City v. L.333, United Marine Division, et. al, 47 OCB 18 (BCB 1991) [Decision No. B-18-91 (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-18-91
Docket No. BCB-1277-90
(A-3373-90)

-and-

LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHORMEN'S ASSOCIATION, AFL-CIO,

Respondent.

DECISION AND ORDER

On April 27, 1990, the City of New York ("the City") appearing by its office of Labor Relations ("OLR") filed a petition challenging the arbitrability of a grievance initiated by Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO ("the Union") on behalf of Marine Oilers employed by the Department of Transportation ("grievants") . The Union filed an answer to the petition on July 20, 1990. The City filed its reply on August 16, 1990.

Background

In 1978, the Department of Transportation ("DOT") eliminated its steam ferries and introduced diesel ferries in their place. As a consequence of this changeover to diesel ferries, the positions and classifications of employees serving in the titles of Water Tenders and Marine Stokers were to be eliminated. The

Union proposed that the employees in these titles be permitted to take qualifying examinations for the Marine Oiler classification and, upon qualifying, to be placed in that classification. The DOT agreed to this proposal.

The City disputes the Union Is assertion that further agreement was reached concerning the calculation of the seniority of those employees who were reclassified into the Marine Oiler title. No writing has been produced which refers specifically to the issue of seniority.

In September, 1989, the DOT implemented changes in the seniority status of employees in the Marine oiler classification. The Union filed a grievance on October 14, 1989, challenging, inter alia, the seniority changes unilaterally made by DOT. In a decision dated April 26, 1990, an OLR review officer denied this part of the grievance. Thereafter, on December 27, 1989, the Union filed a request for arbitration, asserting that "job bid seniority [has been) changed after ten years," and seeking the remedy of "reinstatement of the seniority list that was in force from 1978 to 1989.” In its request, the Union does not state what provision of the parties' collective bargaining agreement allegedly has been violated.

POSITIONS OF THE PARTIES

City’s Position

The city maintains that it is under no obligation to arbitrate this matter since the Union has failed to cite a provision of the

collective bargaining agreement, agency rule or regulation that arguably is related to the grievance. Further, the City argues that the Union has failed to establish a nexus between the alleged "violation" consisting of the implementation of a change in the seniority list and any contractual provision, agency rule or regulation.

The City asserts that the challenged action is within the scope of its management right to exercise complete control and discretion over its organization under Section 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL"), which provides that:

> It is the right of the City ... to ... determine the standards of selection for employment; direct its employees ... ; determine the methods, means and personnel by which governmental operations are to be conducted ...; and exercise complete control and discretion over its organization ....

The City states that the Union has failed to indicate any provision which would limit the City's management right to exercise complete control and discretion over its organization and, therefore, it requests dismissal of the request for arbitration.

In its reply, the City argues, for the first time, that the Union's grievance regarding the seniority status of employees reclassified in 1978 is untimely and therefore, barred by the doctrine of laches. The City states that more than twelve years have passed since the reclassification and "at no point during that time did the Union negotiate any written policy or contractual

obligation with the City concerning the procedure for calculating seniority status of reclassified employees." Further, the City asserts that since no written understanding was reached on this issue, the City properly exercised its managerial rights to determine the employees' seniority status.

The City alleges that the Union has failed to establish the existence of a written policy which is arguably related to this grievance and that would provide a source for the right to proceed to arbitration. The City notes that the Union's allegation that the Department of Transportation ("DOT") failed to bargain in good faith over the seniority status of Marine Oilers can be raised only in an improper practice petition, pursuant to the NYCCBL, and not in a request for arbitration.

Union's Position

In its answer, the Union states that this grievance concerns arbitrary and unilateral action by DOT in changing the seniority status of certain Marine Oilers. The Union claims that DOT has violated Article VI, Section 1 of the parties' collective bargaining agreement ("Agreement") which states that:

> 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 shall not be subject to the Grievance Procedure or arbitration.

Section 2 of the same Article provides that a grievance, as defined by the contract, which is not resolved at the lower steps of the grievance procedure, may be submitted to impartial arbitration.

The Union further argues that DOT's action of unilaterally implementing changes in the seniority status of employees in the Marine Oiler classification is in violation of Article IV-A, Section 15 which provides, in relevant part, as follows:

> In the event that the Employer introduces newly designed vessels to the ferry service, the Employer agrees to negotiate with the Union wages and working conditions with respect to such newly designed vessel.

According to the Union, in 1978 the parties negotiated the issues surrounding DOT's changeover to diesel vessels and the resultant elimination of Water Tender and Marine Stoker positions, as well as the establishment of a qualifying examination for incumbents in those positions to seek reclassification to the position of Marine Oiler. The Union states that the parties agreed that "employees newly placed in the Marine Oiler position would have their seniority calculated from their date of entry into that position." The Union alleges that this agreement was approved and implemented by an order of the City Personnel Director, in Resolution 78-12, and that seniority was maintained in accordance with this agreement from 1978 through September 1989.

The Union states that DOT violated the 1978 negotiated agreement by unilaterally implementing changes in the seniority status of Marine Oilers in September 1989, and that this action has had an adverse effect on the seniority status of the majority of Marine Oilers. The Union contends that Article IV-A, Section 15 of the Agreement requires DOT to negotiate the 1978 reclassification of affected employees, including their seniority status, and that the parties did in fact negotiate this issue in 1978. Further, the Union notes that this provision of the Agreement has remained unchanged in successive agreements from 1978 to the present. The Union submits that DOT's violation of the 1978 agreement, which has been continued in effect through the provisions of Article IV-A, Section 15 of the Agreement, constitutes the basis of an arbitrable grievance. Accordingly, the Union requests that the petition challenging arbitrability be dismissed.

Discussion

We address initially the City's' belatedly-asserted claim that the Union's grievance regarding the seniority of employees reclassified in 1978 is barred by the doctrine of laches. We find that, contrary to the City's characterization, the grievance concerns the September 1989 change by DOT in the seniority of Marine Oilers, and not their reclassification in 1978. The Union

contends that the September 1989 changes were violative of an agreement made in 1978 and continued to the present date. The grievance challenging these changes was filed in October, 1989. It is clear that, regardless of the merit of the Union's claims, this grievance involves a current dispute, not a stale one, and therefore, we hold that the doctrine of laches has no application herein.

It is well established that in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies, 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.[1] In resolving this question, it is the Board's responsibility to ascertain whether an apparent relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. It is well settled that the precise scope of the obligation to arbitrate is defined in the Agreement and that we can neither create a duty to arbitrate where none exists nor enlarge a duty to arbitrate beyond the scope established by the parties.[2] In order to bring a matter to arbitration, the union, where challenged, is required to show that an arguable nexus exists between the matter in dispute and the

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[1] Decision Nos. B-27-89; B-65-88; B-28-82.

[2] Decision Nos. B-35-89; B-26-88; B-14-87; B-24-86.

scope of arbitrable issues defined by the parties' agreement.[3]

The City argues that the Union has failed to cite a provision of the Agreement, agency rule or regulation that arguably is related to this grievance. In fact, the Union did not cite a provision of the Agreement in its request for arbitration. However, it did cite a violation of Section IV-A, section 15 of the Agreement, and of a claimed written policy of the Department (allegedly evidenced by Personnel Director Resolution 78-12), in its Answer to the City's petition challenging arbitrability.

The Union states that when the Water Tender and Marine Stoker positions were eliminated, and the employees in those titles were permitted to take a qualifying examination for the purpose of being reclassified to the title of Marine Oiler, the parties agreed that the newly-reclassified Marine oilers would have their seniority calculated from their date of entry into that position. The Union alleges that this agreement was approved and implemented by an order of the New York City Personnel Director, in Resolution 78-12. The City disputes this, arguing that seniority for Marine oilers was not addressed in the Resolution of the Personnel Director.

In our view, a reading of the plain language of Resolution 78-12 fails to disclose any indication that that document was intended to deal with the subject of employee seniority. The Resolution contains four sections which implement the following

[3] Decision Nos. B-15-90; B-1-84; B-20-82.

civil service actions:

> 1. Earmarks the titles of Marine Stoker and Water Tender for present permanent incumbents or those on eligible or preferred lists only;
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> 2. Adds the title of Marine Oiler (Ferry Operations) to the classification of the Ferry Service;
>
> 3. Reclassifies, without examination or change in salary, persons in the title of Marine Oiler to the new title of Marine Oiler (Ferry operations); and
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> 4. Provides that incumbents in the titles of Marine Stoker and Water Tender may remain in their present positions, and that such persons also are eligible to take a reclassification examination for the title of Marine Oiler (Ferry Operations). It further provides that upon passing the examination, they will be appointed to the position of Marine Oiler (Ferry Operations) at the appropriate rate of pay-

There is no mention of the seniority of the reclassified employees, nor is there any indication that that issue was the subject of negotiations between the parties. We find that the Union has failed to demonstrate an arguable nexus between the language of Resolution 78-12 and the subject matter of its grievance.

Moreover, any reliance on the Personnel Director's Resolution as the basis for submitting this dispute to arbitration is misplaced, inasmuch as Article VI, Section 1(B) of the parties, Agreement expressly provides that,

> ...disputes involving the Rules and Regulations of the New York City Personnel Director shall not be subject to the Grievance Procedure or arbitration. (Emphasis supplied.)

