Patrolmen's Benevolent Ass'n, 21 OCB 9 (BCB 1978) [Decision No. B-9-78 (Arb)], aff'd, Patrolmen's Benevolent Ass'n v. Anderson, N.Y.L.J., Feb. 22, 1979, at 6 (Sup. Ct. N.Y. Co. Aug. 7, 1979).

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

CITY OF NEW YORK,
Petitioner

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,
Respondent

DECISION NO. B-9-78

DOCKET NO. BCB-294-78
(A-685-78)

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DECISION AND ORDER

Request for Arbitration

The PBA request for arbitration in this case states that the grievance to be arbitrated is as follows:

> The Union challenges the Police Department's practice of the Court Alert System. This practice is a subterfuge by the Department to violate Article III, Section 1(b) Hours and Overtime, of the contract and causes undue hardship on our members.

The PBA seeks as a remedy, "overtime under rescheduling provision of the contract."

Applicable Contract Provisions

ARTICLE III - HOURS AND OVERTIME

Section 1.

a. All ordered and/or authorized overtime ... shall be compensated....

b. In order to preserve the intent and spirit of this section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory

> re-assignment of personnel to different days off and/or tours of duty. In interpreting this section, T.O.P. 336, promulgated on October 13, 1969, shall be applicable. Notwithstanding anything to the contrary contained herein, the Department shall not have the right to reschedule employees' tours of duty, except that on the following occasions the Department may reschedule

employees' tours of duty by not more than two hours before or after normal starting for such tours, without payment of pre-tour or post-tour overtime provided that the Department gives at least seven days' advance notice to the employee whose tours are to be so rescheduled: New Year's Eve, St. Patrick's Day, and Thanksgiving Day.

Background

In July, 1970 the Vera Institute of Justice initiated a federally funded pilot program in Manhattan called the Court Appearance Control Project. Its aim was to reduce the number of times prosecution witnesses in criminal cases, both police and civilian, were summoned to appear in court and were then unnecessarily inconvenienced when the case was delayed or rescheduled.

As part of the Court Appearance Control Project, the Court Alert System was introduced in Manhattan. Court Alert is a standby phone system used for certain witnesses who can be reached easily and who are important to the case. Such witnesses are contacted on the day it appears they will actually be needed in court, thus avoiding needless trips to court.

The Court Alert System was expanded to include Brooklyn in February, 1971, and again expanded in June, 1973, to include

the Bronx. After the program was in effect for three years, the Police Department established the Appearance Control Unit (ACU), in July, 1973, to administer and continue to develop the Court Alert System. By March, 1975, the System was instituted in Queens. Staten Island is the only borough which has never had the Court Alert System.

A Police Officer on Court Alert, has his or her regular tour of duty rescheduled to Tour 2 (8:00 A.M. to"4:00 P.M.), on the day he or she is required to appear in court. The officer performs duties on patrol while awaiting a call to leave for the court house. The Police Department has no control over the scheduling of witnesses as the courts and the Assistant District Attorney (ADA) determine on a given day whether a trial will be held and a certain witness will be needed.

Positions of the Parties

In substance, the PBA claims that while the Court Alert System has been in existence since 1970 without being challenged, the system has been expanded over the years and circumstances have changed and problems developed. The PBA asserts that when the Court Alert System was first begun, it was seen by PBA as an "operational tool" administered with the proper consideration for the individual officer's duty chart in matters of rescheduling. PBA members were put on Court Alert only when actually needed, and officers were not unreasonably inconvenienced.

PBA alleges that the system has changed, and officers are now put on Court Alert without any consideration of schedules. In many instances the officer may not even be called to go to court after being put on Court Alert so that rescheduling turns out to have been unnecessary. Further, PBA asserts that officers who work Tour 1 (12 midnight to 8:00 A.M.) and who are rescheduled for Tour 2 (8:00 A.M. - 4:00 P.M.) have their swing times or off duty hours shortened so that they have only 8 hours between tours when they return to their regular tour of duty the next day. It is claimed that this system causes undue hardship to the officer, both in the physical strain involved and in the disruption of family life.

In a statement attached to its request for arbitration, PBA has provided allegations by 6 named police officers claiming that in February, 1977, their hours were rescheduled and they were consequently afforded 8 hours or less between tours. We note that the normal minimum time off between tours under present practice is approximately 16 hours.

The PBA maintains that, in practice, the Court Alert System is so administered that the court, which has the police officer's duty chart before it, avoids scheduling court appearances on regularly scheduled days off which would involve payment of overtime and instead schedules court appearances for duty days regardless of the impact upon the rescheduled officer's work schedule so as to avoid the payment of overtime. "They do not care that

the cop must go without sleep.." The PBA views this practice of rescheduling as a subterfuge by the city to avoid paying overtime.

The City's first contention is that the defense of laches should apply because the PBA waited too long to challenge the Court Alert System. The City states that it has expended a substantial sum of money developing and expanding the program, and has relied on the PBA's lack of objection to the system since its inception approximately six and a half years ago.

The City stresses that the PBA admits in its Answer that the Court Alert System is more than a "practice" or "operational tool." The City points out that the system had been institutionalized as a special unit of the Police Department beginning in 1973 with no PBA objection, and has been used in all the boroughs except Staten Island since 1975, again with no objection from the Union. The City also claims that in addition to the changes made in the Police Department, the courts and the ADAs have also made accommodations in their respective areas due to the Court Alert System and that it would be a great burden on the City to allow the PBA to raise objections now.

Secondly, the City contends that the issue raised by the PBA in its request for arbitration is res judicata. It is the City's position that a previous-arbitration decision "upheld the City's right to reschedule police officers for whom appearance dates have been set by the Court." The City alleges that the underlying issue in the instant case, rescheduling of

a police officer's normal tour of duty so that the officer may appear in court, is essentially the same as that in the previous arbitration. The City asserts that PBA has not alleged any factual differences in the two cases, and that the previous decision upholding the City's position must therefore be controlling. The City requests that the PBA's demand for arbitration be denied.

Discussion

The issues presented are whether the PBA request for arbitration is barred, as the City contends, by the defense of laches and/or by res judicata.

The City cites Tobacco Workers v. Lorillard Corp., 78 LRRM 2273, Prouty v. Drake, 182 NYS 2d 271, and BCB Decision No. B-6-75 for the proposition that where a party would not have changed its position but for its reliance on another's lack of opposition, it would be too heavy a burden to allow a claim against that party where there has been unreasonable delay in bringing the challenge.

In Tobacco Workers, the court pointed out that the principle of laches would bar a claim when there has been an unjustifiable delay in bringing a known claim and which the other party relied on to its detriment. However, the court also stated that whether there has been an unjustifiable delay or not is a factual question and that "... the arbitrator is in the best position to decide it." 78 LRRM at 2280.

The court in Prouty was concerned that unreasonable delay would result in a "greater risk of liability" to the party relying on another's lack of op position. In this connection, the City implies that the PBA's claim constitutes a threat for the entire Court Alert System. While it is true that the Police Department and various other City departments have spent money, time and effort in setting up the Court Alert System, it should be noted that the PBA has not demanded that the System be dismantled; PBA is requesting arbitration of a dispute which arises out of implementation of the System. Of course, an arbitrator would have no jurisdiction to order a change in court procedures.

In this case, PBA is claiming, in essence, that the continuing and expanding use of the Court Alert System has led to new problems of which PBA has only gradually become aware. It is not clear when PBA first became aware, or should have become aware, that the expansion of Court Alert was placing an allegedly onerous burden on police officers. The City has not shown at what time PBA should have become aware of its claim. Thus, a requirement of the defense of laches, that the claimant has unduly rested on a claim for an unreasonably lengthy period of time, is not present in the instant case. Therefore, the City has not met the burden of proving a laches defense.

Res judicata will bar the litigation of a claim which has already been decided, where there is an identity as to parties and as to the claim presented.

The New York Court of Appeals has held that in order for a prior judgment to act as a bar to relitigation, it is sufficient

> "that the cause of action in the former suit was the same, and that the damages or right claimed in the second suit were items or parts of the same single cause of action upon which the first action was founded." Perry v. Dickerson, 85 NY 375 (1881).

The effect of a prior judgment is conclusive "not only in respect to every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." Baltimore Steamship Co. v. Phillips, 274 US 316 (1927). However, if two causes of action involve "different 'rights' and 'wrongs'", the doctrine of res judicata does not apply. Maflo Holding Corp. v. Blume, 308 NY 570 (1955).

The City claims that Arbitrator's Opinion and Decision No. A-361-74, G. Allen Dash, Jr., Arbitrator, issued December 20, 1974, is controlling on the issue raised in this case and bars the PBA's request for arbitration. That decision involved a question whether the City had the contractual right to reschedule tours of duty so that an officer could appear in court, and whether such rescheduling invoked the overtime section of

the contract. The arbitrator held that under the contract the City was permitted to reschedule tours of duty to accommodate court appearance requirements, and that such rescheduling did not require the payment of overtime to the police officers involved merely because the regular tour was rescheduled. The decision generally discussed rescheduling for court appearances hy police officers but did not mention the Court Alert System. The award, rendered while the 1973-1974 contract was in effect, did not deal with allegations of unreasonably short swing times or time off between hours.

While the City alleges that the PBA has no t made any factual allegations to distinguish the case decided by Arbitrator Dash from the present case, we note that the PBA maintains that circumstances have changed since the inception of the Court Alert System, and that these changes in the system as it developed have led to new problems which must be resolved in arbitration. Thus, the kind of claims presented herein by the PBA could not have been presented to Arbitrator Dash. See Baltimore Steamship, supra.

It is clear to the Board that the Dash award makes no reference to the "Court Alert System," that it did not consider claims of burdensome changes with allegedly unduly short time off between tours, and that it did not consider allegations relating to the health of the officers. The instant claims arise under a different contract and following at least two sets of negotiations concerning duty charts and the length of time off between tours. Since the Dash award was issued, duty charts

have been amended at least twice. Therefore, the "damages or right claimed" in the instant case are not on their face the same as those raised before Arbitrator Dash. See Perry v. Dickerson, supra.

The City does not contest the existence of a contractual commitment to arbitrate disputes, nor does the City claim disputes relating to rescheduling are not arbitrable generally. On its face, the claim stated by the Union in its demand for arbitration is clearly a dispute relating to the application of the contract between the parties.

Of course, a Board finding that a matter is arbitrable does not imply a disposition on the merits or a determination as to the substance of the claim; nor should the decision in this case be read as diminishing the validity of the Dash award and the continuing effectiveness of the rule enunciated therein.

O R D E R

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

ORDERED, that the request for arbitration of the Patrolmen's Benevolent Association be, and the same hereby is, granted; and it is further

ORDERED, that the petition of the City of New York contesting arbitrability be, and the same hereby is, denied.

DATED: New York, N.Y.

July 5, 1978

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD J. CLEARY
MEMBER

I dissent * THOMAS J. HERLIHY
MEMBER

*Alternate City Member Herlihy's dissent follows on page 12.

DISSENT OF THOMAS J. HERLIHY

The majority, by relating the question of the impact of chart changes on the functioning of the Court Alert System, has inappropriately injected itself into the heart of the collective bargaining process in order to justify a referral of this matter to arbitration.

The issue of the City's right to reschedule has been clearly established. The assignment of duties on that rescheduled tour is clearly a prerogative of management which has been consistently exercised over the past eight years.

Here, the PBA has acquiesed in a procedure for an extended period of time, complaining only when the City's exercise of its management prerogatives makes the procedure less desirable If subsequent events make a procedure less desirable from a union s point of view, that unhappiness should be resolved at the bargaining table not arbitration.