

City v. DC37, 25 OCB 39 (BCB 1980) [Decision No. B-39-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-39-80

Petitioner,

DOCKET NO. BCB-431-80
(A-919-80)

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

DECISION AND ORDER

This proceeding concerns a petition filed by the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter the City), which challenges the jurisdiction of an arbitrator to hear and decide a contractual grievance pending before the arbitrator. In its petition, filed on June 2, 1980, the City asserts, inter alia, that an improper practice charge filed by the Union herein, District Council 37 (hereinafter D.C. 37), raises an issue which is identical to the issue that the Union is grieving before the arbitrator. The City requests that the Board, of Collective Bargaining (hereinafter the Board) order dismissal of the arbitration.

In papers filed on June 9, 1980, D.C. 37 denies that the issues presented in the arbitration and improper practice proceeding are identical and the Union requests that the Board dismiss the City's petition and order continuation of the two proceedings.

BACKGROUND

The principal underlying issue in this matter concerns a change in the work schedule, to a rotating day schedule, of civilian employees working in the title Police Administrative Aide in the Police Departments. The change in schedule was made on April 16, 1979.

On September 26, 1979, D.C. 37 filed an improper practice petition. Docket No. BCB-359-79) claiming that the Police Department has violated the New York City Collective Bargaining Law) section 1173-4.2(a) by engaging in "a pattern and practice of harassment of union members, union delegates, shop stewards, and leadership. Among the allegations made by the in support of its improper practice charge is the claim that the "harassment" includes "the punitive implementation on April 16, 1979 of a harsh and unnecessary rotating work schedule in retaliation for the exercise of protected union

On September 27, -13729, the Union filed a request for arbitration of a grievance Alleging that "Police Department institution and implementation of rotating day scheduling violates Citywide Agreement." The Union claims that the Police Department violates Article II of the City wide contract. No objection was made to the request for arbitration and an arbitrator was designated to hear the case.

Hearings were ordered on the improper practice charge and commenced on February 1, 1980. During the course of the fifth hearing (of six hearing sessions) on March 25, 1980, the Union questioned a City witness, a Police Sergeant assigned to supervise civilians in the Police Department, concerning the reasons for the implementation of the rotating day chart schedule for civilians in the Sergeant's unit. Objection to the question was made by the City on several grounds, including the claim that the subject matter of the question directly involves an issue pending in arbitration and the testimony would improperly prejudice the City's position in the arbitration. Decision on the objection and related arguments by the parties was reserved and the parties subsequently agreed that the issue should be presented directly to the Board for resolution.

At the end of the last hearing held in the improper practice case (on March 26, 1980), the parties informally agreed to hold both proceedings in abeyance while they discussed the issue of proceeding in two forums on questions involving the chart change. The parties also indicated that they would try to resolve their differences concerning the charts.

Thereafter, by letter received on May 9, 1980, D.C. 37 informed the Trial Examiner that the parties had agreed that although they were still discussing their differences over

the institution of the rotating chart, the dispute over litigation of the chart issue in two forums would be presented to the Board for resolution.

Accordingly, the City filed the instant petition and the Union filed an answer. Subsequently, the parties informed the Trial Examiner that discussions concerning the chart issue and other matters in dispute between the employees and the Police Department were continuing and processing of the instant matter was held in abeyance.

POSITIONS OF THE PARTIES

The City argues that the Union has violated the statutory waiver requirement¹ and the waiver attached to its request for arbitration by litigating in an improper practice proceeding the identical issue that the Union grieves in the request for arbitration. The City cites two BCB decisions to support its position that "once having litigated an issue in one forum, 'a party seeking arbitration of the same issue no longer has the capacity to make a waiver satisfactory to

¹ NYCCBL section 1173-8.0d which provides:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organizations shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other tribunal except for the purpose of enforcing the arbitrator's award.

the statutory requirement.'"² The City asserts that the waiver filed in the instant matter is invalid and concludes that the arbitrator is without jurisdiction to hear the duty chart issue.

The City adds that if the arbitration is allowed to continue, there is a chance of different results in separate proceedings involving the same issue. The City argues that the remedy sought by the Union in the request for arbitration, an order that the City cease and desist using the rotating duty chart, is also available as a remedy in the improper practice case if the Union's charge is sustained. The City asserts that for it to go through an unnecessary repetition of evidence in two forums "would not only violate the well established principle of election of remedies, but also prejudice the City's defense in the two separate proceedings."

