City v. L.3, IBT, 41 OCB 11 (BCB 1988) [Decision No. B-11-88 (Arb)]

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

-between-

DECISION NO. B-11-88
POCKET NO. BCB-999-87
(A-2678-87)

THE CITY OF NEW YORK,
Petitioner,

-and-

LOCAL 3, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

-Respondent-

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DECISION AND ORDER

On October 8, 1987, the City of New York ("the City"), by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of a grievance submitted by Local 3, International Brotherhood of Electrical Workers ("the Union") on behalf of Stationary Engineers (Electric) in the Department of Transportation ("DOT"). The Union filed its answer on October 20, 1987, to which the City replied on October 29, 1987.

BACKGROUND

On or about January 27, 1987, the Union filed a Step III grievance with the Commissioner of Transportation protesting the assignment of two Electricians to perform the

duties of Stationary Engineer (Electric). The DOT denied the Step III grievance and, on or about February 25, 1987, the Union filed a grievance at Step IV. By decision dated September 15, 1987, the Step IV Review Officer denied the grievance, finding that: (1) pursuant to Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL"),[1] the DOT acted properly in assigning its employees; and (2) the "complaint does not constitute a grievance pursuant to the definition of that term found in Section 5 of Executive Order 83 ['E.O. 83']."

No satisfactory resolution of the dispute having been reached, on or about September 24, 1987, the Union filed a request for arbitration in which it claimed that the hiring

[1]Section 12-307b of the NYCCBL states as follows:

> It is the right of the city,...to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work ....

and assignment of two Electricians to perform the duties of Stationary Engineer (Electric) violates the existing policy and practice of the employer. As a remedy, the Union requested the assignment of Stationary Engineers (Electric) to perform the work assigned to the two Electricians.

POSITIONS OF THE PARTIES

City's Position

The City notes that the instant parties are not covered by a collective bargaining agreement containing a grievance and arbitration procedure and, therefore, asserts that E.O. 83 is the sole source of whatever right the Union has to submit disputes to arbitration. The City contends that the request for arbitration must be denied because the Union has failed to state a claim which constitutes a grievance pursuant to the definition of that term set forth in E.O. 83.

In support of its contention, the City points out that E.O. 83 defines the term grievance, inter alia, as a claimed violation of written rules or regulations. The City maintains that where a grievance is so defined, the Board has ruled that the alleged violation of "past practice" does not constitute an arbitrable claim. Since the Union alleges only a violation of policies and practices of the employer, the City argues that the Union has failed to state

a claim which is arbitrable.

The City further argues that E.O. 83 expressly limits the definition of a grievance to out-of-title work performed by the grievant; and does not permit arbitration of a claim that employees in a different title have been improperly assigned work within grievants' duties and functions. Moreover, the City contends that in Decision No. B-12-77 the Board "ruled unequivocally that E.O. 83 precludes the type of 'reverse out-of-title claim that respondent now brings."

Finally, the City contends that the request for arbitration must be denied because the remedy requested is "inappropriate." The City asserts that pursuant to Section 12-307b of the NYCCBL, the right to assign work is clearly a managerial prerogative and, therefore, an arbitrator is not empowered to order employees in particular titles to perform DOT work. In addition, the City claims that, contrary to the Union's assertion, it is the function of the Board, not an arbitrator, to interpret and apply Section 12-307b of the NYCCBL.

Union's Position

The Union does not dispute the City's assertion that the parties to this proceeding are covered by the grievance and arbitration procedure established under E.O. 83, or that E.O. 83 defines a grievance as a claimed violation of

written rules or regulations. However, it argues that "all of DOT's written rules and regulations relating to Stationary Engineers (Electric) and their work imply that these persons shall perform [the work assigned to the two Electricians]" and, as a result, the DOT did not need to promulgate an explicit rule. The Union maintains that the instant case involves a violation of "fundamental bedrock policy," not a mere practice. As such, the Union submits that the instant case is distinguishable from prior decisions wherein the Board has held that "the passage of time without more [does not] convert a practice into a rule or regulation." Moreover, the Union notes that in prior decisions the Board has granted requests for arbitration where only violations of "existing practice" or "existing policy" were alleged by the Union.[2]

Contrary to the City's contention, the Union argues that Decision No. B-12-77 does not preclude arbitration of its claim. The Union asserts that in that case the Board was constrained to deny arbitrability because it determined that "there is no collective bargaining agreement between the parties nor do the records of the OCB indicate that any demand for collective bargaining has ever been made on

[2]Decision Nos. B-7-68; B-5-69; B-7-69.

behalf of the bargaining unit represented by Respondent." The Union contends that the instant case is distinguishable from Decision No. B-12-77 in that its demand that the City negotiate a non-economic agreement is on the record.[3]

Finally, the Union maintains that it is the function of an arbitrator, not the City or the Board, to interpret and apply Section 12-307b of the NYCCBL. The Union contends, however, that whether or not an arbitrator is empowered under Section 12-307b of the NYCCBL to order employees in particular titles to perform DOT work is irrelevant because that is not the remedy it will request. Rather, the Union states that it "will ask the arbitrator to direct DOT to adhere to its policy of giving the work of Stationary Engineers (Electric) to Stationary Engineers (Electric)."

