City & OTB v. L.858, IBT, 49 OCB 29 (BCB 1992) [Decision No. B-29-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

New York City Off-Track Betting Corporation and The City of New York,

Petitioners,

-and-

Local 858, International Brotherhood of Teamsters,

Respondent.
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Decision No. B-29-92

Docket No. BCB-1427-91 (A-3757-91)

DECISION AND ORDER

On October 2, 1991, the New York City Off-Track Betting Corporation ("OTB") and the City of New York, by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance brought by Local 858, International Brotherhood of Teamsters ("the Union").[1] The grievance alleges that OTB breached Article IV of the City-Wide Agreement[2] when it scheduled general managers and assistant managers to work shifts shorter than their regularly scheduled shifts, thereby avoiding payment of overtime compensation. The Union, with the permission of OTB, was granted an extension of time in which to file an answer, which was filed on November 27, 1991. OTB, with the

[1] OTB is the public employer in this case. It appears that OLR is acting as the representative of OTB.

[2] Article IV ("Overtime"), § 2(d) of the Citywide Agreement provides, "[t]here shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation...."

permission of the Union, was granted an extension of time in which to file a reply, which was filed on January 10, 1992.

Background

By letter dated March 5, 1991, OTB informed the Union that, "the Corporation anticipates that as part of its cost-cutting efforts, it will have to permanently suspend the practice of scheduling General Managers and Assistant General Managers to an entire 8 3/4 hour shift when they are covering these shifts on an overtime basis. In a memorandum dated March 6, 1991, addressed to "All General Managers/Assistant General Managers", OTB stated, "[i]n a continuing effort to reduce expenses for the corporation it has been decided to limit overtime hours for all General Managers/Assistant General Managers to a maximum of seven hours per occurrence."[3]

By letter dated March 14, 1991, the Union informed OTB that it was filing "a group grievance for all General Managers and Assistant General Managers ("Managers") .... The Union contends that Managers assigned to the regularly scheduled shift are entitled to work the entire shift. We request an immediate return to scheduling overtime hour for hour...." The grievance was denied on April 15, 1991 on the grounds that OTB has the

[3] According to the parties, the titles involved in this dispute are General Manager and Assistant General Manager. These titles are not certified to the Union. The only titles certified to the Union, and named in the collective bargaining agreement, are Branch Manager and Branch Manager (Trainee).

right to schedule overtime for the number of hours it deems necessary and that covering an 8-3/4 hour shift with 7 hours of overtime does not violate an existing contract or agreement with Local 858. In its determination, OTB also noted that, "Article IV, Overtime, of the City-Wide Agreement does not preclude OTB from determining, at its discretion, the amount of hours needed to cover a particular shift as overtime."

The Request for Arbitration, dated May 13, 1991, claims that OTB breached Article IV of the City-wide Agreement by scheduling General Managers and Assistant General managers to work shifts shorter than the regularly scheduled 8-3/4 hours to avoid paying overtime compensation.

Positions of the Parties

OTB's Position

OTB argues that the instant grievance must be dismissed because the Union has not alleged which section of Article IV of the City-wide contract has been breached and, thus, the grievance is too vague to enable petitioners to respond. OTB contends that the Union has also failed to demonstrate a relationship between the acts alleged and any provision of Article IV that would establish an arguable nexus. It asserts that the overtime provisions of Article IV do not guarantee employees the right to a specific amount of overtime. It cites Article IV, § 2(d), and notes that although the employees in question were assigned to work overtime, their shifts were not rescheduled.

OTB contends that it is exercising a management right by reducing overtime hours for General Managers and Assistant General Managers. It argues that in the absence of a contractual limitation, assigning overtime is within its statutory right under S 12-307(b) of the New York City Collective Bargaining Law ("NYCCBL"),[4] and maintains that no provision in the City-wide contract limits that right. Although the contract provides for compensation for overtime worked pursuant to order or authorization, it claims, such a provision does not guarantee employees the right to perform overtime work in any particular circumstances.

OTB asserts that the parties' agreement concerning a flexible work week is irrelevant to the instant dispute. It maintains that the controversy merely involves limiting overtime hours to seven hours per occurrence. For this reason, OTB

[4] Section 12-307(b) of the NYCCBL provides:

> 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 disciplinary 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 not 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 questions of workload or manning, are within the scope of collective bargaining.

argues, the section of the City-wide Agreement cited by the Union is inapplicable to the instant dispute because it regulates scheduling of days off and tours of duty to avoid paying overtime compensation. It maintains that limiting overtime hours worked is distinguishable from the actions prohibited in the cited provision of the City-wide Agreement.

The Union's Position

The Union states that, contrary to the City's assertion, the City and the Union are not signatories to a collective bargaining agreement. Rather, the Union asserts, it is a party to a collective bargaining agreement with OTB ("0TB contract") negotiated for the period July 1, 1984 to June 30, 1987, which has been renewed through successive collective bargaining and remains in effect.[5] The Union contends that the instant dispute is governed by the grievance procedure provided in Article VI of the OTB contract.[6]

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[5] The contract cited by the Union expired in June, 1987. A search of the records has revealed no evidence that the parties have filed a notice of intent to bargain collectively on a successor contract. As we stated in Decision No. B-14-77, "[a] labor contract is a 'living' document only if it is attended to and revised on a regular basis."