In its petition, the City notes that it had previously argued in its answer to the improper practice charge that the Union's claims concerning the duty chart change in the improper practice charge should be deferred to arbitration because the same issue had been raised in the request for arbitration and the entire matter could be resolved in the arbitration. The City also claims that during the course of

² The City cites NYC Housing Authority v. New York City Housing PBA, Decision No. B-7-76, and City of New York and PBA, Decision No. B-8-79.

the parties' informal discussions the Union agreed in writing to withdraw the request for arbitration and litigate the entire matter in the improper practice proceeding, but the Union later changed its mind.

Thereafter, the City filed the instant petition and asks that the Board dismiss the arbitration request.

In its answer, the Union argues-that it has the right to proceed in two separate forums to remedy the separate claims that it has presented in each. DC. 37 maintains that the grievance alleges violation of a contractual agreement that whenever practicable the employees' work week shall be five days on and two days off. In the arbitration, D.C. 37 continues, the claim is that the rotating chart violates that provision. The improper practice petition, on the other hand, charges that the Police Department has engaged in a pattern and practice of anti-union harassment "motivated primarily by an intention to chill and deter legitimate union activity rather than by any business necessity." The Union alleges that the institution of the rotating chart is an incident of the pattern and practice of anti-union harassment. D.C. 37 concludes that it has presented separate and distinct issues in the two proceeding, requiring separate and distinct determinations. In this regard, the Union contends that it has waived on the record the remedy of rescission of the rotating chart in the proper practice case.

D.C. 37 also maintains that there has been no violation of the waiver agreement attached to the request for arbitration because the issue presented in arbitration, an alleged violation of the collective bargaining agreement, is different than the charges of a pattern and practice of anti-union harassment made in the improper practice petition. The Union claims that the City has not shown any evidence of prejudice to its position that would result from continuation of separate proceedings. The Union believes that no prejudice will result because there are no issues of discovery of secret matters in one forum planned for use in the other forum nor indications of jeopardy to City witnesses in testifying in two proceedings. D.C. 37 states that "the City will be helped by being better prepared in one forum having had a 'trial run' of its testimony regarding chart implementation in the other forum."

The Union concludes that while there may be some overlap in testimony and factual inquiry, the grievant should not be precluded from pursuing its separate claim "because petitioner's anti-union activities also happen to violate a collective bargaining agreement." D.C. 37 asserts that the Board's deferral policy has never been, and should not now be, invoked to deny the Union the right to proceed separately on distinct issues in the appropriate forums. The Union asks that the Board dismiss the City's petition and order that both the improper practice and arbitration

proceedings continue and that testimony as requested concerning the institution of the rotating chart be given in the improper practice hearings.

DISCUSSION

The City, in arguing that this entire matter should be heard and decided in the improper practice proceeding, maintains that the issues raised in the arbitration request and the improper practice charge are identical. This is not the case. The request for arbitration is addressed only to the institution of the rotating day chart and the Union claims that the change in schedule violates the collective bargaining agreement between the parties. The improper practice petition charges that the Police Department has committed several acts constituting a pattern and practice of harassment of Union members, Union delegates, shop stewards and Union leadership. D.C. 37 cites as examples of the "harassment" "surveillance and intimidation, attempts to deprive members of union rights. including transfer and attempted transfer of union leadership for the purposes of interfering with union organization and the punitive implementation on April 16, 1979 of a harsh and unnecessary rotating work schedule in retaliation for the exercise of protected union rights...." D.C. 37 claims that the alleged harassment .Violates NYCCBL section 1173-4.2a.

Thus, the issues in the two proceedings are not identical. The improper practice charge does not allege violation of the collective bargaining agreement. The Union does not allege in the request for arbitration harassment of its members and officials, surveillance and intimidation or deprivation of rights by transfer of personnel. The proceedings are based on different causes of action and allege different, if not entirely unrelated, factual circumstances.

Accordingly, the Union cannot be found to have violated the statutory waiver requirement on the statement of waiver attached to its request for arbitration by pursuing the two claims in separate proceedings. As discussed, the underlying dispute in each case is different. In Decision No. B-13-76,³ the Board held that the filing of an improper practice petitioner alleging violation of statutory rights does not constitute a waiver of the right to seek contractual relief through arbitration of a dispute arising out of the same circumstances which involves the same parties. The Board found that the underlying issue in the improper practice case and in the arbitration were distinct. The Board also relied on the fact that the improper practice charge raised statutory issues that are within the exclusive jurisdiction of PERB and the Board to resolve and that are

³ Queens Borough Public Library and Loral -1321 and D.C. 37, AFSCME, AFL-CIO.

