City, DOT v. L.333, United Marine Divi., 27 OCB 22 (BCB 1981)
[Decision No. B-22-81 (Arb)]

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

THE CITY OF NEW YORK, DEPARTMENT
OF TRANSPORTATION,

DECISION NO. B-22-81

Petitioners,

DOCKET NO. BCB-515-81
(A-1291-81)

-and-

LOCAL 333, UNITED MARINE DIVISION,
I.L.A., AFL-CIO,

Respondent.
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DECISION AND ORDER

On July 31, 1981, the City of New York, Department of Transportation, appearing by its Office of Municipal Labor Relations (hereinafter "the City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 333, United Marine Division, I.L.A., AFL-CIO (hereinafter "Local 333") on July 20, 1981. Local 333 filed a verified answer on August 11, 1981 to which the City replied on August 28, 1981.

Request for Arbitration

The request for arbitration alleges that the City violated Article VII, section 1(c) of the collective bargaining

agreement (the Marine Titles contract)[1] entered into between the parties as well as a "special agreement" between the parties.

Article VII, section 1 cited above reads as follows

ARTICLE VII - GRIEVANCE PROCEDURE

Section 1.

DEFINITION: The term "grievance" shall mean:

(A) A dispute concerning the application or interpretation of the terms of this Agreement;

(B) A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration;

(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;

[1] The formal papers and attached documents indicate that the grievance was brought under the 1976-1978 Marine Titles contract; the 1978-80 successor agreement was entered into in February, 1980. The conduct complained of allegedly took place in May and Tune, 1979.

(D) A claimed improper holding of an open competitive rather than a promotional examination; and

(E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in his permanent title or which affects his permanent status.

The request for arbitration states the grievance to be:

> During a strike, the aggrieved ferry employees were required to work on privately owned tugboats hauling garbage to dumping grounds. Their duties were substantially different from those normally performed and, instead of an eight-hour shift, they were required to work around the clock and supply their own food. They seek the prevailing wage for this out-of-title work, including grub money, all of which the Department (of Transportation) agreed to pay at the time but has since refused to do.

In the Step III determination of the grievance, the OMLR Review Officer described the grievance as two-fold: a) The assignment to and performance of out-of-title work by thirty-six individuals during a thirty-two day period; and

b) The Department of Transportation's alleged reneging on a promise to pay the grievants "grub" money during said period. With regard to the first issue, the OMLR Review Officer cited job specifications for those titles involved and found that there was no out-of-title assignment. Secondly, the Review Officer found that the allegation concerning the non-payment of grub money failed to constitute a "grievance" within the definition of that term under the contract. Furthermore, it was decided that there was no firm commitment to pay the grub money and that any agreement to do so was of no validity.

Local 333 seeks arbitration pursuant to Article VII, sections 1 and 2 of the Marine Titles contract which, in relevant part. provides that an unsatisfactory determination at Step III may be brought to the Office of Collective Bargaining for impartial arbitration.

Positions of the Parties

The City's Position

The City contends that Local 333 has not alleged an arbitrable grievance and thus the request for arbitration should be dismissed. The City argues that the grievance sought to be arbitrated is not covered by the grievance procedure of the written collective bargaining agreement. It identifies the

grievance as that which is stated by Local 333 in the required waiver,[2] to wit:

> Failure to pay prevailing rate and grub money for period during tugboat strike when aggrieved Ferry Employees were required to work on private tug hauling garbage around the clock and to supply own food.

The City maintains that the allegation of a violation of Article VII, section l(c)(supra) is a subterfuge and an attempt to circumvent the collective bargaining agreement. Additionally, the "special agreement" allegedly made was an oral agreement the breach of which would not constitute a grievable matter.

Furthermore, the City argues that the grievants are in the wrong forum. It states that the proper forum for a determination of rights for an employee covered by Section 220 of the New York State Labor Law is the New York City Comptroller's Office.

The City also contends that Local 333's argument

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[2] Section 1173-8.0(d) of the New York City Collective Bargaining Law (hereinafter "NYCCBL") states as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provision, the grievant or grievants and such organization 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 administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

that the City waived its right to challenge arbitrability because it entertained the grievance at the first three steps of the grievance procedure is wholly without merit. The City takes the position that a Petition Challenging Arbitrability cannot be filed until after a Request for Arbitration has been filed.

The City also states that Local 333 is not entitled to show amendments to or modifications of the collective bargaining agreement in an arbitration proceeding. Rather, where the existence of a contract is in dispute, that issue must be resolved by the Board.

Local 333's Position

The Local's approach is two-fold. First, it argues that the present challenge to arbitrability is untimely in that the City fully participated in the initial steps of the grievance procedure and dealt with the merits of the instant claim. Thus, the City has waived its objections and is estopped from making a challenge. Moreover, by reason of the City's processing the grievance through the various steps of the grievance procedure, the individual grievants and Local 333 have refrained from seeking relief elsewhere.

Second, the grievance is clearly arbitrable. Local 333 contends that Article VII, section 1(c), which speaks of assignment to duties different from those stated in the appli-

cable job specifications, covers the present claim, which essentially relates to out-of-title work. The City's acknowledgment of the difference in work, its promise of special pay provisions and its subsequent abandonment of this obligation are matters on which Local 333 intends to adduce evidence during the arbitration hearing. The admissibility and relevance of such evidence is for the arbitrator, Local 333 argues, and is not a proper basis for challenging arbitrability. Similarly, Local 333 maintains that it is also entitled to show in arbitration mutually agreed upon variations of the collective bargaining agreement.

Discussion

The issue before us is whether the union's complaint in this matter is submissible to an arbitrator. To the extent that the challenge to arbitrability rests on a perceived discrepancy between the statement of grievance set forth in the Request for Arbitration and that contained in the Waiver, we find that the statement set forth in the Request is sufficient to give clear notice to the City and to define the proposed area of inquiry and, that in this respect, there is no basis for a finding that the matter is not arbitrable.

In stating the grievance, Local 333 alleges inter alia, that aggrieved ferry employees performed duties substantially different from those which they normally perform.

As a remedy, Local 333 seeks special compensation for this out-of-title work.

Article VII, section 1(c), quoted above, specifically refers to grievances which emanate from assignments to duties substantially different from those detailed in an individual's job specification. Thus, it is readily apparent that the gist of the grievance falls within one of the categories of "grievances" that the parties agreed to submit to the grievance and arbitration processes.

It should be noted that the City does not contest the existence of a contractual commitment to arbitrate disputes, nor does the City claim disputes relating to out-of-title assignments are not arbitrable generally. on its face then, the claim stated by Local 333 in its demand for arbitration is clearly a dispute relating to the application of the contract between the parties and, as such, is an arbitrable matter (Decision No. B-9-78).

We have decided that the grievance as to out-of-title work is arbitrable under the Marine Titles contract. We recognize that the existence of a "special agreement", its form and terms, may be of importance in deciding the remedy in the instant case. However, we reach no conclusion with regard to any such agreement. It is the position of the Board that an oral agreement cannot provide the basis for filing an independent grievance.

Such a finding does not imply a disposition on the merits nor does it speak to the substance of the claim (Decision No. B-9-78, supra; Decision No. B-7-77).

The City's argument that the grievants are not in the proper for-.,m is misplaced. While it is true that Section 20 of the Labor Law provides that wage rates of current employees are to be determined, in New York City, by the Comptroller, this is not to say that such employees are precluded from utilizing the arbitration process. In the instant case the parties have clearly agreed that arbitration shall be the method for resolving disputes as to interpretation and application of their contract and in determining claims of out-of-title work assignments.

The City contends that the Union's allegation of a violation of Article V11, section l(c) is a subterfuge and an attempt to circumvent the collective bargaining agreement. It would appear, although the City's pleadings do not make clear, that this allegation suggests that the true purpose of the Union is to obtain impermissible remuneration for the allegedly improper work assignments. The argument is both speculative and irrelevant. Moreover, it fails to distinguish between that portion of the Union's Request which identifies the alleged wrong and that portion which argues as to the appropriate forum of redress. Tt is well settled that arguments addressed to questions of remedy are not relevant to the

arbitrability of the grievance (Decision No. B-5-74). The propriety of the remedy sought is a matter for the arbitrator, not the Board, to decide, even if the remedy sought is alleged to be illegal (Decision No. B-2-71). Moreover, the mere possibility that an arbitrator might render an award which would violate a specific statutory proscription is no basis for denying an otherwise valid request for arbitration (Decision No. B-2-73).

Local 333 argues that the City is estopped from challenging arbitrability because it participated in the grievance procedure. Not only is such a position contrary to the purposes and policies of the NYCCBL, but to bar a party from exercising its statutory rights on these grounds would discourage participation in and potential resolution of a dispute at the preliminary steps of the grievance procedure (Decision No. B-20-72). Furthermore, it is well settled that the proper time to raise a challenge to arbitrability is only after a request for arbitration is made and not before (Decision No. B-8-74). Therefore, we find that the City is not estopped from challenging arbitrability herein.

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 Local 333, United Marine Division, I.L.A., AFL-CIO, 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.
October 7, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
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