OTB v. L.858, IBT, 33 OCB 27 (BCB 1984) [Decision No. B-27-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE NEW YORK CITY OFF-TRACK BETTING CORPORATION,

Petitioner,

-and-

LOCAL 858, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

DECISION NO. B-27-84

DOCKET NOS. BCB-733-84 (A-1971-84)

BCB-740-84 (A-1976-84)

DECISION AND ORDER

On September 13, 1984, New York City Off-Track Betting Corporation (hereinafter "the City" or "OTB"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 858, International Brotherhood of Teamsters (hereinafter "the Union" or "Local 858") in the case docketed as BCB-733-84 (A-1971-84). The Union filed an answer on September 25, 1984, which it amended on November 13, 1984. The City replied thereto on November 30, 1984.

On October 19, 1984, OTB filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Local 858 in case docketed as BCB-740-84 (A-1976-84). The Union filed its answer on October 24, 1984, which was amended on November 26, 1984. The City replied thereto on November 30, 1984.

In the former case, the Union seeks to grieve the "Demotion of Regional Directors and Managers to Branch Office Managers and demotions of Branch office Managers to Shift Managers." As a remedy, the Union requests

> "An order rescinding the demotions of Regional Directors and Managers to Branch office Managers and of Branch Office Managers to Shift Managers and such other relief as may be just and proper."

In the latter case, the Union seeks to grieve the "Demotion of Branch Office Manager Viviane Hannon to Shift Manager." As a remedy, the Union requests

> "An Order rescinding the demotion of Ms. Hannon, together with full backpay, seniority and such other benefits and relief as may be just and proper."

The "class action" grievance filed in BCB-733-84 (A-1971-84) appears substantially to encompass the individual complaint of grievant Hannon in BCB-740-84 (A-1976-84). Based upon this apparent overlap, plus commonality of parties, events, and arguments presented, and in order to avoid unnecessary delay and to best effectuate the policies of the New York City Collective Bargaining Law ("NYCCBL"), cases BCB-733-81 (A-1971-84) and BCB-740-84 (A-1976-84) have been consolidated for the purposes of decision.

Background

The Civil Service Job Specification for the title of Branch Office Manager (OTB) divides the position into two assignment levels, i.e., managers with responsibilities for an assigned branch office ("Branch Managers"), and managers with responsibilities for an assigned shift within a particular branch office ("Shift Managers"). The collective bargaining agreement ("the Agreement") entered into between the parties acknowledges this distinction, as in that portion of the Agreement which deals with salaries:

ARTICLE VII - SALARIES

Effective on the dates set forth below, employees shall receive the following specified salaries and salary adjustments:

Section 1(a). Branch Office Manager

	Effective Date	Salary Range
BOM (assigned in charge of Branch ("Branch Manager")	7/1/82	$29,809 - $31,403
	7/1/83	$31,896 - $33,601
BOM (assigned in charge of Shift ("Shift Manager")	7/1/82	$25,944 - $27,643
	7/1/83	$27,760 - $29,792

The Union is certified as the exclusive representative of all Branch office Managers pursuant to Decision No. 27-

74. Area Managers (OTB)[1], who have responsibilities

[1] "Area Managers" have also been referred to as "Regional Managers" and "Regional Directors" by the parties.

for a number of branch offices within a particular area, have previously been held to be managerial employees excluded from the bargaining unit (Decision No. 63-74).

By letters dated May 29, 1984, OTB informed the Union that: a) effective July 1, 1984, seven Branch Managers would be reassigned as Shift Managers; b) effective January 1, 1965, an additional thirteen Branch Managers would be reassigned as Shift Managers; and c) also on or about January 1, 1985, the titles of Regional Director and Regional Manager were to be eliminated and individuals serving in those positions would "revert" to the title of Branch Office Manager, at the Branch Manager level.

On August 9, 1984, the Union wrote to OTB demanding an "immediate grievance hearing" over the City's "absurd proposal", stating that it would not "be put in a position of being a disposal unit for O.T.B. unwanted managerial personnel."

With regard to the grievance of Shift Manager Hannon, on July 24, 1984, the Union wrote to OTB claiming that the "wrong method was used to determine seniority" in the "recent demotions of seven branch managers to shift managers". According to the Union, seniority must be determined by applying managerial seniority rather than

corporate seniority and points to the layoff provisions contained in Article XIV (Job Security)[2] of the Agreement as justification for its position. Following such a procedure, contends the Union, Hannon would have retained her Branch Manager position.

OTB denied Hannon's grievance on August 30, 1984, finding that the actions relating to Hannon constituted a reassignment within title rather than a layoff, so that the layoff provisions of the Agreement were irrelevant to her grievance. OTB further held that the Agreement was silent on the subject of reassignments.

Positions of the Parties

The City's Position

OTB submits that it has the right and power to determine unilaterally a reassignment of personnel from the higher assignment level of Branch Manager to the lower assignment level of Shift Manager. It claims that reassignment falls within the realm of reserved managerial preroga-

[2] Article XIV, Section 4 (Non-Competitive Lay-Off Procedures) states in pertinent part:

> b) If two or more employees have the same seniority in title, corporate seniority shall prevail.

tives under NYCCBL Section 1173-4.3(b)[3] as well as OTB's enabling statute, the Racing, Pari-Mutuel Wagering and Breeding Law. Thus, argues the City, the requests for arbitration must be dismissed on the grounds of nonarbitrability since OTB's actions constitute an exercise of managerial prerogatives outside the scope of the Agreement. OTB additionally states that reassignment from

[3] NYCCBL Section 1173-4.3b states:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disiplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are now within the scope of collective bargaining, but, notwithstanding the above questions concerning the practical impact that decisions on the above matters have on employees, such as question of workload or manning, are within the scope of collective bargaining.

the

level of Branch Manager to Shift Manager does not amount to either a demotion or layoff, since there have been no terminations in employment; the Branch Managers reassigned as Shift Managers remain in their classification and title of Branch Office Manager. Thus, concludes OTB, the layoff provisions of the Agreement (Article XIV) cited by the Union are inapplicable herein.

The City also states that the procedures established pursuant to Article XII (Union Management Relations), Section 20[4] pertaining to the establishment of a list of Shift Managers eligible for reassignment to the level of Branch Managers have no bearing on the present matter. OTB contends that these lists pertain only to incumbent Shift Managers' eligibility for reassignment; they do not pertain to original appointments to the Branch Office Manager title.

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[4] Article XII, Section 20 reads as follows:

> OTB shall give a written exercise to establish a list of Shift Managers eligible for reassignment as Branch Managers every two years.

Pursuant to this provision, a Branch Office Manager Selection Committee established a list of candidates eligible for reassignment from Shift Manager to Branch Manager; the list is currently in effect (OTB Interoffice Memorandum dated March 7, 1983).

OTB further argues that it was acting within the scope of its managerial prerogatives when it made a determination to abolish the title of Area Manager and reappoint incumbent personnel to the title of Branch Office Manager, at the Branch Office Manager assignment level. Moreover, urges the City, since the title of Area Manager (OTB) has been designated as managerial and excluded from bargaining, these employees are outside the scope of the collective bargaining agreement and the grievance procedure and the Union cannot be recognized as their bargaining representative.

With regard to the grievance on behalf of Viviane Hannon, OTB states that reassignments were based upon the inverse order of the assignment of Shift Manager to the level of Branch Manager. Corporate, rather than title, seniority, was used to break a tie between the grievant and another employee. The City argues that in the absence of a contractual provision applicable to reassignment, its actions must be considered managerial rights outside the scope of the Agreement and it may utilize any method it deems advisable to effectuate such reassignment. Thus concludes OTB, the request for arbitration fails to contain facts which constitute a grievance and must be dismissed.

The Union's Position

Local 858 asserts that demotion of Regional Directors and Managers into the bargaining unit classification of Branch Office Manager disregards the seniority of incumbents in that classification; the demotion of senior Branch Office Managers to the lower position of Shift Manager results in a diminution of salary, benefits and other terms and conditions of employment. Therefore, claims the Union, OTB's proposed actions violate Articles I (Union Recognition and Unit Designation), VI (Grievance Procedure), VII (Salaries), XI (Branch Office Transfers and Pool Assignments), XII (Union Management Relations), and XIV (job Security) of the Agreement as well as New York City Civil Service Law and Civil Service Rules. The Union maintains that a chain reaction of changed assignments, transfers, and possibly, layoffs, "will necessarily follow the forced infusion of demoted regional officials into the bargaining unit."

Local 858 urges that the City's actions also violate past agreements and practices between the parties. It states that bargaining unit employees advance from Trainee to Shift Manager and from Shift Manager to Branch Manager in accordance with Articles VII (Salaries) and

XII (Union Management Relations) of the Agreement and that OTB has promulgated memoranda and promotional lists in accordance with these provisions. The Union argues that neither the Agreement, written policy nor past practice provide any advancement alternative within and among bargaining unit titles.

The Union further argues that OTB cannot rely on NYCCBL Section 1173-4.3(b) to unilaterally demote branch managers and replace them with demoted nonbargaining unit employees; rather, Section 1173-4.3(a)[5] should govern.

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[5] NYCCBL Section 1173-4.3(a) reads, in pertinent part:

> Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of sums equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law, except that ...

OTB's actions, argues the Union, results in a change in wages, hours and working conditions, issues within the scope of bargaining pursuant to the language of Section 1173-4.3(a). Thus, urges the Union, OTB has violated both the NYCCBL and Article I (union Recognition and Unit Designation) of the Agreement by failing to bargain over changes in wages, hours and working conditions.

The Union also maintains that since the demotions will result in reductions of pay and benefits, they must be considered punitive actions that are grievable as wrongful disciplinary actions in violation of the Agreement and New York City Civil Service Law.

With regard to the Hannon grievance, the Union argues that OTB is barred by estoppel from challenging arbitrability since it processed, heard and ruled on the merits of the grievance pursuant to the steps of the grievance procedure without previously raising this challenge. Furthermore, Local 858 states that Articles XI (Branch Office Transfers and Pool Assignments), XII (Union Management Relations) and XIV (job Security) of the Agreement provide that seniority in the managerial title must first be used to break ties in seniority, rather than corporate seniority, the method chosen by OTB. Addition-

ally, contends the Union, since OTB utilized managerial seniority to achieve the demotions, it must continue to use managerial seniority to break the tie between Hannon and another employee.

Discussion

This Board has repeatedly held that in determining disputes concerning arbitrability, we must decide whether the parties are in any way obligated to arbitrate their controversies.[6] It is clear that the parties in the instant matter have agreed to arbitrate grievances, as defined in Article VI, Section 1 of their Agreement. That Section defines the term "grievance" as:

> (A) A dispute concerning the application or interpretation of the terms of
>
> (i) this collective bargaining agreement or any other collective bar-aining agreement applicable to employees.
>
> (B) A claimed violation, misinter-retation, or misapplication of rules and regulations, written policy, or orders applicable to OTB affecting the terms and conditions of employment, provided, dis-utes involving the rules and regulations of the OTB Civil Service Commission shall not be subject to the grievance procedure or arbitration;

[6] Decision Nos. B-2-69, B-18-74, B-1-76, B-15-79, B-11-81, B-3-82, B-28-82, B-22-83, B-5-84.

> (C) A claimed assignment to duties substantially different from those stated in their job classification;
>
> (D) A claimed improper holding of an open competitive rather than a promotional examination; and
>
> (E) A claimed wrongful disciplinary action against an employee.

The question then becomes whether or not OTB's actions fall within the categories defined above so as to present an arbitrable claim.

OTB submits that its actions are beyond the scope of the grievance procedure by virtue of the statutory management rights provision contained in NYCCBL Section 1173-4.3(b) which guarantees the City's right, inter alia, to assign its employees.[7] However, this right to manage, and the reservation of an area in which management is free to act unilaterally in order to manage effectively and efficiently, is not a delegation of unlimited power. As we stated in discussing Section 1173-4.3(b) in Decision No. B-8-81,

> "the protected area is not intended to be so insulated as to preclude any examination of actions claimed to have been taken within its limits. In short, it is intended as a means to enable management to do that which it should

[7] Decision Nos. B-5-85, B-4-83, B-3-75, B-16-74, B-7-79.

> do but not as a license to do that which it should not. Section 1173-4.3b does not authorize management to abrogate the statutory or contractual rights of employees directly nor does it warrant the indirect accomplishment of such ends through acts which, in a general way, may be said to fall within the area of management prerogative."

