

OTB v. L.858, IBT, 49 OCB 19 (BCB 1992) [Decision No. B-19-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

----- x

In the Matter of

New York City Off-Track Betting
Corporation,

Petitioner,

Decision No. B-19-92

-and-

Docket No. BCB-1453-92
(A-3977-91)

Local 858, International
Brotherhood of Teamsters,

Respondent.

----- x

DECISION AND ORDER

On January 14, 1992, the New York Off-Track Betting Corporation ("OTB"), filed a petition challenging the arbitrability of a grievance submitted by Local 858, International Brotherhood of Teamsters ("the Union"). The grievance alleges that OTB violated the collective bargaining agreement between the parties by assigning the field coordinator work of Branch Managers to employees who are not members of the bargaining unit. The Union filed an answer on February 5, 1992. OTB did not file a reply.

Background

Under the collective bargaining agreement between the parties,¹ Branch Office Manager (OTB) and Branch Office Manager

¹ The collective bargaining agreement runs from July 1, 1984 to June 30, 1987. The Union states, without reply from OTB, that this agreement has been renewed through successive collective bargaining and remains in effect as the negotiated agreement between the parties.

Trainee (OTB) are recognized as titles represented by the Union.² A Field Coordinator position was created approximately ten years ago. Its functions were carried out by Branch Office Managers who had previously been assigned to branch offices. The Field Coordinators coordinated personnel assignments and documentation, distributed paychecks and processed disciplinary charges. The regular duties of Branch Office Managers include responsibilities for the operations of assigned branch offices such as supervising personnel, handling waging and financial systems, and carrying out corporate policies and procedures. The collective bargaining agreement provides that "[a]ny vacancy that occurs in the Field Coordinator position shall be filled by a Branch Manager."³

In 1985, some Field Coordinator duties were assigned to personnel outside the bargaining unit. From 1988 to 1991, OTB changed its methods of operation, rendering many of the

² Article I of the collective bargaining agreement, entitled "Union Recognition and Unit Designation," provides:

Section 1.

OTB recognizes the Union as the sole and exclusive collective bargaining representative for the unit consisting only of the employees of OTB in the below listed titles:

Branch Office Manager (OTB)
Branch Office Manager Trainee (OTB)

Section 2.

Except as otherwise provided herein, for purposes of this Contract, the term "employee" or "employees" shall relate solely to employees described in Section 1 of this Article.

³ Article XII, Section 19.

traditional functions of the Field Coordinator position unnecessary. Branch Office Managers who had held the position of Field Coordinator were reassigned to branch offices. On October 19, 1991, the position of Field Coordinator was eliminated.

On October 4, 1991, the Union filed a group grievance on behalf of Branch Office Managers, alleging that OTB violated the contract by assigning the work of Field Coordinators to clerical employees not in the bargaining unit. OTB denied the grievance at Step III on October 9, 1991, on the grounds that the position of Field Coordinator had been eliminated and, thus, no contractual violation had been committed. No satisfactory resolution of the matter having been reached, the Union filed the instant request for arbitration on November 19, 1991.

Positions of the Parties

OTB's Position

OTB argues that the collective bargaining agreement does not include the Field Coordinator position as a covered title under its recognition clause. It maintains that the Union has never petitioned for the position of Field Coordinator to be included under the recognition clause or to represent Field Coordinators as a separate job title. OTB asserts that the grievance is not arbitrable because the Union claims rights to an unrecognized title.

OTB claims that it has not sought to fill vacancies in the Field Coordinator position but has, instead, eliminated the position. It asserts that its management right to eliminate positions is not an arbitrable issue, because it has not been waived by agreement between the parties.

OTB argues that the job description for Branch office Managers does not include duties performed by Field Coordinators and that Branch Office Managers who worked as Field Coordinators performed duties that were out of title. OTB maintains that eliminating out-of-title work is not a matter that is covered by the collective bargaining agreement.

Union's Position

The Union argues that the collective bargaining agreement provides that "[a]ny vacancy that occurs in the Field Coordinator position shall be filled by a Branch Manager," and that this provision requires that the work performed by Field Coordinators be assigned to Branch Office Managers. For this reason, the Union asserts, the grievance is arbitrable.

The Union responds to petitioner's other arguments by stating that petitioner's challenges to arbitrability argue the merits of the grievance. It cites Decision Nos. B-10-77 for the proposition that no response to the allegations is required, since no proof need be presented to the Board regarding the merits of the grievance. Citing Decision No. B-14-74, it maintains that the Board's function is to decide only whether the

parties' agreement to arbitrate is broad enough in scope to include the instant dispute.

Discussion

When the City challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.⁴ Here, the parties have included a grievance procedure in their collective bargaining agreement culminating in binding arbitration.⁵ The dispute is whether there arguably is a nexus between the alleged acts of OTB and the contract provision that the Union claims has been violated.

The Union contends that petitioner's challenges to arbitrability may not be considered here because they go to the merits of the dispute. As we stated in Decision No. B-52-91, it

⁴ Decision Nos. B-54-91; B-74-89; B-52-88; B-35-88.

⁵ Article VI of the collective bargaining provides, in relevant part:

Section 1.

Definition: The term "grievance" shall mean

(A) A dispute concerning the application or interpretation of the terms of

(i) this collective bargaining agreement or any other collective bargaining agreement applicable to employees...

is sometimes difficult to determine valid issues of substantive arbitrability without crossing the line separating them from issues which involve the merits of the particular case. It has been our practice in such cases to allow limited incursions upon the realm of the arbitrator which are essential and unavoidable in determining threshold questions of substantive arbitrability.⁶ Further, where the City asserts that the action in question is a right accorded to management by statute, the Union must show that a substantial issue under the collective bargaining agreement has been presented.⁷ This requires close scrutiny by the Board.⁸

The Union appears to argue that assigning the work of Field Coordinators to clerical personnel violates the provision of the contract which mandates that any vacancy in the position of Field

⁶ Decision Nos. B-52-91; B-23-90; B-54-87; B-9-83.

⁷ See, Decision No. B-46-86, in which we stated:

We are concerned here to formulate a rule that will strike a balance between the City's right to exercise discretion and the employee's right to fair and reasonable treatment... We will require, in cases such as this, that a union allege more than the mere conclusion that discretion has been exercised in an arbitrary manner. In any case in which the City's discretionary action is challenged on a basis that the discretion has been exercised in an improper manner, the burden will be on the Union to establish initially, to the satisfaction of the Board, that a substantial issue exists in this regard. This is not to say, as the Union suggests, that the Board will examine or determine the merits of this case. Rather, the Union must specify facts and circumstances which establish a relationship between [the alleged violative act] and an arbitrary exercise of discretion.

See also, Decision Nos. B-74-89; B-16-87; B-8-81.

⁸ See, e.g., Decision Nos. B-59-90; B-74-89; B-35-88; B-16-87.

Coordinator be filled by a Branch Office Manager. OTB states that it has eliminated the position of Field Coordinator and appears to argue that it is, therefore, free to assign the work previously performed by Field Coordinators as it deems necessary. OTB also maintains that eliminating positions is a management right which has not been circumscribed by any agreement between the parties. These arguments present us with a threshold question of arbitrability.

Section 12-307(b) of the New York City Collective Bargaining Law grants OTB the right to "direct its employees; ... maintain the efficiency of governmental operations; [and] determine the methods, means and personnel by which government operations are to be conducted...." Parties to a collective bargaining agreement may voluntarily agree to restrict a matter that falls within an area of management prerogative.⁹ A non-mandatory subject remains within the managerial prerogative, however, if it is not limited by such an agreement.¹⁰ Here, petitioner has asserted its right to eliminate the position of Field Coordinator in response to changes in its methods of operation. We must, therefore, examine the facts insofar as they will assist us in determining whether OTB's claimed defense bars arbitrability or the Union has presented a substantial issue under the contract.

It is undisputed by the Union that, from 1988 until 1991,

⁹ Decision Nos. B-64-89; B-67-88; B-53-88; B-31-87; B-14-87; B-29-82.

¹⁰ Decision Nos. B-64-89; B-4-89; B-62-88; B-5-80.

OTB systematically devolved the job duties of the Field Coordinator position onto clerical employees, and that the position was eliminated in October, 1991. OTB is correct in asserting that Section 12-307 grants it the right to eliminate positions for business reasons; in the absence of an express waiver in the contract or otherwise, the methods, means and personnel by which government operations are conducted is a statutory management right.¹¹ A claim that unit work was wrongfully assigned to non-unit members may be submitted to arbitration only where it is shown that there is an agreement between the parties¹² or a unilateral grant by the employer¹³ which arguably limits management's statutory prerogative.

The provision of the contract which the Union cites as having been violated states, "any vacancy in the Field Coordinator position shall be filled by a Branch Manager." The position of Field Coordinator is not a job title that is included in the bargaining unit. It is merely a position created by OTB that was staffed at one time by Branch Managers, and which has now been eliminated. Although the Union may characterize this dispute as an out-of-title grievance, the only agreement reached between the parties concerning this position was that vacancies would be filled by Branch Managers. There is no evidence

¹¹ Decision No. B-19-90.

¹² Decision No. B-17-79.

¹³ Decision No. B-2-70.

presented by the Union that the parties ever reached an agreement by which OTB management was precluded from assigning some of the tasks performed by Field Coordinators to personnel other than Branch Managers, or from abolishing the position altogether.

The Union has not shown that the duties of employees in a recognized title in its bargaining unit, that of Branch Manager, have been assigned to non-unit employees, or that employees represented by the Union have been assigned to duties substantially different from those stated in their job classifications, either of which would constitute a type of out-of-title grievance.¹⁴ Indeed, Branch Managers who had been assigned to Field Coordinator duties have been returned to the jobs for which they were originally classified.

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.¹⁵ In the instant case, the Union has not demonstrated a nexus between the alleged acts of OTB and the provision of the contract that its claims have been violated. Accordingly, the petition challenging arbitrability is granted.

¹⁴ See, Decision Nos. B-35-89; B-6-81; B-2-70.

¹⁵ Decision Nos. B-35-89; B-41-82; B-15-82.

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

ORDERED, that the Request for Arbitration filed by Local 858, International Brotherhood of Teamsters is denied.

Dated: New York, New York _____ MALCOLM D. MACDONALD
April 30, 1992 CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN G. WRIGHT
MEMBER