City & NYPD v. Lieutenant's Benevolent Ass., 49 OCB 13 (BCB 1992) [Decision No. B-13-92 (Arb)]

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

-between-

DECISION NO. B-13-92

THE CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

DOCKET NO. BCB-1443-91 (A-3999-91)

Petitioner,

-and-

LIEUTENANT'S BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On December 13, 1991, the City of New York, appearing by its Office of Labor Relations ("the City") filed a petition challenging the arbitrability of a grievance brought by the Lieutenant's Benevolent Association ("the LBA"). The LBA had filed a request for arbitration on December 3, 1991. In its request, the Union stated that its grievance stemmed from the Department's decision to implement solo supervisory patrols for certain lieutenants "without regard to changes in demographics, crime patterns or statistics; precinct boundaries, procedure for dealing with emotionally disturbed persons, shifting of lieutenants from desk duty to platoon commanders, types of weapons used by perpetrators and related matters." The Union filed an answer to the City's petition on February 10, 1992. The City filed a reply on March 16, 1992.

BACKGROUND

This case is one in a series of eight recent actions brought by the LBA and another union, the Sergeant's Benevolent Association ("SBA"), in an attempt to prevent or forestall the Police Department from instituting solo supervisory patrols for its lieutenants and sergeants. The issue of solo patrols for supervisors has historical roots tracing back thirteen years.

In April of 1979, the Department issued an order that would have caused sergeants and lieutenants in specified precincts under certain "triggering" conditions to operate patrol vehicles by themselves.[1] As soon as the order was issued, the SBA filed an improper practice petition alleging that the plan would have a practical impact upon the safety of police sergeants. The LBA intervened on behalf of lieutenants, making the same claim.

Following an evidentiary hearing, this Board, in Decision No. B-6-79, held that the implementation of solo patrols for sergeants and lieutenants would have a practical impact upon their safety because of three specific deficiencies in the provisions of the order. The decision ordered the parties to attempt to alleviate these three areas of safety impact through prompt negotiations.

The negotiations did not produce an agreement, and a three-member impasse panel was appointed to take evidence and to issue a report and make recommendations for alleviating the safety impact. The panel issued its Report and Recommendations on October 3, 1980. On November 13, 1980, the SBA filed a new petition requesting clarification of certain of the panel's recommendations. The parties held settlement discussions during the next several months while the new petition was pending.

On April 15, 1981, by memorandum of agreement, the SBA and the City

[1] Operations Order Number 40, dated April 6, 1979.

agreed to modify several of the panel's recommendations.[2] On May 6, 1981, the LBA also signed the Sergeants' Memorandum of Agreement, thereby accepting it and agreeing to be bound by its terms. The provisions of the Memorandum of Agreement were incorporated into a series of SBA collective bargaining agreements with the City, including the most recent one. They were not, however, directly incorporated into the 1980-82 LBA collective bargaining agreement, nor were they incorporated into any subsequent LBA contract.

There is no evidence that Operations Order No. 40, as modified by the Sergeants' Memorandum of Agreement, was implemented during the ensuing decade. By letter dated November 7, 1990, however, the Department informed the SBA that it intended to implement solo supervisory patrols beginning in April of 1991. Both the LBA and the SBA met with the City on several occasions in this regard during November and December of 1990, but the discussions produced no results, other than agreement by the City to provide certain requested information.

On December 18, 1990, the SBA filed a scope of bargaining petition against the City, alleging that the City had refused to negotiate over the safety impact of the Department's announced plan to implement solo supervisory patrols. The LBA filed a similar petition against the City on January 11, 1991. The petitions contend that the circumstances concerning policing in New York City have changed since the parties adopted the Sergeants' Memorandum of Agreement in 1981. As a result, the Unions claim that the plan has become unsafe. The Unions also claim that they are entitled to share the cost savings that the plan allegedly would generate.

In Decision No. B-9-91, a consolidated interim decision and order issued on February 21, 1991, this Board ordered the scope of bargaining petitions held in abeyance pending consideration of the solo supervisory patrol program

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[2] "Memorandum of Agreement, On the Subject of Radio Motor Patrol, Between the Sergeants' Benevolent Association and the City of New York" [referred to hereinafter as "the Sergeants' Memorandum of Agreement."]

by the parties' Labor-Management Safety Committees. As directed, the parties held various joint safety committee meetings between February and September 1991. On September 11, 1991, however, the City informed the LBA and the SBA that the Department intended to implement solo supervisory patrols for the day shift, effective November 4, 1991, in fourteen of the precincts listed in Operations Order Number 40.

By letter dated September 17, 1991, the LBA submitted a grievance at Step III, asserting that the Department's announced action would violate Article I of the LBA Agreement,[3] the 1981 Sergeants' Memorandum of Agreement, and the 1980 Report and Recommendations of the impasse panel. The SBA already had filed a similar grievance on March 25, 1991, which was pending.

By letter dated November 18, 1991, the Police Commissioner denied the LBA's grievance, finding that "there has been no violation, misinterpretation or misapplication of the current collective bargaining agreement, nor has there been any violation, misinterpretation, or misapplication of the rules, regulations or procedures of the department." The Commissioner also held that there was no violation of the Sergeants' Memorandum of Agreement or of the impasse panel's Report and Recommendations.

Meanwhile, by letters dated September 25, 1991, the LBA and the SBA advised the Office of Collective Bargaining that the Labor-Management Safety Committees did not resolve the safety impact issues and asked that their scope of bargaining petitions be reactivated. Those cases have been assigned to a Trial

[3] Article I of the Agreement, the Union Recognition and Unit Designation clause reads, in pertinent part, as follows:

> Section 1.
>
> The City recognizes the Union as the sole and exclusive collective bargaining representative for the unit consisting of the employees of the New York City Police Department in the title of Lieutenant.

Examiner and await an evidentiary hearing.

At about the same time, the LBA filed an improper practice petition against the City, claiming that the City's intention to implement solo supervisory patrols without first bargaining over anticipated productivity gains was unlawful. Three weeks later, the SBA filed a similar petition, adding that the solo patrols would impact upon the safety of its members.

On October 30 and 31, 1991, the SBA and the LBA each brought an Article 78 proceeding against the Police Department, seeking to enjoin implementation of the solo supervisory patrol program pursuant to Section 7502.(c) of the Civil Practice Law and Rules.[4] In their Article 78 petitions, both Unions argued that

[4] CPLR §7502.(c) provides a means for obtaining a stay pending arbitration. It reads as follows:

> (c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with **an arbitrable controversy**, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. [Emphasis added.] The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

When a party seeks a provisional remedy under this section and the question of arbitrability is in issue, the court is required to make a finding as to arbitrability, a determination ordinarily within the original jurisdiction of this Board, pursuant to Section 12-309a.(3) of the New York City Collective Bargaining Law ("NYCCBL").

the issue of solo supervisory patrols was an arbitrable dispute. In moving to dismiss the LBA's petition, the City argued that the LBA had failed to state an arbitrable dispute.

On November 8, 1991, in a consolidated decision, Supreme Court Justice Sklar denied the LBA's application, holding that "the LBA has failed to present a colorable claim that it has an arbitrable grievance presently pending before the Board of Collective Bargaining."[5]

POSITIONS OF THE PARTIES

City's Position

The City contends that neither the impasse panel's 1980 Report and Recommendations nor the 1981 Sergeants' Memorandum of Agreement are subject to the parties' contractual grievance procedure. It supports this contention by pointing out that the Memorandum itself contains no dispute resolution mechanism, and that the LBA and the City have not otherwise incorporated it into their collective bargaining agreement, either in express terms or as a side letter. Similarly, the City notes that the impasse panel's Report and Recommendations have never been incorporated into the parties' contract. Therefore, according to the City, a claimed violation of either is not subject to arbitration.

Concerning the contract itself, the City argues that there is no nexus between the Recognition clause, which the LBA cites as one of its bases for arbitration, and the implementation of the solo supervisory patrol program. It contends that the Department has the statutory managerial authority to deploy police lieutenants as it sees fit, unless there exists an express contractual limitation to the contrary.[6] In a case where a nexus challenge involves a managerial right, the City claims that the Union bears a higher

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[5] Toal v. Brown, Index No. 29831/91 (N.Y. Sup. Ct. Nov. 8, 1991).

[6] Citing NYCCBL §12-207b., the statutory management rights clause.

burden of showing that "a substantial issue" under the collective bargaining agreement exists, than it would in an ordinary case where a mere prima facie relationship is sufficient to establish a nexus. In its view, the LBA's unsupported allegation that management's imposition of solo patrols interferes with, and/or adversely affects the Union's representational function as exclusive bargaining agent in violation of the Recognition clause, is insufficient to meet the Union's burden.

Pressing this argument one step further, the City urges that this Board relax the long-held "presumption of arbitrability" policy, in light of a United States Supreme Court decision[7] that assertedly reevaluated the arbitrability doctrine established by the Court in the Steelworkers Trilogy cases.[8] According to the City, AT&T Technologies deemphasized the presumption of arbitrability in favor of a more complete and comprehensive investigation of arbitrability disputes. The City claims that rather than rely on a presumption that the parties intended to arbitrate a particular dispute, the AT&T Technologies decision held that, due to the contractual nature of collective bargaining agreements, determinations of arbitrability should be made based on interpretations of substantive portions of the agreement to determine whether the parties intended to submit a particular dispute to an arbitrator. The City contends that this process is more closely associated with the investigation conducted by courts in contract disputes where there is no presumption, only the usual contract interpretation constraints. In the City's view, the only way this Board can guarantee that it is not expanding on that to which the parties have agreed, is to adopt the Supreme Court's contract analysis approach, and forego the "presumption of arbitrability" policy that it has used in the past.

The City next notes that the LBA commenced an Article 78 action in the

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[7] AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 121 LRRM 3329 (1986).

[8] See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2404 (1960).

New York Supreme Court in an attempt to prohibit the Department from instituting solo supervisory patrols. In that proceeding, the Court first determined that, in dealing with applications pursuant to CPLR §7502.(c), it had concurrent jurisdiction with this Board in deciding questions of arbitrability. It then ruled that the LBA lacked any arbitrable claim.[9] According to the City, because the LBA's arbitrability claim has been fully litigated and decided in a court of competent jurisdiction, the doctrines of res judicata and collateral estoppel allegedly require this Board to accept the court's decision without further review.

Finally, the City claims that the LBA violated the waiver provision of the NYCCBL[10] by filing a request for arbitration after having brought an Article 78 proceeding in which the claim was identical and the same remedy was sought. The City argues that the commencement of the Article 78 proceeding qualifies as an election of remedies concerning the alleged breach of contract. In its view, because the Union chose to pursue its claim in court as a breach of contract action, it should not be allowed to seek an arbitral remedy simultaneously before this Board.

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[9] In its Article 78 petition, the LBA asked the court to issue "a temporary restraining order and a preliminary injunction pending a determination by an arbitrator pursuant to C.P.L.R. §7502(c)." Under the provisions of this section, the court was required to determine whether an arbitrable controversy exists. (See note 4.)

[10] NYCCBL Section 12-312d., the statutory waiver provision, reads as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

Union's Position

The LBA contends that both the impasse panel's 1980 Report and Recommendations and the 1981 Sergeants' Memorandum of Agreement are part of the parties' contract, and therefore are subject to the contractual grievance procedure. The Union bases its contention upon the fact that this Board, in Decision No.
B-9-91, "clearly stated that these documents remained in effect, even absent actual incorporation into the LBA-City Agreement." Thus, according to the LBA, "[t]his Board absolutely believed that the Memorandum of agreement between the LBA and the City was still in effect and, as such, was an integral part of the overall contract."

With respect to the Recognition clause, the LBA argues that any action taken by the City that has an adverse impact on lieutenants' terms and conditions of employment effects its position as the bargaining representative. In the Union's view, the solo supervisory patrol program unquestionably has such an impact because the unilateral implementation of the patrols completely undermines its ability to represent its members adequately. This result assertedly establishes the nexus between the Recognition clause and the institution of the solo patrol program.

The LBA next argues that this Board has a well-established policy favoring arbitration as the selected means of deciding grievances. It contends that the City, in urging this Board to restrict the presumption of arbitrability policy, mischaracterized the holding of the Supreme Court in AT&T Technologies. According to the Union, the Court did not reevaluate or deemphasize the presumption of arbitrability doctrine. Instead, the Court assertedly reemphasized and repeated the principles necessary to decide arbitrability, which it set out years earlier in the Steelworkers Trilogy cases.

Concerning the City's managerial rights defense, the LBA counters that the statutory rights of management are not "unfettered," and employer cannot use this authority to supplant the terms of the collective bargaining

agreement. The Union maintains that the employer's action is reviewable whenever managerial rights infringe upon employees' contractual rights. In addition, the LBA contends that management may not use its prerogative in a way that "effectively erodes" the Union's position as exclusive bargaining representative.

Finally, the LBA denies that it waived its right to arbitration when it commenced an Article 78 proceeding. According to the Union, the resulting decision converted only one specific section of its petition into a breach of contract action; the initial question of whether the Sergeant's Memorandum of Agreement is a contract assertedly remains pending. In addition, the LBA claims that the decision does not consider the impasse panel Report as part of the contract. In the Union's view, the court decision was limited to one "small aspect" of its claim, and is insufficient to grant full and just relief.

In this same regard, the LBA maintains that the doctrine of res judicata does not apply because its Article 78 petition merely attempted to enjoin implementation of the solo supervisory patrol program until its pending grievance could be arbitrated. The Union argues that the court never reached the issue of arbitrability insofar as the NYCCBL is concerned: it merely "ruled against arbitrability for purposes of action under CPLR §7502." According to the LBA, the issue of arbitrability is within the sole purview of this Board. The Union contends that this Board has its own set of standards and precedents to be used in deciding issues of arbitrability, and it has sole jurisdiction to make a final decision whether parties have agreed to arbitrate certain issues under their contract.

DISCUSSION

In its Article 78 proceeding in state Supreme Court, the LBA sought a temporary restraining order and a preliminary injunction against the Police Department's announced intention to implement solo supervisory patrols. The Union's petition argued that it had "a substantial likelihood of success [in

arbitration] on the merits of the charges contained in [a] grievance" based upon the alleged violation the 1980 report of the impasse panel, the 1981 Sergeant's Memorandum of Agreement, and the parties' contractual Recognition clause. The parties each filed lengthy letter briefs and affirmations in support of their positions. These pleadings provided the court with a complete exposition of the meaning and status of these documents and contractual provisions.

On November 8, 1991, the court dismissed the LBA's petition on all grounds. With respect to the Recognition clause, the court said:

> [The Board of Collective Bargaining has held] that the grievant "has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated," specifically, whether the recognition clause is related to the subject of the Union's claim. The LBA has wholly failed to demonstrate how the recognition clause is related to the claim that the supervisory solo patrol was implemented without regard to changes in demographics, crime patterns, etc.

Similarly, the court gave no credence to the LBA's argument that the solo patrols violated the impasse panel report or the Sergeant's Memorandum of Agreement:

> [The City] asserts and the LBA does not deny that a collective bargaining agreement and any incorporated side agreements must be registered with the Financial Control Board and that such registered agreements represent a party's entire collective bargaining agreement. Respondents further note that the [Sergeant's Memorandum of Agreement] was never registered. The Respondents also assert that any claimed violation of the impasse panel report could not be a basis for arbitration since such report constitutes a final binding arbitration award within the meaning of CPLR article 75, ... and that enforcement of such award could only be sought in a court of competent jurisdiction and not by arbitration.
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> In light of the foregoing, it is clear that the LBA has failed to raise a colorable arbitrable grievance pursuant to Article 23 §1(a)(1) [definition of the term "grievance"] of its contract.

After finding that, in dealing with applications pursuant to CPLR §7502.(c), it had concurrent jurisdiction with this Board to rule on arbitrability, the court went on to make a determination that usually is left

to us.[11] In view of the court's decision, we are faced initially with the question of whether the doctrines of collateral estoppel or res judicata prevent us from reconsidering the arbitrability of the LBA's grievance.

The doctrine of res judicata is designed to put an end to a matter once duly decided by forbidding its relitigation. Collateral estoppel, on the other hand, is concerned with less than the whole case. It operates by scanning the first action and taking note of each issue decided in it. If the second action, though based upon a different cause of action, attempts to reintroduce the same issue, collateral estoppel intervenes to preclude its relitigation.[12] We have said that in order for an issue to be precluded by collateral estoppel, the issue must be: (1) identical with an issue in the prior action; (2) actually litigated and determined in the prior action; (3) necessary to the determination of the prior judgment.[13]

The LBA presented the court with three main issues: whether the impasse panel report, or the Sergeant's Memorandum of Agreement, or the parties' Recognition clause could form the basis for an arbitrable grievance. Ruling against the LBA, the court found that the Union did not raise a colorable claim on any of these three grounds.

In these circumstances, we find that there has been a final judgment on issues identical with those being raised by the LBA in this case, and that

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[11] Under the provisions of CPLR Section 7502.(c), the court was required to determine whether an arbitrable controversy exists, a determination ordinarily within the original jurisdiction of this Board. (See note 4.)

[12] See Siegel, New York Practice, §§442-475 (West, 1991). See also Fish v. Vanderlip, 218 N.Y. 29, 37, 112 N.E. 425 (Ct.App. 1916), where the Court said:

> Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.

[13] Decision Nos. B-65-88; B-22-86; and B-3-86.

these issues were necessary to the determination of the matter before the court. The doctrine of collateral estoppel thus precludes us from reconsidering the arbitrability of the LBA's grievance alleging that the solo supervisory patrol program violates either the impasse panel report, or the Sergeant's Memorandum of Agreement, or the parties' Recognition clause. Therefore, we need not consider the City's waiver argument or its interpretation of the U.S. Supreme Court's decision in AT&T Technologies.

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-1443-91, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the Lieutenant's Benevolent Association is denied.

DATED: New York, N.Y.
April 30, 1992

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER