City v. L.1549, DC37, 45 OCB 20 (BCB 1990) [Decision No. B-20-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-20-90

Docket No. BCB-1232-89 (A-3267-89)

-and-

DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO,

Respondent.

DECISION AND ORDER

On December 1, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of a group grievance that is the subject of a request for arbitration. The request was filed by District Council 37, AFSCME, AFL-CIO ("the Union") on or about November 15, 1989. The Union filed an answer to the petition on December 22, 1989. The City filed a reply on January 9, 1990.

Background

On or about February 1, 1989, the Union filed a Step I grievance on behalf of all Police Communications Technicians ("PCTs") in non-radio positions who are assigned to staff the 911 emergency telephone service on the midnight to eight A.M. shift ("the grievants"). In the grievance, the Union protested the

reduction of the grievants' break time from two thirty-minute periods per shift to two twenty-minute periods per shift. The Union alleged that the Police Department ("the Department") had violated Procedure 104-1, page 3, paragraph 3 of the Police Department Patrol Guide ("Procedure 104-1"),[1] and its own past practice when it unilaterally shortened the grievants' break periods.

The Step I grievance was denied on March 1, 1989. The grievance was thereafter submitted at Step II of the grievance procedure on March 15, 1989. In a decision dated April 26, 1989, the grievance was denied at Step II on the ground that the length of break time allocated to the grievants was not provided for in the applicable Clerical Contract ("the Agreement"). on May 3, 1989, the Union submitted the grievance at Step III. The grievance was thereafter denied on August 15, 1989.

No satisfactory resolution of this dispute having been reached, the Union filed a request for arbitration for "Diane Witkowski on behalf of non-radio PCTs working the midnight to eight a.m. tour" on or about November 15, 1989. The request

[1] Procedure 104-1 provides, in relevant part, as follows:

> Public Contact
> 1. Give name and shield number to anyone requesting them . . . .
>
> Prohibited Conduct . . .
>
> 3. Engaging in conduct prejudicial to good order, efficiency or discipline of the department. . . .

alleges that the Department violated Procedure 104-1 and a past practice when it shortened the grievants' break periods to two twenty-minute breaks per shift. The Union relies on Article VI, Section I of the Agreement as the source of its right to arbitrate the instant dispute.[2] As a remedy, the Union seeks the restoration of two thirty-minute breaks for non-radio PCTs who work the midnight to eight A.M. tour.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union has failed to establish a nexus between the instant dispute and the source of the right which it seeks to arbitrate. Therefore, it contends that the Union's request for arbitration must be dismissed.

Initially, the City asserts that there is no nexus between Procedure 104-1 and the disputed reduction in the length of the

[2] The Article VI, Section I of the Agreement provides, in pertinent part, as follows:

> The term "Grievance" shall mean:
>
> (A) A dispute concerning the application of 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 terms and conditions of employment . . .

grievants' break periods. It contends that Procedure 104-1, which delineates prohibited conduct when members of the Department make public conduct, does not refer to break time and therefore, does not limit the Department's authority to shorten the grievants' break periods in the instant case. Moreover, the City alleges that the language of Procedure 104-1 "is clearly directed at the activity of Police Department employees and not at the Department itself."

With respect to the Union's contention that the Department violated a past practice, the City notes that the Board of Collective Bargaining has consistently denied requests for the arbitration of claimed violations of a past practice when the parties have not contractually defined the term "grievance" to include such claims. The City maintains that in the instant case, the alleged violation of a past practice is not within the definition of the term "grievance" set forth in the Agreement, and therefore is not arbitrable.

Moreover, the City dismisses the Union's assertion that the reduction in the length of the grievants' break periods is a violation of written orders by the Department. It argues that this allegation was not mentioned in the Union's request for arbitration, and that the written orders to which the Union refers have not been specified. Consequently, the City concludes that the Board cannot properly grant the Union's request for arbitration on the basis of this contention.

Union's Position

The Union initially argues that the determination of the Department to reduce the grievants' break time violates Procedure 104-1. It asserts that the Board has held the Patrol Guide to constitute a "written policy or order" of the Department. Consequently, the Union maintains that an alleged violation of a provision of the Patrol Guide constitutes an arbitrable grievance within the meaning of the Agreement.

Moreover, the Union disputes the City's claim that Procedure 104-1 is directed only at the activity of Department employees and not at the activity of the Department itself. The Union contends that this "argument is of no merit for the most basic reason that if the Department proscribes a course of conduct for its employees, it, of necessity, proscribes a course of conduct which it must follow."

Furthermore, the Union claims in its answer, that for twenty years the Police Department has assigned PCTs in non-radio positions on the midnight to eight A.M. shift via written order for each shift's roll call. Thus, the Union maintains that when the Department unilaterally shortened the grievants' break periods, it "violated that section of the grievance procedure in the collective bargaining agreement which prohibits violation of orders of the Department . . ." and acted contrary to its own past practice.

DISCUSSION

It is the policy of the New York City Collective Bargaining Law ("the NYCCBL") to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[3] However, in interpreting and applying the NYCCBL, we recognize that we cannot create a duty to arbitrate beyond the scope agreed upon by the parties to a collective bargaining agreement.[4] We note that the Union bears the burden, where challenged to do so, to demonstrate the existence of a prima facie relationship between the grievance in question, and the source of the alleged right, redress of which is sought through arbitration.[5]

The Union, in this case, presents three arguments in opposition to the City's petition challenging arbitrability.

Police Department Patrol Guide

With respect to the Union's contention that the Department violated Procedure No. 104-1 when it reduced the length of the grievants' break periods, we note that Article VI, Section 1 of the Agreement defines the term "grievance" as "a claimed

[3] Decision Nos. B-49-89; B-41-82; B-15-82.

[4] Decision Nos. B-49-89; B-53-88; B-20-79; B-15-79.

[5] Decision Nos. B-27-89; B-19-89; B-47-88; B-5-88; B-16-87.

violation, misinterpretation or misapplication of the Rules or Regulations, written policy or orders of the Employer . . . ." We further recognize that we have long held an alleged violation of the provisions of the Patrol Guide to constitute an arbitrable grievance within this definition.[6]

However, the requisites of our threshold arbitrability test mandate that a union seeking to arbitrate a grievance demonstrate the existence of some nexus between the provision or procedure which it alleges has been violated, and the facts that are the subject of the grievance it presents.[7] In the instant case, we find that the Union has failed to demonstrate such a relationship between Procedure No. 104-1 and the disputed reduction in the length of the grievants' break periods.

We note that the cited provision of Procedure 104-1 only prohibits "[e]ngaging in conduct prejudicial to good order, efficiency or discipline of the department." This provision does not mention employee break times, nor are we convinced that a reduction in the length of the grievants' break periods constitutes conduct which would arguably violate its terms. Therefore, we hold that the Union has failed to demonstrate the existence of a nexus between the instant grievance and Procedure 104-1.

[6] Decision Nos. B-43-88; B-50-87; B-33-87; B-15-80; B-8-78.

[7] See, Decision Nos. B-8-88; B-8-82.

Past Practice

The Union further alleges that it has stated an arbitrable grievance insofar as the reduction in the length of the grievants' break time is contrary to the Department's own past practice of granting them two thirty-minute break periods per shift. We disagree.

We have long held that before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of a past practice is within the scope of the definition of the term "grievance" which is set forth in its collective bargaining agreement.[8] In the instant case, the parties have defined the term "grievance" to include a "claimed violation, misinterpretation or misapplication of the Rules or Regulations, written policy or orders of the Employer. . . .” Clearly, the alleged violation of a past practice is not included within this definition. Therefore, we hold that an alleged violation of a past practice may not serve as a basis for arbitration in the instant case.

[8] See, Decision Nos. B-35-89; B-11-88; B-27-84; B-25-83, B-28-82.

Written Orders

Finally, the Union claims, for the first time in its answer, that the disputed reduction in the length of the grievants' break periods constitutes a violation of written orders involving the assignment of PCTs in non-radio positions on the midnight to eight A.M. tour. The City, in response, asserts that this claim must be dismissed because it was not raised at the lower levels of the grievance procedure. Moreover, the City maintains that the Union has not demonstrated a nexus between the written orders and the instant grievance because the written orders have not been specified.

Initially, we recognize that we have consistently denied requests for the arbitration of claims that are not raised at the lower steps of the grievance procedure.[9] Our rationale in doing so has always been based on our view that:

> [t]he purpose of the multi level grievance procedure is to encourage discussion of the dispute at each of the [grievance procedure] steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at [arbitration] . . . a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of

[9] Decision Nos. B-40-88; B-31-86; B-6-80; B-22-74.

a voluntary settlement.[10]

Since the claimed violation of written orders of the Department was not raised at the lower steps of the grievance procedure or, for that matter, in the request for arbitration herein, the Union's belated assertion in its answer to the City's challenge to arbitrability constitutes the presentation of a novel claim in violation of the policy stated above. Accordingly, we cannot permit this claim to be considered for the first time in the arbitral forum.

Moreover, we note that the Union has failed to submit into the record or to specifically identify the written orders to which it refers. We repeat our longstanding position that in situations where the City challenges the arbitrability of a grievance, the burden is on the union involved to establish the existence of a nexus between the source of the right being invoked and the grievance which it seeks to arbitrate.[11] Consequently, the Union's allegation that the Department violated written orders when it shortened the grievants' break periods is unduly vague, and does not satisfy the Union's burden of proof in overcoming a challenge to arbitrability.

In conclusion, we find that the Union has not established

[10] Decision Nos. B-10-88; B-35-87; B-31-86; B-21-84; B-6-80.

[11] Decision Nos. B-74-89; B-55-89; B-51-89; B-40-89.

the existence of a nexus between the instant grievance and either Procedure 104-1 or the written orders, nor has it demonstrated that an alleged violation of the Department's past practice of allowing the grievants to take two thirty-minute breaks per shift constitutes an arbitrable grievance within the definition of the term "grievance" set forth in the Agreement. Accordingly, we deny the Union's request for arbitration.

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 docketed as BCB-1232-89, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1549, AFSCME, AFL-CIO, and docketed as BCB-1232-89 be, and the same hereby is denied.

Dated: April 25, 1990
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER

SUSAN R. ROSENBERG
MEMBER