City, DOT v. L.333, United Marine Divi., 43 OCB 35 (BCB 1989) [Decision No. B-35-89 (Arb)]

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

-between-

DECISION NO. B-35-89

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT
of TRANSPORTATION,

DOCKET NO. BCB-1150-89
(A-2988-89)

Petitioners,

-and-

LOCAL 333, UNITED MARINE
DIVISION, ILA, AFL-CIO,

Respondents.
-----------------------------------x

DECISION AND ORDER

On March 20, 1989, the City of New York and the New York City Department of Transportation, appearing by its Office of Municipal Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration, which was submitted by Local 333, United Marine Division, ILA, AFL-CIO ("the Union") on or about January 3, 1989. The grievance contests the assignment of certain work to Deckhands rather

than to Marine Oilers at the St. George Staten Island ferry terminal. The Union filed its answer on April 24, 1989. The City filed a reply on May 15, 1989.

BACKGROUND

Local 333, United Marine Division represents, inter alia, New York City employees in the titles of Deckhand and Marine Oiler (Ferry Operations). On June 3, 1988, the Department of Transportation ("the Department") received an out-of-title work grievance from the Union alleging that Deckhands at the St. George ferry terminal were "doing the work of oilers in order to avoid paying overtime." The specific work complained of was walking fuel lines, handling fuel hoses, and turning fuel valves.

By letter dated June 6, 1988, the Director of Municipal Ferry Operations denied the grievance, finding "that the duties of Deckhands properly can include walking the fuel oil pipeline ashore."

By memorandum dated June 14, 1988, the Department's Director of Labor Relations denied the grievance at the second step. His memorandum reads, in pertinent part, as

follows:

> On June 3, 1988, this office received an out-of-title grievance from Local 333, United Marine Division, contending that the Deckhands at the St. George term- inal were doing the work of Oilers in the City's at- tempt to avoid paying overtime. The jobs, according to you, which had traditionally been performed by Oilers, that are presently being performed by Deckhands are:
>
> -turning valves
>
> -walking pipelines
>
> -handling cargo hoses
>
> The grievance is being denied, the reasons for which are stated below.
>
> First and foremost is the fact that, after having read the job descriptions that were forwarded to this office, it is apparent that the tasks that are describ-ed above are not specifically included among the vari- ous tasks of either Oilers or Deckhands, with the pos- sible exception of the Oilers' duty to file a report if the oil pipes are obstructed. Among the duties of Deck-hands are: ...to operate gates and gangplanks, ...load and unload freight, handle lines, clean boats, perform heavy manual labor in connection therewith, perform related work. The deckhands, therefore, are not per- forming tasks that are, according to the Department of Marine and Aviation Rules and Regulations (Bureau of Ferries), designated exclusively as Oiler duties, although, in the past, it may have been only Oilers that carried out such functions.
>
> Secondly, the situation is a temporary one; it is most likely that it will alleviate itself within two months. [Emphases in original.]

On or about June 21, 1988, the Union filed a Step III

grievance, claiming that "the City has the deckhands at St. George doing the work of oilers for the sole purpose of avoiding [overtime] for oilers." As part of its filing, the Union referred to an alleged admission by the Department that "[under past practice] the job of walking a fuel line, handling fuel hoses [and] turning fuel valves, is and always has been the job of a Marine Oiler."

On or about November 10, 1988, the grievance was denied at Step III by the Office of Municipal Labor Relations, after it found that "neither the job description for Marine [Oiler] nor that of Deckhand delineates the three tasks alleged to constitute out-of-title work for Deckhands." The Step III decision notes that "[w]hile it may be true that such tasks have been performed by Marine Oilers in the past the Department is not barred from utilizing Deckhands to perform the cited functions," and it concludes by finding that "[t]he Union has not demonstrated that the tasks in dispute are substantially different from those set forth in the job specification for Deckhand."

With no satisfactory resolution of the grievance having been reached, on or about January 3, 1989, the Union filed a request for arbitration, wherein it claimed that:

The Department of Transportation Bureau of Ferries

> violated the collective bargaining agreement and the past practices of the parties by (a) reducing the dock gang complement from 8 to 6 deckhands; (b) assigning the work of oilers to deckhands (for which oilers would have been paid overtime); and (c) assigning deckhands, who had bid on certain work to which they were entitled by seniority, to perform different work that was traditionally performed by oilers.

The Union claimed that the Department's actions violated Article I, Section 1; Article IV-A (Group 1); Article IV-F;

Article VI; Article XI; and Article XIII of the Agreement.[1] As a remedy, it sought "declaratory judgment that the pipeline work in issue must be assigned to oilers rather than deckhands," and that "the 8 man dock gang shall not be reduced in number," together with certain monetary relief.

---

[1] Article I, Section 1. of the Agreement contains the Union recognition and unit designation clause. It provides that Local 333 shall be the sole and exclusive representative for the bargaining unit consisting of a number of Classified Service titles, including, inter alia, Deckhands and Marine Oilers (Ferry Operations.)

Article IV-A contains the wages and benefits provision for unit members.

Article IV-F contains an interest accrual provision that takes effect when a new agreement is reached, or when shift differential, holiday pay or overtime has been earned and payment is delayed beyond a certain period of time.

Article VI contains the parties' grievance procedure.

Article XI contains an occupational safety and health clause providing that "[a]dequate, clean, structurally safe and sanitary working facilities shall be provided for all employees."

Article XIII contains a distribution of overtime provision, which reads as follows:

> Authorization to work overtime compensable in cash shall be evenly distributed, where practicable, within each agency or agency subdivision, among all those employees who are eligible to perform the overtime work required.

POSITIONS OF THE PARTIES

City's Position

The City argues that there is no nexus between part (a) of the Union's request for arbitration -- the reduction in size of the dock gang from eight to six Deckhands at the St. George ferry terminal -- and the provisions of the collective bargaining agreement cited by the Union.

The City notes that the only claim raised by Union involves an alleged past practice, and it points out that the collective bargaining agreement does not include past practice as part of the definition of a grievance. It points out further that the Union has cited no other term of the Agreement, nor any rule, regulation or written policy or order of the Department that mandates a complement of eight Deckhands. According to the City, in Decision No. B-28-82, where a similar contractual grievance procedure was in issue, this Board held that a change in an unwritten past practice does not constitute a grievable matter under the definition of a grievance.

With respect to part (b) of the request for arbitration

-- the challenge to the City's alleged assignment of certain Marine Oiler duties to Deckhands -- the City repeats its nexus argument, and it further contends that Article VI, Section 1(C) of the Agreement does not apply to "reverse out-of-title" claims where a grievant or grievants are complaining that other employees are performing their work. According to the City, in Decision No.
B-11-88, a case involving nearly identical contractual out-of-title language, this Board held that "reverse out-of-title" claims are not arbitrable.

In response to the Union's contention that the contractual overtime article is implicated in the instant case, the City points out that the overtime clause cited by the Union is an overtime equalization provision. It notes that the Union has made no allegation that overtime has not been evenly distributed among the grievants, and, thus, the City argues that there is no nexus between the overtime provision and the present matter being complained of. The City then cites two decisions in support of its position that the assignment of overtime is a statutory management right.[2]

[2] Decision Nos. B-29-87 and B-16-87.

Finally, the City contends that the overtime provision referred to by the Union does not state that Oilers must do certain work and that Deckhands cannot do that work. According to the City, Deckhands can properly perform any and all of the tasks objected to by the Union.

Union's Position

The Union concedes that there is no "specific term" in the collective bargaining agreement or in any written policy or order of the Department that would require a complement of eight Deckhands. The Union also concedes that its argument against the reduction in the size of the dock gang is based upon a past practice claim. However, the Union maintains that, inasmuch as there is nothing in the collective bargaining agreement which specifically excludes such a claim from arbitration, the question as to whether the City has the unilateral right to reduce the size of the dock gang should be decided by an arbitrator.

With respect to its complaint concerning the assignment of Marine Oiler duties to Deckhands, the Union contends that Board Decision No. B-28-82, cited by the City, is inapplicable to the instant case. It distinguishes that decision by pointing out that it was based upon interpretation of an executive order which had been unilaterally issued by the City, rather than upon the terms of a mutually negotiated collective bargaining agreement. According to the Union, that decision should not be

applicable because of the U.S. Supreme Court's oft-repeated policy based pronouncement that there is a presumption of arbitrability in collective bargaining relationships, and that doubts should be resolved in favor of arbitrability.

Finally, the Union contends that the failure to provide Oilers the opportunity to work overtime because the work has been given to Deckhands directly implicates the overtime distribution provisions of the Agreement, as well as the recognition clause.