DISCUSSION

This Board has long held that in determining disputes concerning arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies

[3]We note that in September 1987, the Union filed an improper practice petition, docketed as BCB-996-87, in which it claimed that the City's refusal to negotiate an agreement on non-economic terms for employees subject to Section 220 of the Labor Law violated the NYCCBL. The City thereafter agreed to negotiate a non-economic agreement and, we note, the parties have commenced negotiations.

and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.[4] The record in the instant case shows that the parties have not negotiated a collective bargaining agreement containing a grievance and arbitration procedure and therefore, if the Union wishes to bring a dispute to arbitration, it must do so by way of E.O. 83.[5]

A grievance is defined by E.O. 83 as follows:

> For purposes of subdivision a [the grievance procedure] of this section, the term 'grievance' shall mean (A) a dispute concerning the application o[r] interpretation of the terms of (i) a written, executed collective bargaining agreement; or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (B) a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment; and (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification. The term 'grievant' shall include all grievants in the case of a group grievance. (Emphasis added)

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[4] See, e.g., Decision Nos. B-4-88; B-12-87; B-6-86.

[5] Executive Order 83, issued on July 26, 1973, establishes a grievance procedure culminating in arbitration for those parties who are not covered by a contractual grievance procedure of their own.

In view of the express language of E.O. 83 and prior Board decisions, we find that the grievance presented in the instant case fails to state a claim which is within the scope of the matters the parties are obligated to submit to arbitration.

In Decision No. B-12-77, this Board denied arbitration of a grievance which alleged that the transfer of nine Oilers and the assignment of Sewage Treatment Workers to perform the work of the transferred employees was improper. We determined that the alleged improper assignment did not constitute a grievance because, pursuant to the definition of the term "grievance" set forth in E.O. 83, the party asserting the claim must show that he or she has been assigned out-of-title work. We stated that "under Executive Order 83, a grievant cannot claim that a different employee has been assigned work out of his or her title, and that is what Respondent in the instant action has alleged."

In the present case, the Union, on behalf of Stationary Engineers (Electric), claims that the hiring and assignment of two Electricians to perform the duties of Stationary Engineers (Electric) was improper. Thus, as in Decision No. B-12-77, the Union does not assert that grievants have been assigned out-of-title work; but rather, that unit work has been assigned to non-unit employees. As such, we find that

the Union has failed to state a claim which is within the definition of the term grievance set forth in E.O. 83.

The Union contends that the instant case is distinguishable from Decision No. B-12-77 because, unlike the situation in that case, its demand for collective bargaining is on the record. Therefore, the Union asserts, Decision No. B-12-77 does not preclude arbitration of its claim. We disagree. In Decision No. B-12-77, we stated that "in the absence of an agreement to arbitrate disputes and relying solely upon an Executive Order which consents ... to arbitration only within a limited group of grievances or complaints, the Union ... is bound by such limitations and has not established the right to arbitrate the instant grievance." Thus, contrary to the Union's contention, only an agreement to arbitrate the type of claim presented herein would distinguish Decision No.
B-12-77 from the instant case; a demand for collective bargaining is not enough.

We also find that the alleged violation of policies and practices of the employer does not state a grievance within the definition of that term set forth in E.O. 83. The Union notes that in prior decisions this Board has held that the passage of time without more does not convert a practice into a rule or regulation. It argues, however, that the instant case is distinguishable from those decisions because

it involves "fundamental bedrock policy," not a mere practice. Furthermore, the Union contends that in prior decisions this Board has granted arbitration where only violations of existing policy or existing practice were alleged.

Contrary to the Union's contention, this Board has consistently denied arbitration of claimed violations of past practice or policy absent an agreement defining the term "grievance" to include such claims.[6] We note that in the decisions cited and relied upon by the Union to support its contention, Decision Nos. B-7-68, B-5-69 and B-7-69, the contractual definition of the term "grievance" included a claimed violation of existing practice and/or policy. In the present case, however, the definition of the term "grievance" in E.O. 83 does not include claimed violations of existing practice and/or policy. Therefore, we find that the cited cases have no bearing on the instant matter.

Although the Union claims that the DOT did not need to promulgate an explicit rule because all of its written rules and regulations relating to Stationary Engineers (Electric)

[6] See, e.g., Decision Nos. B-30-84; B-27-84; B-25-83; B-28-82.

and their work "imply" that employees in this title shall perform the work assigned to the two Electricians, we note that it did not cite any written rules or regulations of the DOT to support its claim. Since the applicable definition defines a grievance in terms of claimed violation of written rules or regulations, there can be no basis for us to find a rule or regulation by implication.

Having found that the request for arbitration must be denied because the Union has failed to state a claim within the definition of the term grievance set forth in E.O. 83, we find it unnecessary to address the City's claim that the remedy requested by the Union is inappropriate. We note, however, that this Board has held that the mere possibility that an arbitrator might render an award that would violate a provision of law is not a sufficient basis to deny an otherwise valid request for arbitration.[7]

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 of the City of New York

[7]Decision Nos. B-5-85; B-23-83; B-14-81; B-2-78.

challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration of Local 3, International Brotherhood of Electrical Workers be, and the same hereby is, denied.

DATED: New York, N.Y.
April 28,1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER