City v. UFA, 49 OCB 18 (BCB 1992) [Decision No. B-18-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
The City of New York,

Petitioner,

-and-

Uniformed Firefighters Association
of Greater New York,

Respondent.

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Decision No. B-18-92

Docket No. BCB-1321-90
(A-3547-90)

DECISION AND ORDER

The City of New York, by its office of Labor Relations ("the City") filed a petition on September 10, 1990 challenging the arbitrability of a grievance submitted by the Uniformed Firefighters Association of Greater New York ("the Union"). The grievance alleges a violation of a policy directive issued by the Fire Department ("the Department") and the collective bargaining agreement. The Union filed an answer on October 26, 1990. The City filed a reply on November 7, 1990.

Background

In December, 1989, the Board of Collective Bargaining issued Decision No. B-70-89, in which it determined that the City's plans to reduce minimum staffing in some engine companies from five-person to four-person crews had not been shown to have a practical impact on employee safety or workload within the meaning of the NYCCBL. The Board dismissed the Union's petition

asking that the City be directed to bargain concerning those plans, and stated:

> The Board takes note of a communication addressed to its hearing officer,[1] well after the close of the hearing in this case, and of the Union's objections to this belated submission. We have decided to accept this submission because it represents a modification of the City's roster manning proposal which apparently gives greater assurance that personnel shortages will not interfere with achieving the manning level the City had projected.
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> In essence, the City has now guaranteed every firefighter in its employ (except during the first six months of probationary status or during final leave) ninety-six hours of overtime opportunities annually for which the authorized budgetary headcount will be reduced to 8896. The scheduling of overtime for each active firefighter will focus on periods of predictably low availability, thus assuring the presence of additional manpower precisely when personnel

[1] The communication is a letter dated November 28, 1989, from Robert Linn, then Director of the City's Office of Municipal Labor Relations, to Prof. Walter Gellhorn, the Trial Examiner appointed by the Board to hear testimony in the case. The letter stated that the City had decided to modify its Roster Manning Proposal by guaranteeing "96 hours of overtime opportunities" to all firefighters, thus enabling the Department to reduce headcount while addressing the UFA's concerns regarding workload and safety. The City said that the Fire Department "intends to schedule the 96 ours of overtime for each active firefighter at the times that the roster manning model predicts low availability." It added that, "the additional pay each active firefighter will receive from the 96 hours of overtime will adequately compensate them for the overtime pay [they] may lose as a result of the implementation of the original roster manning program." The modified plan proposed by the City was as follows:

> > The 96 hours of overtime will be worked according to a schedule established by the Department and must be actually worked by each eligible firefighter to receive the overtime compensation. Mutual exchanges of these overtime tours will only be permitted where the exchange is completed within seven days of the scheduled overtime tour. Full duty firefighters will be assigned to overtime on the backstep and light firefighters to administrative overtime. The Department may, at is discretion, schedule the overtime during low availability periods.

> gaps might otherwise have aroused fresh concern about the workload or safety of firefighters on the "backstep."
>
> The City's revised proposal confirms and reinforces this Board's conclusion that the roster manning program and its constituent elements ... are not demonstrably likely to magnify the dangers or the work burdens inherent in firefighting and ... may be made operative managerially rather than as a product of negotiation. The City's overtime guarantee, though unilaterally given, and the finite reduction in headcount are regarded by this Board as elements of the record.... We wish to emphasize that our decision is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future. [Emphasis in the original.]

On January 25, 1990, the Department issued a policy directive ("PA/ID 90") entitled "Roster Manning Scheduled Overtime" which provides a schedule of "overtime opportunities" for firefighters. Specifically, PA/ID 90 provides that each firefighter will be offered 96 hours of overtime each year, scheduled in groups by tours and vacation numbers. The policy requires a firefighter who cannot work a scheduled overtime tour to forfeit the opportunity, but firefighters may make mutual exchanges of scheduled overtime tours. If a firefighter declines an overtime opportunity without arranging for a mutual exchange, the forfeiture is reported to the Department's office of Manpower Assignments, and the total hours forfeited are subtracted from the firefighter's yearly total of overtime opportunities.

On August 2, 1990, the Department's hearing officer issued a decision at Step III denying a grievance brought by the Union.[2] According to the text of the Step III decision, the Union argued that 96 hours of overtime was guaranteed to firefighters, and that PA/ID 90 violated the collective bargaining agreement, while the Department argued that only the opportunity to work 96 hours of overtime was guaranteed. on August 14, 1990, the Union filed a Request for Arbitration under Article XX of the collective bargaining agreement,[3] alleging a violation of "PA/ID 90 and the Collective Bargaining Agreement."

Positions of the Parties

City's Petition

The City argues that the Union has shown no basis for arbitration in the instant case because it has failed to cite a contract provision, rule or regulation which it claims has been violated by PA/ID 90. It maintains that the Union has not shown that the subject matter of the grievance is arguably related to

[2] A copy of the original grievance was not made part of the record by the parties.

[3] Article XX of the collective bargaining agreement provides, in relevant part:

Section 1.

A grievance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.

any provision of the contract. The City notes that a party may be required to submit to arbitration only to the extent that it has previously agreed to do so, and that the Board may not create a duty to arbitrate where none exists.

Union's Answer

The Union argues that in the process of collective bargaining, "the physical document of the agreement is engrafted" with the regulations or existing policy of the Fire Department affecting terms and conditions of employment and with the decisions of this Board. The Union contends that the previous decision of the Board concerning safety impact constitutes an arbitration award which became engrafted onto the collective bargaining agreement. It argues that the instant grievance arises from the language of Decision No. B-70-89, in which the Board cited the City's guarantee of 96 hours of overtime opportunities for firefighters each year, and asserts that PA/ID 90 is inconsistent with the decision in that case.

City's Reply

The City states that the collective bargaining agreement defines a grievance to include a claimed violation of the provisions of the contract or existing policy or regulations of the Department affecting terms and conditions of employment. It argues that "dicta" from a decision of the Board quoting a statement of the City, submitted after the close of a hearing,

cannot be construed to constitute a grievance. Further, it maintains, the Union has not argued that such a statement by the City represents a policy or regulation.

The City notes that the Union has cited no authority for its assertion that language contained in a decision of the Board becomes part of the collective bargaining agreement. It contends that if the Board accepts the Union's assertion, any statement by a party made during a proceeding would have the binding effect of a collective bargaining agreement on the parties, and that this would have a chilling effect on the hearing process.

Discussion

In considering challenges to arbitrability, we must first determine whether the parties have obligated themselves to arbitrate grievances and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[4] Where challenged by the City to do so, the burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[5]

The parties have included a grievance procedure in their contract that culminates in binding arbitration, and have defined arbitrable grievances.[6] In the instant matter, there is no

[4] See, e.g., Decision Nos. B-55-91; B-58-90; B-19-89; B-65-88.

[5] Decision Nos. B-58-90; B-1-89; B-7-81.

[6] See, note 3, supra.

dispute that the parties have agreed to arbitrate a complaint arising out of a claimed violation of the contract or existing policy or regulations of the Department. The City contends, however, that the Union has not identified any agreement between the parties which has been violated. In response, the Union argues that the alleged "overtime guarantee" has become part of the collective bargaining agreement by virtue of having been discussed in a previous Board decision.

To determine that a claimed violation of the collective bargaining agreement constitutes an arbitrable grievance, we must find that the agreement provides an arguable basis for the Union's claim.[7] Here, the Union has failed to allege facts showing that the disputed departmental procedure violates any provision of the contract. In this regard, we reject the Union's contention that a decision of this Board, or evidence referred to therein, becomes a part of the parties' collective bargaining agreement.

If the Union is claiming that the Department's method of instituting its policy concerning overtime violates an independent agreement between the parties, then that claim must also fail. The grievance claims a violation of an "overtime guarantee" proposed by the City in a letter to the Board in a practical impact case. There is no record of an agreement between the parties on this issue. Although we have found

[7] Decision Nos. B-30-89; B-67-88; B-8-82; B-15=80.

grievances arbitrable where they were based on letters of agreement between the parties, there is no basis to support such a finding in this case.

We find that the Union has failed to establish a nexus between the instant grievance and any source of a right to submit the dispute to arbitration. Accordingly, the Union's request for arbitration is denied. We note, however, that if the Union believes that the overtime procedure contained in PA/ID 90 has diminished the overtime guarantee presented to the Board in the earlier practical impact case, it may seek to offer evidence to support that allegation to the Trial Examiner in the current practical impact case concerning roster staffing.[8]

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 be, and the same hereby is, granted; and it is further

[8] Docket No. BCB-1265-90.

ORDERED, that the Request for Arbitration filed by the Uniformed Firefighters Association of Greater Now York be, and the same hereby is, denied.

Dated: New York, New York
April 30, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER