City & Dep't of Homeless Ser. v. L.246, SEIU, 53 OCB 30 (BCB 1994) [Decision No. B-30-94 (Arb)]

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

- between -

City of New York and Department of Homeless Services,

Petitioners,

Decision No. B-30-94
Docket No. BCB-1673-94
(A-5610-94)

- and -

New York City Local 246, Service Employees International Union, AFL-CIO,

Respondent.
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DECISION AND ORDER

On July 6, 1994, New York City Local 246, Service Employees International Union, AFL-CIO ("the Union") filed a grievance on behalf of Robert P. Waytowich and Sheet Metal Workers ("grievants") employed by the Department of Homeless Services ("the Department") alleging that the Department had assigned to Carpenters work that is "within the jurisdiction and job description" of the grievants. According to the Union, this

action violates Article VI, § 1(c)[1] of the collective bargaining agreement between the parties.

On August 2, 1994, the City, by its Office of Labor Relations, filed a petition challenging the arbitrability of the grievance. The Union requested, and was granted, extensions of time in which to file an answer, which was filed on September 16, 1994. The City requested, and was granted, an extension of time in which to file a reply, which was filed on October 1, 1994.

Background

On March 7, 1994, Robert Waytowich, a Supervisor of Sheet Metal Workers, filed a grievance at Step I of the grievance and arbitration procedure. It alleged:

> This dispute is about the right of sheet metal workers to install all metal material in connection with the supply and discharge of air. Apparently, carpenters at HRA believe that when they build a typical HRA office area dividing wall (9' - approx. 8' height of studs & sheetrock and just studs and open area for approx. 1' on top), there is no clear reason for the 1' open area at the top. However, this typical wall design at HRA was designed as a shortcut means to provide ventilation in the newly created areas that, otherwise, would have no ventilation unless the proper alteration to the HVAC system was done by sheet metal workers prior to the walls being built. Since the placement of expanded metal on the top of these walls is for the sole purpose

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[1] Article VI of the collective bargaining agreement ("Grievance Procedure") provides, in relevant part:

> Section 1.
> DEFINITION: The term "grievance" shall mean:
> * * *
> (c) A claimed assignment of employees to duties substantially different from those stated in their job specifications;....

> of providing some form of ventilation, the expanded metal should be installed by sheet metal workers; not other trades.

As a remedy, the grievant sought that the agency "[e]stablish policy for this work with sheet metal workers doing their contractually defined work with regard to this matter of installation of air transfer screens between the top of the walls and the bottom of ceilings." Attached to the grievance were photocopies of two pages of the collective bargaining agreement between Local 28 of the Sheet Metal Workers International Association and a private employer.

The Union advanced the grievance to Step II on April 29, 1994, claiming that:

> [h]aving the carpenters install metal grillwork fabricated by Sheet Metal Workers for purpose of ventilation and air transfer, which the Sheet Metal Workers have installed in the past is a violation, misinterpretation or misapplication of the rules, regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting the terms and conditions of employment, Article VI, Grievance Procedure, Section [1](b).[2]

When the grievance was not resolved at Step II, the Union advanced it to Step III. By letter dated June 15, 1994, the OLR

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[2] Article VI of the collective bargaining agreement provides, in relevant part:

> Section 1.
> DEFINITION: The term "grievance" shall include:
> * * *
> (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 terms and conditions of employment....

hearing officer denied the Union's request for a Step III conference on the grounds that "there is no contractual provision within any agreement covering Sheet Metal Workers which grants the Union the right to file a 'grievance' concerning employees in titles outside of the bargaining unit who are allegedly performing duties of employees covered therein i.e. reverse out-of-title duties."

The Union filed a request for arbitration on July 6, 1994, alleging that the Department had assigned to Carpenters at the Department work that is "within the jurisdiction and job description" of the grievants. As a remedy, it seeks that the City "cease and desist from assigning Carpenters work that is within the job description and jurisdiction of Sheet Metal Workers."

Positions of the Parties

City's Position

The City argues that the Union has failed to show an arguable relationship between the act complained of and Article VI, § 1(c) of the contract because the Union has not shown that the provision has been violated as to its members, the Sheet Metal Workers. It maintains that the grievance constitutes a "reverse out-of-title" claim which is not within the grievance procedures set forth in the contract between the parties. It cites Decision No. B-10-92 for the proposition that, when the

parties specifically define the term "employee" to include only bargaining unit members, a claim that the work of bargaining unit members has been assigned to non-unit employees does not fall within the parties' agreement to arbitrate. Furthermore, the City argues, the Union lacks standing to bring the instant grievance on behalf of employees it does not represent, such as Carpenters.

In its reply, the City maintains that the Union raised a new claim in its answer when it asserted that the grievance concerns a violation of Department policy rather than an out-of-title claim. It argues that the grievance considered at the lower steps of the grievance procedure was defined by the Union as an out-of-title claim, and that the instant request for arbitration should, therefore, be dismissed in its entirety.

Union's Position

The Union claims that it is the past practice of the Department to assign Sheet Metal Workers to perform all sheet metal fabrication and installation, as is required by their job specification. It maintains that, rather than employing Sheet Metal Workers to install a ventilation system in new construction of office space, the Department employed Carpenters to install metal grillwork in the space between the wall and ceiling. The Union asserts that "the grievance is not a complaint of the illegality of the assignment of metal work to the Carpenters, but

rather the violation of the Department's policy concerning the assignment of all sheet metal work only to Sheet Metal Workers."

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[3] Here, the parties have included in their collective bargaining agreement a grievance procedure which culminates in binding arbitration. The dispute is whether a nexus exists between the alleged violative act and the cited contract provisions.

The original grievance, filed by an individual employee at Step I, cited a provision of a contract between Local 28 of the Sheet Metal Workers International Association and a private employer and stated, "the expanded metal should be installed by sheet metal workers; not other trades." At Steps II and III, the Union cited Article VI, § 1(b) of its collective bargaining agreement with the City, which provides for arbitration of a dispute concerning alleged violations of written Department policy. The grievance was denied at Steps II and III because the hearing officers believed that the Union alleged a "reverse out-

[3] See, e.g., Decision Nos. B-19-92; B-54-91; B-74-89; B-52-88; B-35-88.

of-title" claim which properly should have been brought on behalf of employees in the title of Carpenter.

In its request for arbitration, the Union again alleged that the basis of the grievance was "[t]he assignment of Carpenters ... to work that is within the jurisdiction and job description of Sheet Metal Workers" and cited a provision of its contract which makes arbitrable an alleged out-of-title assignment. In its answer to the challenge to arbitrability, however, it advanced the theory that the grievance was arbitrable because the contested action violated a policy of the Department only to assign sheet metal work to Sheet Metal Workers.

We have consistently denied claims first alleged after the request for arbitration is filed. Permitting arbitration of such a claim would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure.[4] The record shows, however, that the Union first advanced its argument concerning an alleged policy violation in Steps II and III. Inexplicably, it then abandoned that theory in its request for arbitration, in favor of an argument concerning assignment of out-of-title work. In its answer, the Union disclaimed the out-of-title argument and resurrected the policy argument. The Union has consistently raised the argument concerning an alleged violation of policy,

[4] Decision Nos. B-12-94; B-40-88; B-1-86; B-11-81; B-12-77; B-20-74.

except in its request for arbitration, and for that reason we will consider it. Since the Union disclaimed its argument concerning out-of-title assignment, it is not necessary for us to reach that issue.

Article VI, § 1(b) of the collective bargaining agreement provides that the term "grievance" includes "a claimed violation, misinterpretation or misapplication of the ... written policy ... of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment." The Union claims that the Department's action violates its policy "concerning the assignment of all sheet metal work only to Sheet Metal Workers," but does not cite a written policy of the Department upon which it bases its allegation. Rather, it relies on what it claims is the past practice of the Department concerning such assignments. In order for us to permit arbitration of a claimed violation of past practice, there must be contractual language permitting such a claim,[5] citation for which the Union has failed to provide in the instant case. Without such proof of a contractual provision allowing arbitration of a past practice or unwritten policy, we find no nexus between the contract and the alleged violative act. Accordingly, the City's petition challenging arbitrability is granted.

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[5] See, e.g., Decision Nos. B-13-93; B-24-92; B-20-90; B-11-90; B-11-88.

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 the Department of Homeless Services in Docket No. BCB-1673-94 be, and the same hereby is, granted.

Dated: New York, New York
December 22, 1994

MALCOLM D. MACDONALD
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