OFB v. L.3, IBT, 41 OCB 24 (BCB 1988) [Decision No. B-24-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of		
NEW YORK CITY OFF-TRACK BETTING CORPORATION,	x	DECISION NO. B-24-88
Petitioner,		
-and-	x	DOCKET NO. BCB-1003-67
LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,	x	(A-2689-87)
Respondent.		

DECISION AND ORDER

On November 6, 1987, the New York City Off-Track Betting Corporation ("OTB"), by the Office of Municipal Labor Relations ("the City"), filed a petition challenging the arbitrability of two grievances that are the subject of a consolidated request for arbitration filed by Local 3, International Brotherhood of Electrical Workers ("the Union") on October 21, 1987. on November 6, 1987, the Union filed an answer to which the City submitted a reply on November 19, 1987. On November 26, 1987, the Union filed a rebuttal to the City's reply.

Request for Arbitration

Upon the consent of both parties, this request for arbitration consolidates two separate grievances for which no satisfactory resolution has been achieved. Both grievances concern actions taken by OTB relating to Department 738, a newly created job site of the employer.

On August 3, 1987, the Union initiated two individual Step III grievances alleging, in the first instance, that OTB violated

the seniority clause, Article III, Section 1[1] of the collective bargaining agreement in selecting a junior Supervising Electronic Technician ("SET") for a job assignment in Department 738 over the request of more senior Supervising Electronic Technicians, i.e., S. Levicky, et. al. The grievance was denied by letter dated October 7. 1987, which stated that the SET with the least title seniority was involuntarily chosen for the assignment after OTB's canvas for volunteers proved unproductive. Furthermore, the decision stated that since "[b]oth the [contract] and OTB procedures are silent as to how volunteers for transfers are selected," the City made its selection for staffing of the department as it saw fit.

The second Step III grievance alleges a violation of paragraph #15 of the 1983 Memorandum of Understanding between the parties. This paragraph provides, in pertinent part, that

> "a supervising Electronic Technician [shall be] assigned as a supervisor during all shifts (field and shop) at the Central Repair Facility at Long Island City."

The Union asserts that the assignment of only one supervisor to Department 738 violates the aforementioned paragraph since the

[1] Article III, Section 1 provides:
"Seniority (job assignment) for employees who were previously employed by CSC to work on OTB equipment and who thereafter came to work for OTB without a break in service shall start at the date of their employment by CSC at OTB." (emphasis added)

work tasks at the Long Island City location have been moved to Department 738 subsequent to the signing of the Memorandum of Understanding. This grievance was denied by letter dated September 21, 1987, which stated that the supervisory requirement of paragraph #15

> "refers exclusively to the Long Island City facility [in that] no reference is made to other locations [and moreover,] Department 738 requires different levels of supervision."

On October 21, 1987, the Union filed a consolidated request for arbitration of both grievances pursuant to Article XII, Section 2, Step IV of the collective bargaining agreement. it seeks as a remedy the assignment of S. Levicky, a more senior SET, to the requested position in Department 738 and the supervision of all shifts in Department 738 by an SET.

Positions of the Parties

City's Position

The City takes the position, in both grievances, that the Union has failed to establish a sufficient nexus between the provisions relied upon and the acts complained of - the alleged denial of a transfer request of a more Senior SET and the alleged failure of OTB to maintain mandatory supervisory coverage at a particular worksite. The City maintains that the union has not demonstrated any controlling contractual language applicable to

either dispute which limits the City's exercise of an otherwise managerial prerogative to assign and direct its employees.

According to the City, Article III, Section 1 of the collective bargaining agreement was not intended to vest transfer rights in more senior employees but rather to establish unit seniority for employees who were previously employed by CSC (Computer Service Corporation) to work on OTB equipment who thereafter came to work for OTB without a break in service. In the absence of any limiting contract provisions applicable to transfers, the City asserts that its actions must be considered the exercise of managerial rights which authorizes OTB to utilize any method it deems advisable to effectuate such transfers. Therefore, the City contends that its alleged denial of a transfer request by S. Levicky to a position in Department 738 does not constitute a grievable matter.

Similarly, the City asserts that there is no obligation to arbitrate the grievance concerning mandatory supervisory coverage by SET's in Department 738 since the union fails to allege facts which establish an arguable relationship between OTB's actions and paragraph #15 of the Memorandum of Understanding. The City argues that paragraph #15, in no uncertain terms, requires the assignment of SET's on all shifts at the Central Repair Facility at Long Island City only, in language that is both “clear and unambiguous.” Therefore, because the Union "has failed to cite

any contractual provision, rule, regulation or written policy or order to demonstrate that a [SET] must be assigned to any location other than the Central Repair Facility," the City submits that the request for arbitration of this matter must also be dismissed.

Finally, the City urges that under Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL") and in the absence of controlling contractual language applicable to either grievance, the right of OTB to assign and direct work is a managerial prerogative which is outside the scope of the parties agreement to arbitrate. As a consequence, the City submits that an arbitrator is not empowered to grant the relief requested and seeks an order dismissing the request for arbitration.

Union's Position

The Union argues that contrary to the City's contention, Article III, Section 1 "does apply to transfers of employees" and that "[had] the seniority clause ... been applied, Levicky ... would have been transferred." In support of this position, the Union asserts that the intended function of Article III, Section 1, in establishing seniority within the unit, is borne out by the fact that is has been applied in the past in effecting transfers. Therefore, the Union contends that it has alleged facts sufficient to establish a nexus between OTB's denial of a

requested transfer by a more senior SET and the source of his alleged right to that transfer.

As to the second grievance, the Union alleges that paragraph #15 of the Memorandum of Understanding does provide a contractual basis for the grievance concerning mandatory supervisory coverage in Department 738. They submit that the language of paragraph #15 was merely a shorthand method of describing job duties actually performed at the Central Repair Facility and allege that since the Memorandum was signed in 1983, the duties performed at the Central Repair Facility have been moved to Department 738. The Union argues that the spirit and intent of paragraph #15, which provides for the assignment of SET's to supervise all shifts of teletheatre designated branches, reasonably follows the relocation of those duties. Therefore, the Union asserts that a reasonable interpretation of this paragraph provides a nexus between OTB's refusal to assign an SET on all shifts in Department 738 and the source of the Union's right to grieve such matters.

The Union disputes the City's contention that an arbitrator is not authorized to "impinge upon OTB's statutory right to assign its employees," maintaining that contractual limitations on management prerogative do exist in both instances. Therefore, the Union asserts that an arbitrator may decide whether the cited

provisions are controlling and, if so, fashion an appropriate remedy.

Discussion

Where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before this Board on a petition challenging arbitrability is whether the particular controversies at issue are within the scope of their agreement to arbitrate.[2] Two such questions are presented in the instant request for arbitration for our resolution:

First, the City asserts that there is no relationship between the act complained of, i.e., assigning a junior SET to a position in Department 738, and Article III, Section 1 of the contract. In the City's view, the seniority clause cited does not bestow "transfer rights" on the basis of seniority, reserving for itself the right to effect such transfers using its own discretion. The Union argues that the seniority clause does apply to transfers, as it has been applied in past practice, and that the applicability of the clause to this set of facts is a matter for interpretation by an arbitrator;

It has long been held that in determining issues of abitrability we have a responsibility to inquire as to the prima facie relationship between the act complained of and the source

[2] Decision Nos. B-10-86; B-29-85; B-5-84; B-9-83.

of the alleged right, redress of which is sought through arbitration.[3] Although it is our policy in arbitrability disputes not to adjudicate the merits of a claim, in certain cases, when required to determine whether the contract provision invoked is arguably related to the grievance to be arbitrated, we necessarily scrutinize the terms of the agreement more closely than we might otherwise. That is not to say that we interpret those terms; that is a function solely for the arbitrator. But, we do have a responsibility to ascertain whether the provision of the agreement relied upon provides a colorable basis for the Union's claim.[4]

In the instant matter, we find that Article III, Section 1 does refer to the conferment of seniority upon certain members of the unit who were formerly employed by CSC, as the City pointed out. However, we also note that this section further identifies the seniority bestowed upon such employees by virtue of this clause, as such for the purpose of "job assignment". A reasonable reading of the clause, in light of this delineation, does permit the inference that job assignment is subject to

[3] Where challenged to do so, the Union has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated. See, e.g., Decision Nos. B-8-86; B-4-86; B-15-80.

[4] Decision No. B-21-80.

seniority rights, as the Union asserts. Such a reading would appear to undermine the City's claim that such matters are left entirely to management prerogative. Therefore, we find that the Union has met its burden of establishing an arguable relationship between the subject of this grievance, transfer rights, and Article III, Section 1, which relates to seniority and job assignment. This determination is not an adjudication of the merits of the claim, but rather a finding that there is a contractual provision upon which the claim can be based. The question of whether or not OTB actually violated Article III, Section I goes to the merits of the dispute and the resolution of that issue is within the province of the arbitrator.

In the grievance concerning supervisory coverage in Department 738, OTB submits that its actions are shielded from the grievance procedure by virtue of the statutory management rights provision contained in NYCCBL Section 12-307b which guarantees the City's right, inter alia, to assign and direct its employees.[5] The City asserts that, unless limited by the

[5] NYCCBL Section 12-307b, in pertinent part, provides: "it is the right of the City, or any other public employer, acting through its agencies, to determine the standards of service to be offered by its agencies; determine the standards of the location of employment; direct its employees ... determine the methods, means and personnel by which governmental operations are to be conducted ... and exercise complete control and discretion over its organization and the technology of performing its work."

collective bargaining agreement, management is free to act unilaterally in order to manage effectively and efficiently. Therefore, the City contends that because the Union has failed to demonstrate "any limitation upon the right of OTB to determine how many, if any, [SET's] to assign as supervisors in Department 738," the request for arbitration must be dismissed for failure to allege facts which constitute a grievance. Furthermore, the City asserts that the Union's reliance on paragraph #15 of the 1983 Memorandum of Understanding to provide a nexus is misplaced in that "the language of the Memorandum is so distinct in speaking only about [SETS] at the Central Repair Facility at Long Island City, that there can be no other interpretation."

The Union argues that paragraph #15 does establish the source of the right of SETS to be assigned to supervise all shifts in Department 738, asserting that it is the "intent" of the right granted in that paragraph that is at issue, rather than the geographical location of the worksite mentioned therein. The Union contends that the paragraph requires supervision over "work tasks" and "when [the] work of the Central Repair Facility [was] moved ... to Department 738, the contract requirement [continued] to apply." Thus, the Union disputes the City's contention that its right to assign supervisory coverage in Department 738 is unfettered.

We find merit in the Union's assertion that there is an arguable basis for an arbitrable claim, having alleged sufficient

facts to establish a nexus between the act complained of and the source of the alleged right. The Union does not dispute that the assignment of personnel ordinarily is a management right. Rather, the Union contends that a limitation on that right has been imposed by the contract, permitting the Union to grieve actions that would otherwise be reserved as an exercise of management discretion. Determination of whether OTB's actions in the instant matter are subject to the contractual limitations of paragraph #15 involves an interpretation of the intent of this provision. Whether paragraph #15 was intended to follow the work performed by the Central Repair Facility, or to apply only within the geographical confines of that facility, is not a matter to be determined by this Board. The resolution of disputes concerning contractual intent and application, we have long held, are matters for an arbitrator.[6]

Accordingly, we will grant the Union's request for arbitration of both grievances and deny the City's petition challenging arbitrability.

ORDER

Pursuant to the powers vested in the Board of Collective

[6] Decision Nos. B-30-86; B-10-86; B-10-83.

Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the New York City Office of Municipal Labor Relations be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 3, International Brotherhood of Electrical Workers be, and the same hereby is, granted.

DATED: New York, N.Y.
June 30, 1988

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