outside the scope of an arbitrator's authority under the grievance-arbitration clause. The Board also noted that there were remedies available in one forum which differ from the relief available in the other. Clearly, decision of the instant matter is governed by the Board's decision in B-13-76 that the filing of an improper practice charge does not bar arbitration of a matter involving the same parties and similar factual circumstances but which raises separate and distinct issues.⁴

The City's claim, made in its answer to the improper practice petition, that the matter is appropriate for deferral to arbitration is also erroneous. The Board has discretion to defer its authority to decide and remedy improper practice claims to the arbitration process where the contract clearly provides for grievance arbitration, where the improper practice charge raises a claim of contract right, and where it appears that arbitration will

⁴ The Appellate Division, Second Department has held that the dismissal of an improper practice charge by PERB. does not foreclose a union's right to arbitrate a dispute arising out of the same set of factual circumstances. City School District of Peekskill v. Peekskill Faculty Association NYSUT, 59 A.D. 2d 739, 398 N.Y.S. 2d 693 (2nd Dept. 1977)

The Court stated:

The contractual right to arbitration and the statutory right to fair employment have legally independent origins and are equally available to the [union]. The violation of these rights by the same factual occurrence does not vitiate their separate nature.

resolve both the improper practice charge and the contract interpretation issue.⁵ However, where, as in the instant matter, the improper practice charge concerns only statutory rights and in no way involves interpretation of contract, the Board is without authority to defer its jurisdiction to an arbitrator and the arbitrator is without authority to hear and decide the claim of violation of statutory rights.

The Union's claim of contract violation, which it is seeking to remedy in arbitration, is likewise not appropriate for deferral to the improper practice proceeding. Not only is there no precedent for such an order, and the City does not cite any authority to support its conclusion, the matter of resolution of the merits of the parties' contractual dispute is clearly outside the scope of the Board's authority. In numerous cases, the Board has held that it is without jurisdiction to inquire into the merits of a grievance and that resolution of a claim of contractual right is for an arbitrator to decide.⁶

Finally, the City's claims of chances of inconsistent results and prejudice to its defense if the two proceedings are allowed to go forward are groundless. There can be no problem regarding the consistency of a determination of the grievance in arbitration and the Board's decision on the improper practice charge because the cases involve different

⁵ District Council 37 and the City of New York, Decision No. B-10-80.

⁶ Board Decisions Nos. B-8-68; B-4-72; B-25-72; B-19-74; B-1-75; B-1-76; B-2-77; B-5-77; B-6-77; B-10-77.

issues. The arbitrator's decision whether the change in schedule violates the party's contract will be unrelated to the Board's decision whether the change in schedule and several other alleged employer acts constitute interference with employee statutory rights. The City's claim of prejudice to its position is not supported by any evidence, argument or citation of authority. Questions concerning the reasons for the institution of the rotating chart are relevant to the Union's prosecution of the improper practice charge. It must be presumed that if the reasons for the change in work schedule are an issue in the arbitration, the answer given will be the same in the two proceedings. There is not only no basis for the claim of prejudice, the City's position in this regard also is counter to court and NLRB holdings that management, as part of its duty to bargain, is required to furnish information to a union in the course of its investigation of a grievance.⁷

Therefore, we deny the City's petition challenging jurisdiction of the arbitrator and order that the improper practice and arbitration proceedings continue. Because the entire question of appropriate forum is before the Board in this proceeding, including the related issue of distinction of the two matters, we rule on the objection made by the

⁷ NLRB v. Acme Industrial, 385 U.S. 432, 64 LRRM 2069 (1967).

Decision No. B-39-80
Docket No. BCB-431-80
(A-919-80)

13

City to questions asked by the Union in the improper practice hearing and order that the Union be allowed to question City witnesses in the improper practice case concerning the reasons for the institution of the rotating day schedule for civilians working in the Police Department.

ORDER

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 petition challenging jurisdiction of the arbitrator filed by the City of New York be, and the same hereby is, denied; and it is further

Decision No. B-39-80
Docket No. BCB-431-80
(A-919-80)

14

ORDERED, that District Council 37, AFSCME, AFL-CIO may proceed on the improper practice charge (Docket No. BCB-357-79) and on the request for arbitration (Docket No. A-919-80) in the separate forums and may question witnesses in both proceedings on the reasons for the institution of the rotating day schedule for civilians working in the Police Department.

DATED: New York, New York
November 5, 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

FRANKLIN J. HAVELICK
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER.