Bowers v. L.237, IBT, et. al, 45 OCB 56 (BCB 1990) [Decision No. B-56-90 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE IMPROPER PRACTICE PROCEEDING

-between-

Howard Bowers,

Petitioner,

-and-

Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO,

Respondent.
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Decision No. B-56-90
Docket No. BCB-1279-90

DECISION AND ORDER

On May 9, 1990, the Petitioner, Howard Bowers, filed a verified improper practice petition against Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO ("the Union") wherein he alleged that the Union breached its duty of fair representation by refusing to protest his assignment to an unsatisfactory work location in arbitration. The Union filed a verified answer on May 10, 1990, and the Petitioner filed a reply on July 16, 1990.

Background

The Petitioner was hired as a provisional employee by the New York City Housing Authority ("the Authority") in 1962. On May 21, 1971, he was appointed to his current position as a

permanent Elevator Mechanic.

Pursuant to the collective bargaining agreement executed by the parties, the Authority utilizes a "job pick" system to allocate work assignments among Elevator Mechanics.[1] Under this assignment system Elevator Mechanics receive a list of possible assignments, and are asked to rank their top five choices in numerical order. Final assignments are thereafter determined on the basis of seniority and preference.

In December of 1989, the Petitioner prepared a "pick sheet" indicating that his first choice of assignment was the "Emergency Service Squad Shift, 4:30 p.m.- 12:00 a.m., all boroughs district."[2] The Petitioner was granted his first choice, and assigned to a worksite located in lower Manhattan.

In a letter dated January 3, 1990, Steven A. Morelli, Esq., wrote to the Union protesting the Petitioner's assignment to a lower Manhattan worksite. Morelli contended that this location was inconvenient for the Petitioner because it was far from his home in the Bronx. Morelli further asserted that it is the

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[1] Section 24, paragraph F of the parties' collective bargaining agreement deals with job picks, and provides in relevant part as follows:

> All employees in elevator titles shall be entitled to make job picks based upon seniority in title . . . ."

[2] Other assignments on the pick sheet filled out by the Petitioner involved assignments to specific boroughs, including assignments to the Bronx.

Authority's usual practice to assign Night Elevator Mechanics to locations which are as close to their homes as possible, and that the Petitioner had been treated differently due to his involvement in a recent legal battle against the Authority. In conclusion, Morelli requested that the Union resolve the Petitioner's problem in arbitration.

Morelli's letter was referred to the Union's counsel, Adam Klein, for his legal opinion. In a written memorandum, Klein informed the Union that the term "job pick" was not defined in the collective bargaining agreement between the parties, and that the pick sheet signed by the Petitioner did not designate the specific borough to which a Night Emergency Service Squad Elevator Mechanic would be assigned. He further noted that in practice, Night Emergency Service Squad Elevator Mechanics had always been assigned to work locations at the discretion of management. Therefore, Klein concluded that a grievance seeking that the Petitioner be assigned to a worksite in the Bronx would not succeed in arbitration.

In a letter dated February 9, 1990, the Union relayed Klein's opinion to the Petitioner, and provided him with a copy of Klein's memorandum. In its letter, the Union indicated that rather than "wasting time with a losing arbitration," it would attempt to resolve the Petitioner's problem informally. Thereafter, the Union succeeded in convincing the Authority to offer the Petitioner a position with the Night Emergency Service

Squad at the "Mitchell Houses" worksite in the Bronx. However, the Petitioner refused this offer because he wanted to be assigned to another Bronx location that he deemed to be more desirable.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner asserts that "pursuant to established rules and practices," Night Emergency Service Squad Elevator Mechanics must be assigned to their worksites on the basis of seniority. He argues that in the instant case, the Authority did not take his seniority into consideration when it assigned him to a worksite in lower Manhattan, and that a less senior Elevator Mechanic was improperly assigned to the Emergency Service Squad, Night Shift, at his first choice work location.

Consequently, the Petitioner maintains that he has a valid grievance against the Authority, and that the Union is obligated to pursue this grievance in arbitration. The Petitioner argues that the Union has breached its duty of fair representation by refusing to pursue his claim in arbitration for "arbitrary, invidious, and unwarranted reasons." As a remedy, he requests that the Union be directed to initiate an arbitration on his behalf in order to secure an assignment for him at a suitable worksite in the Bronx.

Union's Position

The Union argues that its decision to refrain from proceeding to arbitration on the Petitioner's behalf, based on the advice of its attorney, was made in a fair, non-arbitrary, and non-discriminatory manner. The Union further notes that it represented the Petitioner's interests in good faith by informally convincing the Authority to offer him a Bronx assignment. Accordingly, the Union asserts that it complied with its duty to fairly represent the Petitioner's interests, and that the instant improper practice petition must be dismissed.

DISCUSSION

The duty of fair representation obligates a union to act fairly, impartially and non-arbitrarily in negotiating, administering and enforcing a collective bargaining agreement.[3] It is well-settled that a union does not breach its duty of fair representation merely by refusing to bring a grievance to arbitration.[4] Nonetheless, such a refusal must be made in good-faith and in a non-arbitrary, non-discriminatory manner.[5]

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[3] Decision Nos. B-27-90; B-51-88; B-50-88; B-53-87; B-11-87; B-49-86.

[4] Decision Nos. B-27-90; B-58-88; B-50-88; B-30-88; B-34-86; B-32-86; B-25-84; B-18-84; B-2-84; B-42-82.

[5] Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; B-30-88; B-2-84.

Arbitrarily ignoring a meritorious grievance or processing a grievance in a perfunctory fashion may constitute a violation of the duty of fair representation.[6] The burden is on the petitioner to plead and prove that the union has engaged in such conduct.[7]

The Petitioner contends that the Union violated its duty of fair representation when it refused to pursue his grievance to arbitration. We reject this contention on the ground that the Petitioner has failed to establish that the Union's determination was effected arbitrarily, discriminatorily or in bad faith.

It is clear that the Union's determination to refrain from pursuing the Petitioner's grievance in arbitration was in no way improperly motivated. Rather, the evidence presented in this case establishes that the Union's determination was reached in good faith, after it assessed the circumstances of the Petitioner's situation and consulted its attorney. We note, in this respect, that a union's decision not to arbitrate a grievance, when reasonably based on the good faith advice of counsel would not constitute a breach of the duty of fair representation, even if such reliance amounted to poor judgment.[8]

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[6] Decision Nos. B-27-90; B-72-88; B-58-88; B-50-88; B-30-88.

[7] Decision No. B-50-88.

[8] Decision Nos. B-27-90; B-50-88; B-20-88; B-2-84; B-12-82.

Moreover, we note that even though the Union's attorney determined that the Petitioner had no contractual right to an assignment in the borough of his choice, the Union succeeded in obtaining an assignment for him in the Bronx. We are therefore satisfied that the Union complied with its responsibility to the Petitioner, and that it represented the Petitioner's interests in good faith, despite the fact that it was unable to secure a position for him at his first choice worksite.

Accordingly, we find that the Petitioner has not established that the Union acted in an arbitrary, perfunctory or discriminatory manner when it refused to pursue his complaint in arbitration. We therefore hold the Petitioner has failed to demonstrate that the Union's conduct towards him constitutes a basis for a finding of improper public employee organization practice under the New York City Collective Bargaining Law, and we dismiss the instant improper practice petition in its entirety.

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 improper practice petition filed by Howard Bowers in the case docketed as BCB-1279-90 be, and the same hereby is, dismissed.

DATED: September 17, 1990
New York, N.Y.

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