City, DOT v. District No. 1--MEBA/NMU, 49 OCB 24 (BCB 1992)
[Decision No. B-24-92 (Arb)]

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

-between-

DECISION NO. B-24-92
DOCKET NO. BCB-1418-91
(A-3792-91)

CITY OF NEW YORK - DEPARTMENT OF TRANSPORTATION

Petitioners,

-and-

DISTRICT NO. 1--MEBA/NMU, AFL-CIO

Respondent.
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DECISION AND ORDER

On August 30, 1991, the Department of Transportation ("DOT" or "the Department") and the City of New York ("the City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance submitted by the District No. 1--MEBA/NMU, AFL-CIO ("MEBA" or "the Union"). On October 4, 1991, the Union submitted an answer accompanied by a brief in opposition to the petition. On November 14, 1991, the City filed a reply.

Background

On April 24, 1991, MEBA filed a Step III grievance with DOT, on behalf of the Licensed Ferry Boat Officers for the Staten

Island Ferry, alleging that "Run 5"[1] of the Department's 1991 Bid Board violates Article V, Section 1[2] and Article XIV, Section 6[3] of the parties' collective bargaining agreement. The Union further alleged that the 1991 Bid Board violates "long-standing

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[1] "Run 5" of the Bid Board provides:

RUN	TOUR		REMARKS
5	10:30 P.M. x 6:30 A.M.	Tuesday through Saturday	Unlicensed personnel are on a rotating watch schedule.
	11 P.M. x 7 A.M.	Sunday and Monday	Licensed officers will work the following schedule: A- Mon./Thurs. B- Fri./Sun. Mon.- to be assigned to A.M. or P.M. tours at discretion of the Personnel Office.

[2] Article V, Section 1 of the parties' collective bargaining agreement provides:

> The rates prescribed in Article IV of this Agreement shall constitute compensation in full for the regular work week for the operation of ferryboats as practiced in various agencies; that is, four (4) eight-hour (8) tours per week which shall be consecutive, and 207 eight-hour (8) days per annum of which 198 eight-hour (8) days are work days (representing 1484 hours work at straight time pay plus 100 hours worked at overtime pay), and nine (9) eight-hour days are paid holidays (representing 72 hours) of holiday pay at straight time.

[3] Article XIV, Section 6 of the parties' collective bargaining agreement provides:

> Per annum Licensed Officers shall have the right to bid for jobs on the basis of seniority. Such bid will be permanent for one year.
>
> Changes may be made before the expiration of the year by mutual consent of the Licensed Officers, subject to prior approval by the Employer. Such approval shall not be unreasonably withheld.

past practice" and the status quo provision of the NYCCBL,[4] since the Union is currently in the process of negotiating with the Department.

The Step III decision rendered in this case characterizes the grievance as follows: The Union initially pointed out that Article V, Section 1 of the contract provides for four eight-hour tours which must be scheduled consecutively. The Union contended

[4] Section 12-311d of the NYCCBL, the status quo provision, provides:

> During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or impasse panel is appointed.

that under the 1990 Bid Board, an acceptable "Run 5"[5] schedule would be as follows:

Thursday 10:30 P.M. - Friday 6:30 A.M.
Friday 10:30 P.M. - Saturday 6:30 A.M.
Saturday 10:30 P.M. - Sunday 6:30 A.M.
Sunday 10:30 P.M. - Monday 6:30 A.M.

The Union argued that the 1991 Bid Board, on the other hand, contains language referring to an "A.M." or "P.M." tour on Monday which would enable the Department to schedule an employee's fourth tour to begin sometime on Monday rather than on Sunday at 10:30 P.M. Therefore, the Union argued, an employee could conceivably have to work into Tuesday morning in violation of the contract; such a schedule would consist of four eight-hour tours in five days, Friday - Tuesday, rather than in four days or "consecutively" as the contract requires. The Department disagreed with this contention, arguing that an employee whose workweek begins on Thursday at 10:30 p.m. would not be assigned a final tour to begin later than 4:00 p.m. on Monday and would therefore not be required to work into Tuesday. According to the Department, schedules requiring an employee to begin the final tour on Monday at 4:00 p.m. would not violate past practice since such schedules had been followed prior to 1991.

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[5] The 1990 Bid Board provided, in relevant part:

#5 RUN

Boat will run: 10:30 P.M. x 6:30 A.M. Steady Watches- Rotating Days off. Licensed Personnel - Steady Watches - Steady days off...This run works 11 P.M. to 7 A.M. on Saturday and Sunday nights.

On June 3, 1991, the Step III grievance was denied. By letter dated June 10, 1991, the Union notified OLR that the Step III decision contained errors and omissions. The Union took exception to the following statement found in the decision:

> [The Department's representative] stated that a tour beginning at 10:30 p.m. on Thursday and concluding on Friday at 6:30 a.m. is considered a Friday tour since the major portion of the tour occurs on Friday. (There was no dispute on the part of the Union concerning this issue.)

According to the Union, the parties are not in agreement on this issue. Furthermore, the Union contends, the decision omitted its claim that the 1991 Bid Board could even create a six day workweek. Additionally, the Union maintained that the decision made no mention of evidence presented at the hearing which clearly demonstrated the existence of past practice.

No satisfactory resolution of the dispute having been reached, on June 21, 1991, the Union filed a request for arbitration reiterating the grievance as it was stated at Step III and citing the same contractual and statutory provisions. As a remedy, the Union seeks an order directing the City to "stop violating the Agreement and leave the 1990 Bid Board wording for "Run 5" the same in 1991."

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City argues that an alleged violation of the status quo provision of the

NYCCBL is not an arbitrable claim. The City maintains that the Board of Collective Bargaining has exclusive jurisdiction under the Taylor Law in addressing violations of the NYCCBL. Moreover, the City argues, the collective bargaining agreement itself limits the arbitrator's authority to the terms of the agreement. Accordingly, the City argues, alleged violations of the status quo provision cannot be submitted to an arbitrator. As to the Union's argument that it should be permitted to arbitrate this issue on equitable grounds, the City contends that the Board cannot, for any reason, confer its exclusive jurisdiction in this area upon an arbitrator.

Addressing the Union's claim that "Run 5" of the 1991 Bid Board violated "long standing past practice," the City argues that past practice or unwritten policy is not sufficient to form a basis for an arbitrable grievance where, as in the instant case, the parties' collective bargaining agreement defines the term "grievance" narrowly to include only a claimed violation of "rules or regulations, written policy or orders of the employer [emphasis added]."[6] Furthermore, the City argues, the fact that

[6] Article XV, Section 1 of the collective bargaining agreement provides, in relevant part:

> Section 1 - Definition
> The term grievance shall mean:
> 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...

the alleged past practice is "long-standing" is irrelevant since the Board has held that the mere passage of time does not convert past practice into a "rule or regulation, written policy or order" as defined by the parties' agreement.

The City argues that the Union has failed to establish a nexus between the grievance and Article XIV, Section 6. According to the City, Article XIV, Section 6 provides that once the Bid Board for the year has been posted by the employer, licensed officers shall bid assignments on the basis of seniority; it does not address the structure of the available assignments. The City argues that the Union has failed to allege that the job bidding by licensed officers will not comply with the order of seniority.

With respect to Article V, Section 1, the City contends that the Union has failed to present an arbitrable claim in that the issue presented in the request for arbitration is not ripe. The City maintains that the issue in the instant case is hypothetical; the Union has failed to allege that any licensed officer has been affected by the posting of the Bid Board. According to the City, the definition of the term "grievance" found in the collective bargaining agreement refers to actual violations of the agreement; it does not include hypothetical questions. Moreover, the City contends, "the parties should not seek an advisory opinion at a Step IV grievance level from an arbitrator."

Addressing the Union's argument that the City waived its right to challenge arbitrability because it did not raise the issue during the lower steps of the grievance procedure, the City argues that this is contrary to prior Board holdings. In fact, the City argues, it can only raise its challenge after a request for arbitration has been filed by the Union.

Finally, the City argues that, contrary to the Union's assertion, its petition challenging arbitrability is not untimely. According to the City, it had until August 30, 1991 to file the petition and the petition was filed on that date. The City notes that the four month statute of limitations applicable to improper practice petitions does not apply to petitions challenging arbitrability.

Union's Position

The Union argues that the City has waived its right to challenge arbitrability because it failed to raise the issue during the steps of the grievance procedure. In fact, the Union argues, the City explicitly agreed that this matter should be submitted to arbitration.[7]

[7] As evidence of this assertion the Union submitted a Step III grievance letter, dated April 24, 1991, from Union Director James LaRiviere to James Hanley, Commissioner, Office of Labor Relations, which outlined the grievance and stated, in relevant part:

(continued...)

