concerning an employee's suspension and the employer then filed a grievance concerning the same suspension. The Court ordered arbitration, holding that the NLRB and the Courts have concurrent jurisdiction, the Courts to enforce the contract and the NLRB to decide whether the NLRB has been violated.

In Steelworkers v. American Aluminum Corp., 334 F 2d 147, 56 LRRM 2682, Ct. of Appeals, 5th Cir. 1964, the union sought arbitration of employee discharges while its unfair labor practice charge

[8] The state-wide improper practice jurisdiction has been exercised by PERB since March 1, 1973.

involving the same matter was pending at the NLRB. The employer argued that the jurisdiction of the subject matter of the controversy was with the NLRB. The Court held that the arbitration must go forward because separate rights were involved in the two actions and, moreover, that there was little danger of a conflict between an arbitral award and an NLRB decision. However, the court indicated that in the event of a conflict, the NLRB's authority would supersede that of the arbitrator.

Finally, in Carey v. Westinghouse, 375 U.S. 261, 55 LRRM 2042, Sup. Ct., 1964, where the union sought arbitration of its grievance that employees of another union were performing the work of its unit, the Court held that although the facts alleged by the union would constitute the basis for both representation and work assignment proceedings before the NLRB in addition to the contract dispute raised by the unions, the availability of unfair labor practice remedies were not a bar to arbitration of an alleged breach of contract.

Consistent with the holding of the federal courts where unfair labor practices are presented to the NLRB concurrently with the pendency of a request for arbitration, we shall direct arbitration of the City's grievance herein.

However, we must limit the scope of the arbitrator's inquiry under our findings herein so as to prohibit him from dealing with issues as to the alleged violation of status quo, since that is the issue now pending before the PERB.

We believe that the disposition set forth is a reasonable resolution of the latest of a number of difficult jurisdictional issues presented by the bifurcation of Office of Collective Bargaining authority. We recognize the necessity of avoiding any disposition of issues properly before us which would prejudice or otherwise interfere with the resolution of issues properly before the PERB under the present state of the law. We believe that the instant decision accomplishes this end.

Since the Library contract continues through the period here in question and the current City-Wide Contract by its terms is also binding upon the Library and its employees, it is apparent that provisions of the Library contract and of the City-Wide Contract as to shift differentials and length of the employees work week may overlap.

We believe that resolution of all of these questions, i.e., the extent of rights, if any, under either or both contracts, and the effects of any overlap in any such rights as well as any alleged right to rescind are questions appropriately for resolution by an arbitrator. We will, accordingly, refer these issues to an arbitrator for decision, limiting the scope of his inquiry so as to prohibit consideration of any alleged violations of the status quo under the Taylor Law or NYCCBL.

ORDER AND DETERMINATION

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the matter of "supper allowance benefits" is a mandatory subject of bargaining, and that the appropriate level of bargaining for "supper allowance benefits" is at the City-wide level; and it is further

DETERMINED, that a provision dealing with "supper allowance benefits" was included in the Library contract for the period February 1, 1971 to August 31, 1973; and it is further

DETERMINED, that by operation of the NYCCBL the terms and conditions of the said Library contract continue in full force and effect during the current period of negotiations; and it is further

DETERMINED, that the terms and conditions of the current City-Wide Contract are applicable to the employees in the Queens Borough Public Library; and it is

ORDERED, that the rights and duties of the parties, if any, under the Library contract and the current City-Wide Contract, as well as any conflict which may exist with regard to any such several rights and duties, shall be submitted to an arbitrator for resolution; and it is further

ORDERED, that any issue as to alleged violation of the status quo under the Taylor Law or under §1173-7.0d of the NYCCBL shall not be submitted to, considered by, or disposed of by the arbitrator.
DATED: New York, New York May 7, 1975

Arvid Anderson
CHAIRMAN

Walter Eisenberg
M E M B E R

Eric Schmertz
M E M B E R

Thomas Roche
M E M B E R

Vincent McDonnell
M E M B E R

Joseph Solar
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Edward Gray
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