DISCUSSION

This grievance, in its original form, protested the City's alleged assignment of Marine Oiler job duties -- turning valves, walking fuel lines and handling fuel hoses -- to Deckhands. The grievance as framed by the Union in its Request for Arbitration, however, contains three separate claims: (a) that the City violated the collective bargaining and past practice by reducing the dock gang complement from eight to six Deckhands; (b) that the work of Oilers was being assigned to Deckhands, thus depriving the Oilers of overtime; and (c) that the Deckhands, "who had bid on

certain work to which they were entitled by seniority," were being assigned to perform different work, that traditionally had been performed by Oilers.

In order to decide whether or not this grievance is arbitrable, in whole or in part, we must consider three issues:
First, to the extent that the grievance opposes the reduction in the size of the dock gang based upon past practice, and because the contractual definition of a grievance does not specifically include past practices, we must decide whether the alleged reduction is arbitrable. Second, we must decide whether there is a nexus between the contractual provisions cited by the Union and the alleged reduction in the opportunity for overtime earnings by Oilers. Third, we must decide whether the claim that Marine Oiler work has been assigned to Deckhands is arbitrable under the contractual definition of a grievance.

It is well established that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[3] However, we cannot create a duty

[3] _E.g._ Decision Nos. B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[4]

The first part of the Union's request for arbitration alleges that the Department violated the collective bargaining agreement by "reducing the dock gang complement from 8 to 6 deckhands." However, the Union does not point to any language in the Agreement that would support the arbitrability of this claim. It concedes that there is no specific contractual provision that would require a complement of eight Deckhands, and it admits that there is no other written policy or order to support its claim. The Union's sole argument is based on the contention that, because the collective bargaining agreement does not specifically exclude arbitration of a past practice claim, a claim based upon past practice should enjoy a presumption in favor of arbitrability.

This Board has long held that a claim of the existence of a past practice, without more, is insufficient to establish a basis for arbitration.[5] Before we will order a grievance that is based upon a past practice to be placed

---

[4] Decision No. B-41-82 and B-15-82.

[5] Decision Nos. B-28-82 and B-20-72.

before an arbitrator, the party requesting arbitration must clearly demonstrate that an alleged violation of a past practice is specifically included within the contractual definition of a grievance. The mere showing that the collective bargaining agreement does not exclude the arbitration of past practice grievances does not provide a sufficient basis for arbitration. Thus, we reject the first part of the Union's arbitration request concerning the alleged reduction in the size of the dock gang by management from eight to six Deckhands.

The second issue that we must decide concerns the question of nexus between the contractual provisions cited by the Union and the alleged reduction in the opportunity for overtime earnings by Oilers. Where the City has challenged nexus in an arbitrability proceeding, the Union bears the burden of showing that a *prima facie* relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[6] In this case, the Union has cited Article I, Section 1, Article IV-A (Group 1), Article IV-F, Article VI, Article XI and Article XIII as the contractual provisions

---

[6] *See*, Decision Nos. B-47-88; B-5-88; B-16-87; B-35-86; B-8-82; B-15-79; and B-1-76.

implicated in the grievance. We shall examine them separately in order to determine whether the required nexus exists for any or for all of them.

Article I, Section 1 is a standard union recognition clause, which states that the employer recognizes Local 333 as the exclusive collective bargaining representative and sets out the classified service titles to be covered by the agreement. In Decision No. B-6-81, we held that there was no nexus between a similar recognition clause and a grievance that challenged the assignment of overtime to detectives doing police officers work because the provision "is not and does not purport to be either a job description or a grant of exclusive work jurisdiction."[7] Similarly, in this case, the Union has failed to establish that specific and substantial reasons exist whereby the alleged assignment of Oilers' work to Deckhands adversely affects the Union's representational rights.

Article IV-A sets out the wages and benefits provisions for bargaining unit employees. However, the Union fails to offer any rationale as to how this Article has an arguable relationship to the assignment work among certain classes of

[7] Decision No. B-6-81 at 6.

employees. We do not perceive the nexus between Article IV-A and the claims contained in the grievance. Similarly, Article IV-F, which provides for interest accrual on wages when remuneration is delayed beyond a certain period of time, contains no prima facie relationship to the assignment of work to certain employees, nor to an alleged deprivation of the opportunity for certain employees to work overtime.

Article XI, the "Occupational Safety and Health" clause, contains a single substantive provision: "[a]dequate, clean, structurally safe and sanitary working facilities shall be provided for all employees." There is no showing of a nexus between this provision and the grievance, as the Union's claim clearly does not involve a complaint about the facilities or the environment within which unit employees are required to work.

The final contract provision cited by the Union concerning its overtime deprivation claim, Article XIII - Distribution of Overtime, provides that "[a]uthorization to work overtime compensable in cash shall be evenly distributed, where practicable, within each agency or agency subdivision, among all those employees who are eligible to perform the overtime work required." The City challenges the Union's overtime deprivation claim by arguing that the

assignment of overtime is a statutory management right, and it cites Decision Nos. B-29-87 and B-16-87, in support for its contention that the assignment of overtime is a statutory management right in the absence of contractual limitation or otherwise.

We have held that the rights accorded to management under Section 12-307b. of the New York City Collective Bargaining Law do not amount to an unlimited delegation of power. When an action falls within an area of management prerogative, but also is alleged to be in conflict with the rights granted to employees under the terms of a collective bargaining agreement, the City is not insulated from an inquiry into its actions by claims of management prerogative.[8] The decisions cited by the City are distinguishable because, in each of those cases, we determined that there was no applicable contractual limitation on the statutory management right involved.

The instant grievance does not challenge the Department's right to refuse its employees the opportunity to work overtime. Rather, it raises an issue of overtime distribution. The Union claims that Oilers are being

[8] Decision Nos. B-47-88; B-4-87; B-27-84; and B-8-81.

deprived of overtime, although it has not made clear whether Deckhands are performing the disputed work as overtime, or the work is being performed by Deckhands as part of their regularly scheduled tours of duty. If there has been a reassignment of overtime from Oilers to Deckhands, we find that the grievance arguably involves the interpretation of the phrase "eligible to perform overtime work" as well as the question of how this provision should apply to the instant facts.[9] On the other hand, if there has been no such reassignment, there would be no overtime to distribute evenly, and Article XIII could not serve as a basis for arbitration.

The final issue with which we must deal concerns the Union's out-of-title work claim. Article VI contains the parties' grievance procedure, including definitions of the term "grievance." Section 1 (C) provides that a grievance shall include "[a] claimed assignment of employees to duties substantially different from those stated in their job specifications." We find that, under this definition, there

[9] In this regard, we note that the City asserts that the three tasks complained of by the Union may be performed either by Oilers or by Deckhands. We also note that neither the job description for Marine Oiler nor the job description for Deckhand mentions any of the three tasks alleged to constitute out-of-title work for Deckhands.

arguably exists a nexus between the Agreement and the Union's claim that Deckhands are doing the work of Oilers. We note that the City may not be in disagreement with our conclusion, for in its reply the City acknowledges that "[a]t best, the Deckhands may have an out-of-title claim."

The City puts forth a second objection with respect to Article VI, however, by characterizing the alleged assignment of Marine Oiler duties to Deckhands as a "reverse-out-of-title" claim, and contending that such a claim is not arbitrable under Article VI, Section 1 (C) of the Agreement.

We do not agree that the request for arbitration involves a "reverse out-of-title" claim, i.e., a claim by a grievant or grievants that their work has been assigned to other employees. The instant grievance involves a claim that duties that allegedly have been and should be performed by Marine Oilers -- walking fuel lines, handling fuel hoses, and turning fuel valves -- have been assigned to Deckhands. Both Marine Oilers and Deckhands are members of the bargaining unit that has filed this grievance.

In addition, we note that the Department, in its Step II decision, referred to the grievance as the "Deckhands Out-of-Title Grievance," and the City, in its Step III

hearing notice, entitled the matter as "Deckhands (St. George) -and- Department of Transportation (Alleged out-of-title assignment)." In its Step III decision, the City summarized the grievance as an allegation "that the duties of walking a fuel line, handling fuel hoses, turning fuel valves which have been assigned to Deckhands are substantially different from those noted in the job description for Deckhands." We further note that the request for arbitration lists the grievants as "(t)he affected deckhands and applicable oilers." Thus, it would appear that both parties understood that the gravamen of the Union's complaint involved a claim by Deckhands that they have been assigned work that is not a part of their job description. As such, the grievance does not qualify as a "reverse-out-of-title" claim.

Moreover, even if this matter could be construed as a "reverse out-of-title" claim, we would not necessarily conclude that Article VI, Section 1 (C) would bar arbitration of such a claim. In Decision No. B-11-88, we held that the definition of a grievance contained in Executive Order 83, the applicable dispute resolution mechanism in that case, precluded a union from arbitrating a claim concerning two electricians who allegedly were

assigned to do the work of stationary engineers, because the Executive Order defined the term grievance, _inter alia_, as "a claimed assignment of a _grievant_ to duties substantially different from those stated in his or her job classification." [Emphasis added.] By contrast, the definition of a grievance in the instant case is arguably broader (a claimed assignment of _employees_ to duties substantially different from those stated in their job specifications).

This distinction is significant. In Decision No. B-2-70, we held that a grievance brought on behalf of motor vehicle dispatchers and protesting the alleged assignment of district foremen to perform the dispatchers' duties was arbitrable under §8a(2)(C) of Executive Order 52. At the time, §8a(2)(C) defined a grievance as "a claimed assignment of _employees_ to duties substantially different from those stated in their job classifications." [Emphasis added.] We specifically noted that §8a(2)(C) "is not limited to claims of assignment of the grievant to out-of-title work...but also encompasses a claim that employees in a different title have been improperly assigned work within the grievant's

duties and functions."[10]

In Decision No. B-7-70, we similarly held that a grievance brought on behalf of automotive repair and service employees and challenging the assignment of non-unit Sanitationmen to perform the alleged duties of the automotive employees was arbitrable under Section 8a(2)(C) of Executive Order 52. In that case, the City argued that Decision No. B-2-70 was erroneous and should be overruled, because Section 8a(2)(C) was never intended to cover more than a complaint that the grievant himself or herself was assigned out-of title work. We expressly rejected the City's argument by comparing the difference between Section 8a(2)(C) of Executive Order 52, with the narrower definition in the procedure provided for the police under Section 8b(1)(e)(C) of the Order. The police provision defined a grievance as "a claimed assignment of the _grievant_ to duties substantially different from those stated in his job classification." [Emphasis added.] We determined that this difference was "patent", and "manifestly demonstrate[d] a deliberate intent to provide a broader definition of out-of title work grievances" where language such as that in

[10] Decision No. B-2-70 at 2.

Section 8a(2)(C) was used.[11]

Decision No. B-12-77 further illustrates the significance of the difference between the provision in the instant contract and the provision referred to in Decision No. B-11-88. In Decision No. B-12-77, we held that a grievance brought on behalf of Oilers and protesting the assignment of Sewage Treatment Workers to perform the work of Oilers was not arbitrable under Executive Order 83, the provisions of which had replaced certain parts of Executive Order 52. In particular, Section 8a(2)(C) had been replaced with a new provision that defined a grievance as "a claimed assignment of a <u>grievant</u> to duties substantially different from those stated in his or her job classification." [Emphasis added.] We said that this change was an important one, and we held that "[w]ith the language now changed from 'of employees' to 'of a grievant,' the person bringing the grievance must [now] show that he or she has been assigned out-of-title work."[12] In the present case, Article VI, Section 1 (C) of the parties' agreement refers to the out-of-title work of "employees," and not "grievants", and so

---

[11] Decision No. B-7-70 at 3.

[12] Decision No. B-12-77 at 6.

our rulings in Decision Nos. B-2-70 and B-7-70 would be dispositive of the arbitrability of the claim herein, were we to view it as a "reverse out-of-title" grievance.

In summary, we find that the grievance, as originally framed by the Union, alleging that the duties of Marine Oilers have been assigned to Deckhands, is arbitrable. We also find the Union's overtime distribution claim arbitrable, to the extent that the assignment of the disputed work results in overtime being performed by Deckhands rather than by Oilers. Finally, we grant that portion of the City's petition challenging arbitrability pertaining to the alleged reduction in the size of the ferry terminal dock gang from eight to six Deckhands, and we hold that the Union may not arbitrate an alleged manning reduction when its claim is based upon a past practice rather than upon an express contractual provision.

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 arbitrability filed by the City of New York and the New York City Department of Transportation, and docketed at BCB-1150-89, be, and the same hereby is, granted with respect to alleged violations of Article I, Section 1; Article IV-A; Article IV-F and Article XI od the agreement and, in all other respects, is denied; and it is further

ORDERED, that the request for arbitration filed by Local 333, United Marine Division, ILA, AFL-CIO, in Docket No. BCB-1150-89 be, and the same hereby is granted, insofar as it alleges violations of Article VI, Section 1(C) and Article XIII of the Agreement and, in all other respects, is denied.

DATED: New York, N.Y.
____

____

____

____

____

____

____

____