In this regard, we take administrative notice of the fact that the definition of the term "regulation", set forth in Rule I of the Rules of the City Personnel Director, includes:

> a resolution of the city personnel director setting forth policy or procedures for the effectuation of the provisions of the civil service law . .. and the rules of the city personnel director ....[4]

Thus, a claimed violation of Resolution 78-12 of the Personnel Director is the equivalent of a claimed violation of a Regulation of the Personnel Director, which is a matter the parties expressly have placed outside the scope of their agreement to arbitrate. While the City has not expressly raised this point, we may not overlook it. Where a party relies upon a provision of the Agreement, that party, as well as this Board, is bound by all the terms of that provision, including any limitations or exclusions set forth therein. The exclusion contained in Article VI, Section 1 (B) of the Agreement is clear and must be given effect by this Board. Therefore, we find that even if the Union had established a nexus to Personnel Director Resolution 78-12, that document could not serve as the basis f or the submission to arbitration of the Union's claim herein.

The Union also contends that the action of DOT in changing the seniority of Marine Oilers in September, 1989, is violative of

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[4] It should be noted further that the Personnel Director's powers regarding the classification and reclassification of positions are set forth in Rule VII, Section III of the Personnel Director’s Rules, and that Resolution 78-12 effectuates an exercise of the Personnel Director's powers under that Rule.

Article IV-A, Section 15 of the Agreement, which provides:

> **In the event that the Employer introduces newly designed vessels to the ferry service, the Employer agrees to negotiate with the Union wages and working conditions with respect to such newly designed vessels.**

The Union notes that the above section has remained unchanged in successive collective bargaining agreements from 1978 to the present. The Union argues that pursuant to this section, the DOT was required to, and did, negotiate the reclassification of employees in 1978, due to the changeover from steam to diesel ferries; and that these negotiations included the subject of the seniority status of any affected employees. The Union asserts that a unilateral change in the seniority status of these employees constitutes both a breach of the agreement reached in 1978 and a violation of Article IV-A, Section 15 of the current Agreement, a matter which can be submitted to arbitration for determination.

It is not our function in this arbitrability proceeding to resolve the issues of whether the parties negotiated over seniority in 1978, and, if so, whether they reached an agreement. The focus of our inquiry is whether the Union has cited a provision of the current Agreement which bears an arguable nexus to the subject matter of the grievance. We are unable to find that such an arguable nexus exists between Article IV-A, Section 15 and the grievance herein.

Section 15 states that the Employer "agrees to negotiate" when newly designed vessels are introduced into the ferry service.

Here, a new class of vessels was introduced in 1978, and the DOT did negotiate at that time, according to the Union. The grievance concerning a change in seniority arose in September of 1989, eleven years later. The Union has not alleged that newly designed vessels were introduced in 1989, nor has it explained any other basis which would trigger the provisions of Section 15 at that time.

Article IV-A, Section 15, on its face, defines a circumstance which will give rise to an agreed-upon duty to bargain. It does not constitute a mechanism for enforcing any agreement reached as a result of bargaining commenced under its terms. The Union must look elsewhere to enforce the substance of such an agreement. However, the Union has not identified any provision of the Agreement or any written policy of the DOT which embodies the substance of the alleged agreement regarding employee seniority.[5] Therefore, its request for arbitration cannot be sustained.

Finally, with respect to the Union's allegation that the DOT failed to bargain in good faith over changes in the seniority

[5] We note that the Union's reliance on several of our decisions which it contends held arbitrable claimed violations of unwritten policy of an agency, is misplaced. Two of the cited decisions (Decision Nos. B-27-89 and B-36-88) involved unusual grievance definitions which included claimed violations of "existing policy" rather than only "written policy", as is the case under the Agreement herein. In the third cited decision (Decision No. B-27-84), a claimed violation of a written policy was found arbitrable, while a claimed violation of an unwritten "past practice" was barred from submission to the arbitrator. Moreover, in that decision, we held arbitrable claims concerning seniority rights because three separate separate Articles of the Agreement contained provisions relating to seniority. The Union in the present case has not identified any provision of the Agreement relating to seniority.

status of Marine Oilers, we agree with the City's contention that an allegation of failure to bargain in good faith must be brought before this Board in an improper practice petition pursuant to Section 12-306a(4)[6] of the NYCCBL. Such a claim is within the exclusive jurisdiction of this Board and is not arbitrable under the collective bargaining agreement.

For the reasons set forth above, we shall grant the City's petition challenging arbitrability in its entirety.

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[6] Section 12-306a(4) of the NYCCBL provides:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

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(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

DATED: New York, New York
March 26, 1991

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