[6] Article VI of the contract defines grievances to include, in relevant part:

> (A) A dispute concerning the application or interpretation of the terms of
>
> (i) this collective bargaining agreement or any other collective bargaining agreement

(continued...)

The Union cites Article IV of the OTB contract,[7] which provides that the parties may mutually agree upon and adopt a flexible work week. The Union maintains that it has agreed with OTB on a flexible work week for general managers and assistant general managers consisting of four days of eight and three-quarter hours each, and asserts that this arrangement has not been revoked. It then cites Article IV, § 2(d) of the City-wide Agreement, and argues that only an arbitrator can decide whether the limiting language contained therein restricts the employer's right to change regularly scheduled shifts in order to avoid payment of overtime.

The Union claims that the contents of OTB's letter of April 15, 1991, and its petition, demonstrate that OTB was aware that Article IV, § 2(d) of the City-wide Agreement is the provision

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6 (... continued)
applicable to employees....

(B) A claimed violation, misinterpretation, or misapplication of rules and regulations, written policy, or orders applicable to OTB affecting the terms and conditions of employment...

[7] Article IV, "Work Week", of the collective bargaining agreement provides:

> The normal work week shall consist of five (5) days, seven (7) hours per day or thirty-five (35) hours per week. The foregoing shall not, however, constitute a bar to a flexible work week and/or a flexible work day, provided however, that OTB and the Union mutually agree upon such deviation from the normal work week. Any mutually agreed upon flexible work week and/or flexible work day may be unilaterally revoked (1) by the Union upon one (i) month's notice to OTB and (ii) by OTB upon seventy-two (72) hours notice to the Union.

that the Union claims has been breached. The Union argues that the question of whether Article IV, § 2(d) gives employees in these titles the right to work regularly scheduled shifts, even if they require overtime rates of pay, is for an arbitrator to decide.

The Union asserts that the Board's only function here is to decide whether the parties' agreement to arbitrate is broad enough to include the particular controversy. It maintains that the question of whether the cited contractual provisions are applicable to the facts of the case is a matter going to the merits, and is for an arbitrator alone to determine.

Discussion

Initially, we note that the contract between OTB and the Union expired five years ago, and that the parties have neither filed a notice of intent to bargain pursuant to § 12-311 of the NYCCBL[8] nor engaged in bargaining on a successor unit contract.

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

> **a. Bargaining notices.** (1) At such time prior to the expiration of a collective bargaining agreement as may be specified therein (or, if such time is not specified, at least ninety but not more than one hundred and fifty days prior to expiration of the agreement) a public employer, or a certified or designated employee organization, which desires to negotiate on matters within the scope of bargaining shall send the other party (with a copy to the director) a notice of the desire to negotiate a new collective bargaining agreement on such matters. The parties shall commence negotiations within ten days after receipt of such a bargaining notice, unless such time is extended by agreement of the parties, or by the director of the board of collective bargaining.

We note further that although the titles General Manager and Assistant General Manager, created in 1987, were assigned separate title codes and salaries, and an examination for the positions was held in 1988, the Union has never petitioned the Board of Certification to add these titles to the Union's existing certification of the titles. Since the record reveals that the parties negotiated for the terms and conditions of these new titles, however, we will consider further the claim raised by the Union.[9]

In considering challenges to arbitrability, the Board must first ascertain whether there is a demonstrable relationship between the act complained of and the source of the right alleged to have been violated.[10] When challenged, the party requesting arbitration must show that the contract provision invoked is arguably related to the grievance to be arbitrated, and that the parties have agreed to arbitrate the type of dispute set forth in

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[9] Section 12-303 of the NYCCBL provides, in relevant part:

> g. The term "public employer" shall mean... (2) ... the New York city off-track betting corporation....
>
> 1. The term "certified public employee organization" shall mean any public employee organization: ... (2) recognized as such exclusive bargaining representative by a public employer other than a municipal agency....

Because OTB is a public employer other than a municipal agency, we deem that the negotiations between the parties concerning the titles General Manager and Assistant General Manager constituted constructive recognition by OTB of the Union as the representative of those titles.

[10] See, e.g,, Decision Nos. B-19-89; B-65-88; B-28-82.

the Request for Arbitration.[11] Further, where the public employer 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.[12] This requires close scrutiny by the Board.[13]

OTB claims that the Union's failure to specify which section of Article IV of the City-wide contract it claims has been breached renders the Request for Arbitration too vague to enable it to respond. In appropriate cases, we may find that the public employer was, or should have been, on notice of the nature of a claim, based on the totality of the grievance as expressed by the Union.[14] The Union alleged, in its Request for Arbitration, that

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[11] Decision Nos. B-1-89; B-7-81.

[12] 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.

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

[14] Decision Nos. B-44-91; B-55-89; B-14-87.

"OTB breached Article IV of the City-wide Agreement by scheduling General Managers and Assistant General managers to work shifts shorter than the regularly scheduled 8-3/4 hours to avoid paying overtime compensation." Section 2(d) is the only provision of Article IV which mentions scheduling shifts to avoid payment of overtime. Since the Union's meaning is apparent from reading its claim and Article IV together, we find that OTB had sufficient notice of the nature of the Union's claim to frame a response. This conclusion is consistent with the clear mandate of § 12-302 of the NYCCBL[15] and with our own well-established policy of favoring the resolution of disputes through impartial arbitration.[16] We note, however, that a party risks dismissal of a claim which fails to provide information sufficient to enable respondent to formulate its defense.

Although the City-wide contract includes a grievance and arbitration procedure, the parties have bound themselves in the OTB contract to a grievance and arbitration procedure[17] which

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[15] Section 12-302 of the NYCCBL provides:

> **Statement of policy.** It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

[16] Decision Nos. B-29-89; B-20-79; B-9-79. See also, B-44-91; B-55-89; B-9-89; B-35-87; B-14-87; B-21-84; B-6-76.

[17] See, note 6, supra.

supersedes the procedure provided in the City-wide Agreement.[18] The Union appears to argue that OTB has violated Article IV of the collective bargaining agreement,[19] and thus is subject to the grievance and arbitration procedure, because of a claimed revocation of an agreement between the parties in which employees in these titles were allowed to work a flexible work week.[20] This issue, however, has no bearing on the instant dispute. The question here is whether OTB violated the City-wide Agreement by reducing overtime hours assigned to employees in the affected titles.

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

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[18] Article III of the OTB contract provides as follows:

> Except where otherwise provided herein, the parties agree that the Contract which has been or may be negotiated between the City of New York and the City-wide bargaining representative on City-wide matters shall be applicable for all employees.

[19] See, note 7, supra.

[20] The Union has not provided us with evidence of such an agreement. We note, however, that it would appear that by the terms of Article IV, OTB would have the right to revoke such an agreement by giving notice to the Union 72 hours before it took such an action.

and unavoidable in determining threshold questions of substantive arbitrability.[21]

Section 12-307(b) of the New York City Collective Bargaining Law grants OTB the right to "direct its employees; ... 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; ... and exercise complete control and discretion over its organization.... Parties to a collective bargaining agreement may voluntarily agree to restrict a matter that falls within an area of management prerogative.[22] A non-mandatory subject remains within the managerial prerogative, however, if it is not limited by such an agreement.[23] Here, petitioner asserts that it has reduced overtime hours worked in order to maintain the efficiency of its operation. We must, therefore, examine the facts insofar as they will assist us in determining whether the Union has raised a substantial question of a contract violation sufficient to constitute an arguable limitation on the management right.

This grievance arose when OTB wrote to the Union and issued a memorandum to employees in the affected titles announcing its intention to limit overtime hours in order to reduce operating

[21] See also, Decision Nos. B-23-90; B-54-87; B-9-83.

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

[23] Decision Nos. B-64-89; B-4-89; B-62-88; B-5-80.

costs. As OTB correctly states, such an action is within its management rights under § 12-307 (b) of the NYCCBL. The burden here is on the Union to demonstrate a limit, derived from the collective bargaining agreement, on this management right. The Union characterizes OTB's action as a rescheduling of work tours to avoid paying overtime compensation, which would be prohibited by Article IV, § 2(d) of the City-wide Agreement. These arguments present us with a threshold question of arbitrability.

OTB is correct in asserting that Section 12-307(b) grants it the right to eliminate overtime for business reasons; in the absence of an express limitation in the contract or otherwise, the assignment of overtime is within the public employer's statutory management right to "determine the methods, means and personnel by which government operations are to be conducted."[24] Even where the contract provides for compensation for overtime worked pursuant to order or authorization, such a provision does not guarantee an employee the right to perform overtime work in any particular circumstance.[25] The decision as to when, and how much, overtime is authorized or ordered is within OTB's statutory rights, and is outside the scope of OTB's obligation to bargain collectively.[26] Absent a contractual or other limitation, therefore, OTB has the statutory right to determine that a shift

[24] Decision Nos. B-19-90; B-29-87; B-20-87; B-17-87; B-23-86.

[25] Decision Nos. B-29-87; B-35-86.

[26] Decision No. B-29-87.

of seven hours of overtime per occurrence is sufficient for its purposes.

The Union has made conclusory allegations that OTB reduced the number of hours in a regular work shift for employees in these titles. Without evidence that these employees were forced to work less than the contractually provided 35-hour week, it appears that the only reduction made by OTB was in the amount of overtime hours worked. Such an action is not included within the definition of arbitrable grievances provided in the OTB contract. Furthermore, the Union's reliance on Article IV of the City-wide Agreement is misplaced. The language of § 2(d) is explicit. It states, "[t]here shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation." Nothing in the Union's grievance suggests that tours of duty or days off have been rescheduled by OTB. Rather, OTB has merely decided to exercise its right to limit overtime worked by employees in these titles.

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

[27] Decision Nos. B-35-89; B-41-82; B-15-82.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining it is hereby,

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Off-Track Betting Corporation 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 be, and the same hereby is, denied.

Dated: New York, New York
June 24, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

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