City & DOT v. District No. 1 - PCD, MEBA, 63 OCB 14 (BCB 1999) [Decision No. B-14-99 (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 and the New York City Department of Transportation,

Petitioners,

And

District No. 1 - PCD, MEBA (AFL-CIO),

Respondent.

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Decision No. B-14-1999
Docket No. BCB-2006-98
(A-7359-98)

DECISION AND ORDER

On July 20, 1998, the Department of Transportation ("Department") filed a petition challenging arbitrability of a grievance brought by District No. 1 - PCD, MEBA ("Union"). The grievance alleged that the Department had violated a practice by which some employees were paid for travel time and unilaterally changed employees' arrival bids. The Office of Collective Bargaining ("OCB") acknowledged receipt of the Department's petition by letter dated July 21, 1998, with a copy to the Union.

By letter dated October 3, 1998, the OCB told the Union that its answer had been due on August 3, 1998 and it would now have to request an extension of time in which to file and also seek the Department's position on its request; if it did not, the Board would issue a decision based on the existing record. By letter dated October 29, 1998, the Union advised the OCB that it had not been served with the Department's petition. By letter dated November 10, 1998, the

OCB told the Union that the Department had filed its petition with proof of service but that the agency would assume that the petition had been lost in the mail and would allow the Union to file an answer. The Union filed an answer on November 24, 1998.

By letter dated December 1, 1998, the Department objected to the OCB's acceptance of the Union's answer, on the grounds that it was untimely. By letter dated December 4, 1998, the Union asserted that the City's petition was untimely and that the Union's answer was submitted within the time allowed by the OCB. By letter dated December 8, 1998, the OCB advised the parties that the Union's answer had been accepted as timely. The City filed its reply on December 22, 1998.

BACKGROUND

The Union represents individuals in Licensed Ferryboat titles who are employed by the Department. The Union and the Department are parties to a collective bargaining agreement which expired in 1994 and, at the time the petition was filed, continued in effect because of the *status quo* provision of the New York City Collective Bargaining Law ("NYCCBL").[1] The

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[1]Section 12-311 of the NYCCBL provides, in relevant part:

d. Preservation of status quo. 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

(continued...)

contract includes a grievance and arbitration procedure that culminates in binding arbitration.[2]

The Ferryboat "Gov. Lehman" usually ties up overnight in Staten Island, but the Department docked it for the night in Manhattan from July 8, 1997 until August 27, 1997. In the job bid for the "Gov. Lehman," the reporting time was listed as 5:00 A.M. in Staten Island, with inspections to be conducted from 5:00 A.M. until 6:20 A.M. The Union says that while the boat was docked in Manhattan, the reporting time remained 5:00 A.M. but the Grievants reported in Staten Island and took a boat to Manhattan.

On October 3, 1997, the Union filed a grievance at Step III.[3] It stated:

> This grievance covers the period from July 8, 1997 to August 27, 1997

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[1](...continued)
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 an impasse panel is appointed.

[2]The grievance and arbitration procedure is set forth in Article XV of the contract. Section 1 provides, in relevant part:

The term grievance shall mean:

a. A dispute concerning the application and interpretation of the terms of this Agreement;
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;....
c. A claimed assignment of employees to duties substantially different from those stated in their job specifications;....

Section 2 sets forth the steps of the grievance and arbitration procedure.

[3]The parties agreed that the grievance would be initiated at Step III.

> when the Ferryboat "Governor H.H. Lehman" was tied up in Manhattan instead of Staten Island.
>
> The city unilaterally changed the established place where Ferryboat Officers were to report to work and punch in.
>
> The City claimed that the long established practice of starting a tour always in Staten Island would be stopped for some of its employees working on the Ferryboat Lehman.
>
> Some of the employees were allowed to swipe in on Staten Island and get paid for their travel time and some were not.
>
> The MEBA Agreement calls for an employee to bid his job once a year. On the Big Board it is stated that all tours start in Staten Island. This unilateral change stopped this long past practice.
>
> Some of the employees were not paid for properly warming up the vessel because of the change in the vessel's location.

The Union also alleged that the Department's action violated Article XIV, § 6 of the contract.[4] The grievance was denied on June 24, 1998.

On July 9, 1998, the Union submitted a request for arbitration. As its statement of the grievance, the Union wrote, "City paid some employees Travel Time to temporary vessel, but did not pay Ferryboat Officers as per past practice. City unilaterally changed employees arrival bids." The Union cited Article XIV, § 6 as the contract provision violated and Article XV, § 2 as the contract provision under which the request for arbitration is made. It asked for overtime "for

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[4]Article XIV, Section 6 ("Job Bidding") provides, in relevant part:
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.

additional hours worked due to temporary change in vessel location."

POSITIONS OF THE PARTIES

City's Position

The Department claims that there is no nexus between the grievance and the contract. It asserts that the Union has not cited a contract provision referring to travel time. The Department contends that the Board will not find arbitrable a grievance based on an alleged violation of a past practice unless it is specifically included within the scope of contractually-defined grievances.[5] The Board, it says, has not found a grievance arbitrable where, as here, a violation of past practice is alleged and a grievance is defined in the contract as a violation of a "written policy."[6]

According to the Department, the Union's answer is untimely and should not be considered because the Union did not comply with the relevant OCB rule.[7] Even if the original petition was not delivered, the Department contends, the Union has not explained why it was not

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[5]The City cites, among others, Decision Nos. B-24-92 and B-11-90.

[6]The City cites Decisions Nos. B-24-92 and B-20-90.

[7]Section 1-07 of the Rules of the Office of Collective Bargaining provides:

* * *

(h) Answer - service and filing. Within ten (10) business days after service of the petition, or, where the petition contains allegations of improper practice, within ten (10) business days of the service of the notice of finding by the executive secretary, pursuant to §1-07(d), that the petition is not, on its face, untimely or insufficient, respondent shall serve and file its answer upon petitioner and any other party respondent, and shall file an original and three (3) copies thereof, with proof of service, with the board. Where special circumstances exist that warrant an expedited determination, it shall be within the discretionary authority of the director to order respondent to serve and file its answer within less than ten (10) business days.

put on notice of the petition by the OCB's letter of July 21, 1998, acknowledging service.

In its reply, the Department states that it is not contesting the portion of the grievance that concerns Article XIV, § 6. Rather, it asserts, the portion of the grievance challenged is the allegation that the Department should pay the grievants for travel time from Staten Island to Manhattan.

Union's Position

The Union asserts that the contractual definition of a grievance is not limited to a violation of a written policy and includes disputes "concerning the application or interpretation" of the contract and "a claimed assignment of employees to duties substantially different from those stated in their job specification." It notes that the grievance claims not only a violation of a past practice but also an allegation that the City unilaterally changed employees' arrival bids by causing the employees to report to a different location than specified in the original job bid. According to the Union, job bids are provided under Article XIV, § 6 of the contract and the work day or work tour is established and defined in Article V, so there is a nexus between the contract and its grievance.

It argues, further, that a past practice is a form of proof of the parties' interpretation of their agreement and also part of the agreement itself. In this case, it says, it illustrates an interpretation of the starting hours and location of employment and is, thus, a question of contract interpretation.

The Union claims that the Job Bid Board identified Staten Island as the terminal to which

the affected employees were required to report at the start of their tour. It says that the time clock is located at the terminal, not on the boat. Therefore, it contends, the work tour should have started when employees reported to the Staten Island terminal at 4:00 A.M., and that they should have been "on the clock" when they traveled to Manhattan to meet the "Gov. Lehman." By changing the location and hours of work, it asserts, the Department unilaterally changed a condition of employment during the *status quo* period.

DISCUSSION

When the City challenges the arbitrability of a grievance, we must first determine whether the parties are in any way obligated to arbitrate disputes and, if they are, whether that contractual obligation encompasses the act complained of by the Union.[8] Here, the parties have included in their collective bargaining agreement a grievance procedure that culminates in binding arbitration. The dispute is whether there is an arguable nexus between the Department's alleged acts and the contract provision the Union claims has been violated.

Under our case law, in order for a grievance based upon a claim of a violation of past practice to be found arbitrable, the union must show that the dispute falls within the definition of a grievance as set forth in the contract.[9] The Union cites three of the five definitions of a grievance set forth in this contract as providing the required nexus.

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[8]*Office of Labor Relations v. Social Service Employees Union*, Decision No. B-2-69 at 2.

[9]*See., e.g., City and MEBA*, Decision No. B-24-92 (where the parties defined the term "grievance" to include a "claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer," an alleged violation of past practice was not arbitrable)

The Union relies on Article XV, Section 1(c), which states that a grievance is "a claimed assignment of employees to duties substantially different from those stated in their job specifications." Here, the grievants' job duties have not changed; only the place where they clock in is different. Therefore, we see no nexus between this provision of the contract and the grievance.

Another definitional provision cited by the Union is Article XV, Section 1(b), which says that a grievance is a "claimed violation, misinterpretation or misapplication of the Rules or Regulations, written policy or orders of the Employer. . . ." Where a union alleges a change in a past practice, we find the requisite nexus only where the contractual definition of a grievance included a claimed violation, misinterpretation or misapplication of existing policy.[10] Here, however, the parties have not agreed that an alleged violation of existing policy is an arbitrable grievance, and the Union has not shown any rule or regulation, written policy or order that may have been violated.

The Union also relies on Article XV, Section 1(a), which says that a grievance is "a dispute concerning the application or interpretation of the terms" of the contract. The Union contends that a past practice is a form of proof of the parties' interpretation of their agreement and also part of the agreement itself. In this case, it says, the past practice illustrates an interpretation of the starting hours and location of employment, giving rise to a question of contract interpretation which should be decided by an arbitrator. As we stated previously, we will not find a claim of a violation of past practice to be arbitrable in itself unless the parties have

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[10] *See*, *NYC Health and Hospitals Corp. and Committee of Interns and Residents,* Decision No. B-39-98 and the decisions discussed there.

expressly included such a claim in their contract.[11] In appropriate cases, we may find that an arbitrator should determine whether a policy exists, but only where the contract permits arbitration of an "existing policy."[12]

Accordingly, the Union's claim of a violation of past practice is not an arbitrable grievance in itself. Since the City does not contest the Union's claim of a violation of Article XIV, § 6 of the contract, only that claim will go to the arbitrator.

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[11]See., e.g., *Dept. of Homeless Services and. L. 246, SEIU,* Decision No. B-30-94 (for the Board to permit arbitration of a claimed violation of past practice, there must be contractual language permitting such a claim); *City and MEBA*; Decision No. B-24-92 (where the parties defined the term "grievance" to include a "claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer," an alleged violation of past practice was not arbitrable); *City and Local Union No. 3, International Brotherhood of Electrical Workers*; Decision No. B-11-88 (the Board has consistently denied arbitration of claimed violations of past practice or policy absent an agreement defining the term "grievance" to include such claims); *City and. Local 237, IBT*; Decision No. B-20-72. (where a grievance is defined as a claimed violation of a rule or regulation, an alleged violation of "past practice" does not constitute an arbitrable claim).

[12]

DECISION AND ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law it is hereby,

ORDERED, that the petition docketed as BCB-2006-98 is granted to the extent that the instant grievance is based on a claim of a violation of past practice and, therefore, is not arbitrable; and it is further,

ORDERED, that the Union's request for arbitration is dismissed to the extent that it is based on a claim of a violation of past practice; and it is further,

DIRECTED, that the Union's claim of a violation of Article XIV, § 6 of the collective bargaining agreement be sent to arbitration.

Dated: New York, New York
May 4, 1999

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
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