As to the City's argument that alleged violations of the status quo provision cannot be submitted to an arbitrator, the Union maintains that the City should be estopped from taking this position on equitable grounds. The Union contends that it did not file an improper practice petition concerning the status quo provision during the four month limitation period, as required by §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), because the City's actions "lulled" it into believing that all of the issues that were raised during the grievance steps could be resolved in arbitration. Specifically, the Union maintains during the four month period the City never asserted that the Union could not raise the status quo issue in arbitration; instead, it suggested arbitration as a means of resolving the dispute. Significantly, the Union contends, the City waited until an improper practice petition would be untimely before it filed its petition challenging arbitrability.

The Union contends that where, as in the instant case, an alleged violation of the status quo provision could also be subject to the contractual grievance/arbitration provision, the Board should defer to the contractual procedure.

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[7](...continued)
The Union met with Mr. Michael McDonald, Mr. E. Castillo and Captain Gooden to resolve this grievance. Mr. McDonald suggested this step III grievance and arbitration if needed.

According to the Union, past practice in the instant case illustrates the parties' common interpretation of the contractual provisions in question. Therefore, the Union contends, the City cannot remove past practice from the arbitrator's consideration. The Union further argues that "to the extent that written policy is required, it exists in the collective bargaining agreement."

The Union asserts that the two cited provisions, Article V, Section 1 and Article XIV, Section, must be read together. According to the Union, Article XIV, Section 6 requires that there be an annual Bid Board for all unit positions, while Article V, Section 1 establishes the workweek which should be reflected in the schedules to be bid. As to the ripeness issue raised by the City, the Union contends that the City violated both of these provisions when it placed language in the Bid Board which would lead to the infringement of the contractual workweek. The Union contends that this action informed the unit members that some of them would have to bid for tours which are not in conformity with the contract. The Union argues that the employees should not have to wait until they are forced to suffer the consequences of that violation before proceeding to arbitration.

In any event, the Union argues, City's petition should be dismissed as untimely. The Union notes that §7.3 of the OCB Rules, which addresses the Board's jurisdiction over arbitrability cases, contains no period of limitations.

Therefore, the Union contends, the Board should look to the "most clearly analogous" limitations period, i.e., the 4 month period found in §7.4 of the OCB Rules. The Union argues that the petition challenging arbitrability was filed on August 30, 1991, more than four months after the Step III grievance letter was filed on April 24, 1991.

DISCUSSION

As a preliminary matter, we find that, contrary to the Union's assertion, the City's petition challenging arbitrability is not untimely. The Union is incorrect in its contention that the four-month limitation period found in §7.4 of the OCB Rules applies, or should apply, to petitions challenging arbitrability. While neither the OCB Rules nor the NYCCBL contain a period of limitations applicable to petitions challenging arbitrability, §6.4 of the OCB Rules provides that a request for arbitration may contain a notice stating that a petition challenging arbitrability must be filed within 10 days. The request for arbitration in the instant case contained such a 10 day notice. The Union filed its request for arbitration on June 20, 1991, thereby requiring the City to file its petition by June 30, 1991.

However, the City requested several extensions ultimately extending its time to answer until August 30, 1991.[8]

The Union's argument that the City waived its right to challenge arbitrability because it failed to raise the issue during the steps of the grievance procedure is also inaccurate. It is well-established that challenges to arbitrability are properly raised when the union files a request for arbitration; participation in the initial steps of the grievance procedure does not estop a party from asserting an objection to arbitration when the request for arbitration is filed.[9]

It is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of disputes.[10] We cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[11] In determining questions of arbitrability, it is the function of this Board to decide

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[8] Most of the requests for extensions of time were expressly consented to by the Union. The last of these requests, which was not consented to by the Union, was filed on August 27, 1991 seeking an extension until August 30, 1991. The City explained in this request that it was unable to contact the Union's representative for consent. Given the Union's history of consenting to extensions, the City had no reason to believe that the Union would not consent to a further extension of only three days.

[9] Decision Nos. B-24-84; B-19-83; B-20-79; B-8-74.

[10] See NYCCBL §12-302

[11] Decision Nos. B-60-91; B-31-90; B-11-90; B-10-90; B-49-89; B-35-89; B-41-82.

whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the controversy at issue is within the scope of that obligation.[12]

With respect to the Union's claim that the City has violated Article V, Section 1 and Article XIV, Section 6 of the contract, we note that the parties do not dispute that a claimed violation of these provisions is within the scope of their agreement to arbitrate. The City argues, however, that the Union has failed to establish the requisite nexus between Article XIV, Section 6 and the complained of act because this provision does not address the structure of the assignments. As to the claimed violation of Article V, Section 1, the City contends that because there is no allegation that any employee has been forced to work four tours in five days, the dispute is not ripe for arbitration.

It is well-settled that when challenged, a union must establish a nexus between the act complained of and the contract provisions it claims have been breached.[13] Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to decide the applicability of the cited provisions.[14] Here, the Union argues that the cited provisions must be read together; Article XIV, Section 6 requires

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[12] Decision Nos. B-31-90; B-6-88.

[13] Decision Nos. B-29-91; B-2-91; B-41-90; B-10-90; B-27-89.

[14] Decision Nos. B-46-91; B-29-89; B-54-90; B-11-90.

that there be an annual Bid Board for all unit positions, while Article V, Section 1 establishes limitations on the workweek which should be reflected in the schedules to be bid. The Union's claim is not patently unreasonable; it represents an arguable interpretation of the cited provisions, the merits of which must be judged by an arbitrator. We therefore find that there is an arguable relationship between the Union's claim and the cited provisions of the contract.

As to the City's ripeness argument, we find that, as the Union correctly maintains, the City arguably violated both of the cited provisions when it placed language in the Bid Board which could lead to the infringement of the contractual workweek. In other words, the arguable violation occurred when the Department posted a Bid Board which granted it discretion to assign four tours in more than four days. The fact that the bid board was posted renders the dispute ripe for submission to an arbitrator since unit employees at that point were required to either bid for (and thus consent to) assignments pursuant to the Bid Board structure or protest the Bid Board, as they do here.

The Union also seeks to arbitrate its claim that the City violated the status quo provision of the NYCCBL. As the City correctly contends, pursuant to Section 205.5(d) of the Taylor Law, the Board of Collective Bargaining has exclusive non-delegable jurisdiction to hear and resolve improper practices

arising in New York City.[15] Where, as in the instant case, the resolution of an alleged violation of the status quo provision rests on the interpretation and application of contract provisions, this Board has considered it appropriate to defer to the contractual grievance arbitration procedure.[16] However, in such a case the scope of the arbitrator's inquiry is limited to the question of whether the contract has been violated; the arbitrator may not consider whether the status quo provision of the statute has been violated as well.[17] Thus, even had the Union filed an improper practice petition, and had we deferred consideration of the matter to arbitration, the arbitrator would not have been permitted to reach the question of an alleged violation of the statutory status quo provision. Notwithstanding this, the Union contends that it should be permitted to take its status quo claim to arbitration because the City's actions "lulled" it into believing that all of the issues that were raised during the grievance steps could be resolved in arbitration. To so hold would be to relieve the Union of its

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[15] Decision No. B-57-87.

[16] Decision Nos. B-57-87; B-10-85; B-1-72.

[17] Decision No. B-12-75.

obligation to inquire as to the means necessary to preserve its rights.[18]

In its request for arbitration, the Union's statement of the grievance to be arbitrated includes an alleged violation of "long standing" past practice. In its answer to the petition challenging arbitrability, the Union argues that the City cannot remove past practice from the arbitrator's consideration. Thus, it is unclear whether the Union is citing past practice as a basis for arbitration or whether it simply wishes to introduce past practice as evidence in an arbitration hearing.

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 past practice is within the scope of the definition of the term "grievance" which is set forth in the parties' agreement.[19] 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, an alleged violation of past practice is not included within this definition. Furthermore, the mere passage of time does not convert a past practice into a rule, regulation, written policy

[18] Decision No. B-3-91.

[19] Decision Nos. B-20-90; B-35-89; B-11-88; B-27-84.

or order.[20] Therefore, we hold that an alleged violation of past practice may not serve as an independent basis for arbitration in the instant case. However, if the Union believes that past practice will help to clarify the parties' intent as to Article V, Section I and Article XIV, Section 6, it may seek to offer this as evidence before an arbitrator.

[20] Decision Nos. B-43-88; B-23-83.

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 City's petition challenging arbitrability as to claimed violations of the status quo provision of the NYCCBL and past practice be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration as to Article V, Section 1 and Article XIV, Section 6 of the parties' collective bargaining agreement be, and the same hereby is, granted.

DATED: New York, New York
May 19,1992

Malcolm D. MacDonald
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Jerome Joseph
MEMBER

Thomas J. Giblin
MEMBER

George B. Daniels
MEMBER

Dean L. Silverberg
MEMBER