Furthermore, in cases analogous to this one,[8] we have attempted to accommodate the competing interests of the parties by fashioning a test in which the grieving party is required to allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged right.

The Union in the instant matter has alleged, and OTB concedes, that the reassignment/demotion of Branch Managers to Shift Managers will have a direct and immediate effect on the salaries of employees working at the lower assignment level. Similarly, it appears that the accrued seniority rights of all individuals in the bargaining unit will be effected by OTB's actions. The Agreement clearly states that seniority is applied in situations such as those involving transfers and reassignment requests

[8] Decision Nos. B-5-84, B-9-81, B-8-81.

(Article X), scheduling vacations (Article XII) and layoffs (Article XVI). The Union has thus established a sufficient nexus between its allegations and OTB's actions to support the conclusion that this dispute is within the scope of the parties' agreement to arbitrate by virtue of a possible breach of contract. This finding is in no way a - determination of the merits of the underlying dispute.

While an alleged violation of past practice does not fall within the contractual definition of a grievance under the Agreement herein, a violation of written policy may be sounded as a grievable matter. The Union claims that directives dealing with reassignment and promotional lists of Shift Managers eligible to become Branch Managers have been violated. These directives are contained in interoffice memoranda[9] promulgated pursuant to Article XII of the Agreement, cited above. Again, the Union has established a prima facie relationship between the subject of its grievance (reassignment/demotion) and the source of its alleged right (the Agreement, written policy); it is now for the arbitrator to determine the merits of the dispute.

[9] See OTB Interoffice Memorandum of January 8, 1979, October 1, 1980, October 21, 1980, and March 7, 1983.

Local 858 alleges that the demotion of bargaining unit members amounts to wrongful disciplinary action. In this connection, we note that the Union has failed to allege any facts or circumstances traditionally characteristic of wrongful disciplinary action, such as the service of disciplinary charges or the utilization of the special procedures contemplated by Section 4 of the grievance procedure (Article VI) for dealing with grievances alleging wrongful disciplinary action. Furthermore, OTB has alleged business necessity as the underlying reason for its actions. Under these circumstances, Local 858 cannot claim that the management actions complained of herein constitute wrongful disciplinary action.

The contractual definition of a grievance cited above specifically excludes disputes involving rules and regulations of the OTB Civil Service Commission from the grievance procedure,[10] so that the Union is precluded from alleging such violations as grievances. The Union's allegation that management's actions herein constitute a violation of NYCCBL Section 1173-4.3(a) even if proven, would not constitute allegations of contract violation which are the appropriate subject matter for arbitration.

The Union has also alleged that the demotion of Regional Managers presents a grievable matter. While there

[10] See Article VI, Section 1 (B), cited above.

can be no question of the Union's right to grieve any and all violations of the contract rights of employees in the unit it represents, it may not act on behalf of non-unit employees.

With regard to the grievance on behalf of Viviane Hannon, we note that participation in the initial steps of the grievance procedure does not estop a party from contesting arbitrability; challenges to arbitrability are properly raised when the union files a request for arbitration.[11]

The Union has alleged that ties in seniority must be broken by utilizing an employee's managerial title anniversary date. Whether or not the provisions of the Agreement cited by the Union (particularly Article XIV Job Security) call for such an application is a matter of contract interpretation to be resolved by an arbitrator.

For the above stated reasons, we shall grant the Union's requests for arbitration under Article VI, Sections l(A),(B) of the Agreement and dismiss the OTB's petitions provided, however, that insofar as the Union's requests for arbitration and other submissions specify a claim

[11] Decision Nos. B-20-72, B-8-74.

of wrongful disciplinary action; viol&tion of past practice; violation of the NYCCBL and/or of Civil Service Law and Rules, we will direct that no such claim be considered by the ar~)itrator.

0 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 petitions challenging arbitrability be, and the same hereby are, denied; and it is further

ORDERED, that the Union's requests for arbitration under Article VI, Sections l(A) and (B) of the Agreement be, and the same hereby are, granted; and it is further

ORDERED, that claims relating to wrongful disciplinary action; violation of past practice; violation of the NYCCBL and/or Civil Service Law and Rules in the

instant matters may not be submitted to or considered by the arbitrator.

DATED: New York, N.Y.
December 18, 1984

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MILTON FRIEDMAN
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