Valentine v. 15C, Inter. Union of Oper. Engineers, et. al, 27 OCB 26 (BCB 1981) [Decision No. B-26-81(IP)]

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

ROBERT C. VALENTINE,

DECISION NO. B-26-81

Petitioner,

DOCKET NO. BCB-488-81

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15C, AFL-CIO

-and-

MUNICIPAL TRACTOR OPERATORS ASSOCIATION,

Respondents.
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DECISION AND ORDER

This proceeding was commended on April 9, 1981, by the filing of a verified improper practice petition by Mr. Robert C. Valentine (hereinafter "Petitioner"). Petitioner alleges that the International Union of Operating Engineers, Local 15C, AFL-CIO (hereinafter "Local 15C") and the Municipal Tractor Operators Association (hereinafter "MTOA"), jointly referred to as "Respondents,"[1] committed improper practices by prohibiting the Petitioner from performing regular Sunday overtime and holiday[2] work. Peti-

[1] MTOA is a subdivision of Local 15C, which, along with Local 246, S.E.I.U., AFL-CIO is jointly certified as the exclusive representative for the purposes of collective bargaining of all tractor operators and motor grader operators employed by the City of New York.

[2] At the hearing, herein, Petitioner amended his petition to include allegations pertaining to his being precluded from performing work on holidays as well as on Sundays.

tioner alleges that Respondents, who aid in formulating the assignments for both Sunday and holiday work, "unjustly punished" him in retaliation for his performance of emergency work for the employer, the New York City Department of Sanitation (hereinafter "the Department"). Respondents filed their answer on April 22, 1981 in which they denied the material allegations of the petition and denied that facts constituting an improper practice had been alleged. Respondents admitted however, that overtime work of tractor operators was the subject of an "equalization" program among all tractor operators at various land fill sites. Respondents further claimed that Petitioner performed overtime work "far in excess" of that received by all other tractor operators and that Petitioner was consistently called for emergency work despite the fact that other tractor operators were ready, willing and available for emergency work, but were never called. In his reply of April 28, 1981 Petitioner stated that his high incidence of emergency work was on account of his accepting such assignments while other operators consistently turned down requests to perform emergency services. Petitioner denies that he was offered emergency work more often than other employees.

A hearing was held in this matter on August 26, 1981. All parties were afforded the opportunity to present evidence and give testimony. Except for minor discrepancies, the basic

facts are not in dispute. At the conclusion of Petitioner's case, Respondent moved to dismiss the instant petition claiming that Petitioner had failed to prove any violation of Section 1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL").[3] The Motion to Dismiss was referred to this Board for decision.

Background

Petitioner began working for the Department as a tractor operator approximately fourteen years ago. For the last five years, he has been working out of the Fountain Avenue land fill location in Brooklyn. Petitioner has been a member of Local 15C since 1974; he had also been a member of MTOA through the end of 1980. However, he stopped sub-

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[3] NYCCBL §1173-4.2(b) provides:

b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 1173-4.1 of this chapter, or to cause, or attempt to cause, a public employer to do so;

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

mitting dues to MTOA after being excluded from the Sunday regular overtime work lists.

Three land fill locations, the aforementioned Fountain Avenue, Muldoon Avenue (Staten Island) and Edgemere (Rockaway) comprise a separate section in the Bureau of Waste Disposal (hereinafter "the Bureau"). overtime in the three locations is shared amongst all tractor operators in the section. Fresh Kills (Staten Island) is a separate section in the Bureau. The employees in its two plants perform marine unloading functions. This work is dealt with separately from the truck fill operations performed elsewhere in the Bureau and marine unloading employees have their own overtime work. Employees from Fresh Kills s are summoned to truck fill locations only in the event of emergencies and when the necessary number of truck fill tractor operators are unavailable.

Emergency work at the land fills consists primarily of firefighting and is performed only on Sundays, the sites being regularly manned the other six days of the week. In the event of an emergency, a chief clerk from the Department calls tractor operators at their homes. The tractor operators have the option of either accepting or rejecting the emergency work assignment; employees are not penalized if they decline.

Emergency work performed on Sundays is to be distinguished from regular Sunday overtime. By its very nature, emergency work is performed only as the need arises at a landfill. Regular Sunday overtime however, is posted six days

in advance and consists of routine truck fill operations at varying sites. Premium pay for any work performed on a Sunday is double time. Holiday work is similar to regular Sunday overtime in that notice is posted in advance and routine work is done. Compensation for holiday work however, is at the rate of time and a half.

Assignments of regular Sunday overtime and holiday work are handled differently from emergency work. In these cases, the chief clerk tells MTOA Recording Secretary Ralph Votta how many tractor operators will be needed on a particular Sunday or holiday. Votta in turn supplies the clerk with the names of eligible employees. A roster is then prepared by the Department clerk and posted on the bulletin boards at the various locations. Like emergency overtime, regular Sunday and holiday overtime is not mandatory. However, records are maintained as to which employees were offered the overtime and whether those individuals accepted or rejected the option.

Respondents claim that prior to March, 1979 they received numerous complaints from their members to the effect that tractor operators from Fountain Avenue were receiving a substantially higher amount of Sunday work than were the employees at other truck land fills. In order to rectify the imbalance and comply with Executive Order No.56 of the

Mayor of the City of New York (April 2, 1976),[4] in February, 1980 the Department, the MTOA and Local 15C established a program for the systemized equalization of overtime.

Using the beginning of January, 1979 through the end of January, 1980 as a base period, a count was made of all holidays and Sundays "charged" to tractor operators. Both acceptances and refusals were considered chargeable items.[5] Separate holiday and Sunday[6] rosters were compiled, in order of seniority. The rosters provided a clear and comprehensive overview of the relative amounts of overtime worked or offered to each employee in the bargaining unit. Charts were devised so that in the future, those employees with the lowest number of "charges" would be called first, until the number of Sundays and holidays that each tractor operator was called and/or worked became "equalized".

Under the new rosters about half a dozen men, including Valentine and Votta, had considerable more Sundays charged to their names than did other unit employees. None of these individuals have been offered regular Sunday overtime since the institution of the

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[4] Section 2 of Executive Order 56 requires, inter alia, that overtime be evenly distributed, where practicable, among all those employees who are eligible to perform the overtime work required.

[5] We note that if emergency work is refused, it is not considered a chargeable item; emergency work is considered chargeable only if accepted and performed. Regular Sunday overtime is considered chargeable so long as the offer to perform it is extended to an employee.

[6] "Sunday"work is composed of both regular overtime and emergency work.

"equalization program" in February, 1980. Except for one instance, a similar situation exists with regard to holiday work.[7] Valentine however, has increased the number of Sundays chargeable to his name by regularly accepting emergency work. The parties stipulated at the hearing that the more emergency work a person refused, the sooner that person would be called for regular Sunday overtime.

The record indicates that Petitioner is the only individual who complained about the equalization program. In March, 1980 he discussed the situation with Votta. Valentine suggested that the system be changed so that new lists be made at the start of each year. Votta told Valentine that he did hot have the power to make such a change and to bring the proposal before the MTOA Executive Board or the general membership. Valentine did not present his suggestion to either forum.

Petitioner maintains that the only reason Respondents stopped submitting his name for regular Sunday overtime was to equalize the work. He agrees With the theory of equal overtime but argues that it is unfair that he be penalized for performing

[7] The testimony indicates that on July 5, 1981 Petifioner was passed over for holiday work. An employee by the name of John DeBiase, who had more chargeable holidays than did Valentine worked that day. Votta testified that DeBiase should not have worked that day. Votta explained that he was on vacation the prior week and was unable to catch this oversight which was made by the Department. Votta's explanation, based on the evidence and his demeanor, is credited.

the "dirty work", i.e., emergency work.[8] He argues that emergency work should not be classified together with regular Sunday overtime and holiday work. Furthermore, Valentine would have individuals charged for refusing to answer emergency calls.

Discussion

The petitioner, whose testimony was found to be quite credible, nonetheless failed to establish a prima facie case of improper practice against Respondents. Assuming, arguendo, the truth of Petitioner's allegations, the facts presented do not amount to a violation of the NYCCBL. We therefore grant Respondents' Motion to Dismiss.

The United States Supreme Court has long held that bargaining agents must represent all employees in a unit without arbitrary discrimination (Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 [19441). However, the duty to represent all employees impartially does not necessarily prevent a union from making a contract which is disadvantageous to some members of the unit in relation to others. As stated by the Court in Ford Motor Co. v. Huffman,

[8] Valentine states that he refused emergency work only once (on May 31, 1981) and that he did so because he though that it was unfair that employees from Fresh Kills were also being called to the Fountain Avenue site.

345 U.S. 330, 31 LRRM 2548 (1953), the existence of contract terms which affect individual employees differently does not mean that the bargaining agent has failed to meet its legal obligations. Rather, the Union, said the Court, must be given a "wide range of reasonableness" in this respect.

The New York State Public Employment Relations Board (hereinafter "PERB"), in a decision affirmed by a state appellate court, has declared that the duty of fair representation applies with the same force in the public sector as it does in private industry (Jackson v. Regional Transit Service, 388 NYS 2d 441, 54 A.D. 2d 305, 10 PERB 7501 (1976)). PERB has held that a negotiated collective bargaining agreement which favors one group of employees over another may be valid when no hostile discrimination is shown (Matter of PSC and Adjunct Faculty Assoc., 7 PERB 4529 (1974)). PERB has also stated that in general, a union will not violate its obligation of fair representation when it makes a "legitimate business judgment" which has the effect of compromising some individuals' interests for the benefit of the majority of the negotiating unit (Opinion of Counsel, 13 PERB 5002, June 4, 1980)). Similarly, this Board has hold that a union's failure to satisfy all person's it represents does not necessarily amount to a breach of the duty of fair representation (Decision No. B-13-81).

Turning to the facts of the instant dispute, it becomes clear that Respondents acted for the benefit of the majority of the employees in the unit when it negotiated and implemented the equalization program. Respondents' actions were in response to numerous complaints from employees concerning the inequitable distribution of overtime. Had these complaints been ignored, Respondents could have become subject to improper practice charges from those tractor operators who continued to be adversely affected by the inequitable overtime distribution.

Whether or not Valentine was called for emergency work more often than other tractor operators is academic. Petitioner has failed to show any improper motivation on the part of Respondents that would indicate malicious retaliation for Valentine's regular performance of emergency work. The fact that Petitioner is a dedicated tractor operator who almost always responds to emergency calls is indeed admirable. It does not, however, give him the right to dictate to the majority of unit employees the manner in which overtime work is to be distributed. He would prefer that emergency overtime and scheduled overtime be dealt with separately; the majority prefers that all overtime, however acquired, be counted together. The system adopted at the behest of the majority applies equally to all unit employees

and cannot be said to discriminate against Petitioner or any other employee. In this connection we note that some employees, including Petitioner, may be ineligible for scheduled overtime until the amounts of overtime worked by all employees have been equalized.

It is not within our province to examine and evaluate the various components of the equalization program. The mechanics of the program fall within the purview of a legitimate business judgment made by Respondents. Having made that determination and finding no indication of discriminatory motivation against Petitioner, it is not our function to go further and to examine the soundness of a given business decision of a union or to evaluate the efficiency with which such a decision is implemented. If Petitioner, the only employee who was heard to complain about the program, was dissatisfied with such operational details of the program, the matter of what constitutes a chargeable item or how often the rosters are rewritten, he could have pleaded his case before the MTOA Executive Board or the general membership. Having chosen not to do so, Petitioner may not now seek consideration of such questions by this Board.

The record is devoid of any evidence that would indicate that Respondents administer the provisions of the overtime program in a manner that is arbitrary, grossly negligent

or improperly motivated. The fact that certain tractor operators, including at least one official of the MTOA, may be individually disadvantaged on account of the program does not amount to a breach of the duty of fair representation. It is abundantly clear from the record that Respondents are not guilty of any improper practices in the instant matter.

O R D E R

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 improper practice petition filed by Robert C. Valentine be, and the same hereby is, dismissed.

DATED: New York, N.Y.
November 6, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

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