City v. L.1455,DC37 57 OCB 7 (BCB 1996) [Decision No. B-7-96 (Arb)]

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

-between-

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-7-96

-and-

DOCKET NO. BCB-1735-95
(A-5908-95)

DISTRICT COUNCIL 37, LOCAL 1455,

Respondent.

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DECISION AND ORDER

On March 23, 1995, the City of New York ("the City") filed a verified petition challenging the arbitrability of a group grievance that is the subject of a request for arbitration filed by Local 1455, District Council 37, AFSCME, AFL-CIO ("L. 1455" or "the Union"). On March 30, 1995, DC 37 filed a verified answer to the petition. Based upon representations that the parties were attempting to settle the dispute, several requests for an extension of time to submit a reply were granted the City. By a letter dated October 13, 1995, the City filed a letter response in lieu of a verified reply.

BACKGROUND

The City and the Union are parties to a collective bargaining agreement, hereinafter referred to as the Citywide Agreement, dated July 1, 1990 - June 30, 1992. On or about October 5, 1994, the Union filed a group grievance at Step III, claiming a violation of Article XIV of the Citywide Agreement. Article XIV, entitled "Occupational Safety and Health," provides, in pertinent part:

Section 2.

a. Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.

The grievance, which was filed on behalf of employees in the title Traffic Device Maintainer ("TDM"), seeks to submit to an arbitrator:

> Whether the employer, the City of New York, through its Department of Transportation ["DOT"], failed to provide L. 1455 members with adequate, clean, structurally safe and sanitary working facilities in violation of the collective bargaining agreement in failing to conduct safety training.

As a remedy, the Union seeks:

> Restoration and preservation of adequate, clean, structurally safe and sanitary facilities to L. 1455 members by providing safety training for members conducted on a regular (annual) basis.[1]

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[1] According to the Union, it originally sought to reopen a 1992 grievance that was resolved at Step III, in which the Union alleged the same contractual violation and sought the same remedy. As evidence of that proceeding, the Union submitted copies of the grievance form, an internal memorandum of the employer, and a letter from the City's Office of Labor Relations ("OLR") Hearing Officer, addressed to the Union.

The internal memorandum, dated July 31, 1992, which is from Epifanio Castillo, DOT's Assistant Commissioner of Employee and Labor Relations, to DOT Deputy Commissioner Michael Primeggia and DOT Assistant Commissioner Elizabeth Theofan, provides as follows:

> RE: TDM SAFETY TRAINING
>
> It has been brought to my attention by DOT's Safety and Health Office that the annual TDM Right-to-Know (RTK) and OSHA Hazard Communication Standard (HCS) training is due. This training is mandated by New York State law, along with Hazardous Waste and Blood Borne Pathogens training for those TDM's that are at risk of exposure.
>
> I am told that it has been practical in the past to provide Workzone Channelization training along with Personal Protective Equipment & General Safety training at the same time as the RTK and HCS training.
>
> A training schedule must be coordinated immediately between the Bureau of Traffic and the Safety & Health Office. You should be in contact with either Carol Chirgwin or John Massey at the DOT Safety & Health Office at 566-3935.
>
> This matter is also the subject of a Step III Grievance, so expediency is needed.

(continued...)

In a Step III Decision dated February 1, 1995, the Review Officer found that the Union offered no authority for its claim that DOT was contractually mandated to conduct annual training. Thus, the grievance was denied.

On March 10, 1995, the Union filed the instant request for arbitration.

POSITIONS OF THE PARTIES

[1](...continued)
cc: Carol Chirgwin
John Massey
Bill Fenty, L. 1455
Steven Isaac, OLR

* * *

The letter, dated September 10, 1992, which is from Steven Isaac, OLR Review Officer, to Wilson A. Fenty, President of Local 1455, provides as follows:

> RE: OLR File No. 15480
> LOCAL 1455 TRAFFIC DEVICE MAINTAINER
> -AND-
> DEPARTMENT OF TRANSPORTATION
> (ALLEGED UNSAFE WORKING CONDITIONS)
>
> This is to inform you the [DOT] is in the process of finalizing the scheduling for the remaining Occupational Safety & Health training Requirements.
>
> Accordingly, the Review Officer finds that since the Department is in the process of scheduling this training, there is no need for a Step III Review at this time.
>
> Thus, the instant case is hereby remanded to the Department for further (expeditious) processing, and, is closed at Step III.
>
> However, if the Union is dissatisfied with the determination which will be rendered by the Department on the instant case, then a request for a re-opening of same Step III may be made by the Union. Said request, however, must be made in writing and refer to CLOSED OLR FILE NO. 15621.
>
> cc: E. Castillo, Esq.
> Carol Chirgwin
> John Massey

The City's Position

The City contends that the Union's request for arbitration should be denied because the dispute concerns a matter within the scope of management's statutory rights, set forth in §12-307b of the New York City Collective Bargaining Law ("NYCCBL").[2] The City cites several prior decisions of the Board of Collective Bargaining ("the Board") for the proposition that questions concerning training and the amount of training to be provided to employees are within the City's managerial prerogative and thus are not mandatory subjects of bargaining.[3] The City denies that Article XIV of the Citywide Agreement limits its right to act unilaterally in this area, maintaining that nothing therein "entitles the Grievants to safety training or ... limits management's right to determine whether employees will receive training."

The City also argues that the Union has failed to demonstrate a nexus between the act complained of and the source of the alleged right to submit this dispute to arbitration. In this respect, the City submits that the Union has failed to allege facts and circumstances which establish an arguable relationship "between the act of not providing training and the provision of the Citywide [Agreement] related to health and safety in the workplace."

The Union's Position

The Union submits that the City misapprehends the essential nature of the dispute when it characterizes it as one of training, a management prerogative, rather than one of on the job safety,

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[2] The City points out that NYCCBL §12-307b grants management the right to, inter alia:

> ... direct its employees; maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted; ....

[3] The City cites Decision Nos. B-4-89; B-43-86; B-5-80; and B-16-81.

a mandatory subject of bargaining.[4] The Union alleges that "the work environment is inadequate" and that the gravamen of the dispute is whether the City is in violation of the Citywide Agreement because it has "failed to provide safety training as is necessary to render the environment safe." According to the Union, the nexus between the dispute and Article XIV of the Citywide Agreement is clear and, referring to the 1992 grievance proceeding that was resolved at Step III, recognition of that fact was acknowledged by the employer in the past.

Alternatively, even assuming that this dispute does concern training, the Union submits that the City limited its management prerogative in this regard when it agreed to the Occupational Safety and Health provisions in Article XIV of the Citywide Agreement.

DISCUSSION

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before the Board of Collective Bargaining ("Board") on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[5] In the instant matter, the Union claims that DOT's failure to provide training constitutes a violation of the Occupational Safety & Health provisions of the Citywide Agreement.[6] The City denies the assertion, contending that the mere allegation that the employer has failed to provide training does not transform an act of management discretion into a violation of its contractual obligation to provide "adequate, clean, structurally safe and sanitary working facilities [Article XIV, Section 2(a)]."

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[4] The Union cites Scarsdale PBA, 8 PERB ¶3075; CSEA and Town of Niagara, 14 PERB ¶3049.

[5] E.g., Decision Nos. B-52-89; B-33-88; B-28-87; B-5-84.

[6] Article XIV, Section 2(a), supra, at 2.

It is well settled that this Board cannot create a duty to arbitrate where none exists nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[7] Where an act, or a failure to act, which on its face concerns a management prerogative is claimed to constitute a violation of a provision of a contract which is not directly addressed to that prerogative, then it is appropriate to require that a union present facts sufficient to demonstrate that a substantial issue under the contract has been presented; in such a case, the burden will not only be on the union ultimately to prove its allegations, but it will be required initially to establish that a substantial issue in this regard is presented.[8]

In the instant matter, the contract provision upon which the Union relies does not, on its face, grant employees a specific right to training. Without such a grant of right, or any other limitation on a matter which otherwise is within management's discretion,[9] we would not find a mere allegation that the workplace had been rendered inadequate by management's failure to provide training sufficient to demonstrate the requisite nexus to Article XIV of the Citywide Agreement. However, here the Union has supported its claim by submitting an internal memorandum of the employer which apparently concedes that the training in issue is required by law and couples to that concession its claim that the employer's failure to provide that training actually causes the facilities in issue used by the employees it represents to be inadequate, unclean, structurally unsafe or unsanitary in violation of Section 2 of Article XIV. In these

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[7] See Decision No. B-40-89, where we did not "perceive an arguable relationship between a complaint concerning the height of lighting fixtures and a contract provision which expressly enumerates only the alleged failure to maintain adequate heating, hot water and sanitary facilities as grievable contract violations;" See also, Decision Nos. B-52-88; B-41-82; B-15-82.

[8] Cf. Decision Nos. B-3-94 and B-2-92 (determination of staffing and manning levels); B-75-90 (procedures concerning the submission of recommendations for merit increases); B-46-86 (agency's discretion to grant unearned sick leave).

[9] In Decision Nos. B-4-89, we held that "demands involving the training of personnel are within the City's statutory managerial prerogative." See also, Decision Nos. B-43-86; B-16-81; B-5-80; B-7-77; B-23-75.

particular circumstances, we are satisfied that the Union establishes that an arbitrable dispute exists under Section 2 of Article XIV as to whether, as a matter of fact (and apart from what is required by law), the facilities in issue, as used by the employees represented by the respondent, have been rendered inadequate, unclean, structurally unsafe or unsanitary in violation of Section 2 of Article XIV because the training in issue was not provided. The question of whether the contract has, in fact, been violated in this fashion is for an arbitrator; the question of whether the alleged failure of DOT to provide training constitutes a violation of state of Federal law is not.

Accordingly, we shall deny the City's petition challenging the arbitrability of this matter in its entirety.

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 filed by the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 1455, District Council 37, AFSCME, AFL-CIO be, and the same hereby is, granted.

DATED: New York, New York
January 31, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER

GEORGE NICOLAU
MEMBER