

**L.858, IBT v. OTB, 49 OCB 38 (BCB 1992) [Decision No. B-38-92 (IP)]**

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper  
Practice Proceeding

-between-

LOCAL 858, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,  
Petitioner,

DECISION NO. B-38-92  
DOCKET NO. BCB-1467-92

-and-

THE NEW YORK CITY OFF-TRACK  
BETTING CORPORATION,  
Respondent.

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DECISION AND ORDER

On February 26, 1992, Local 858, International Brotherhood of Teamsters ("Union") filed an improper practice petition against the New York City Off-Track Betting Corporation ("OTB"). OTB filed an answer on April 13, 1992. The Union filed a reply on May 5, 1992.

BACKGROUND

The 1984-1987 collective bargaining agreement negotiated between the Union and OTB provides at Article V, §3 that:

All full-time employees shall be entitled to a duty free uncompensated meal period of one hour.

All full-time employees shall have two (2) paid fifteen (15) minute breaks daily.

The agreement also provides at Article IV that:

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 (i) by the Union upon one (1) month's notice to OTB and (ii) by OTB upon

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seventy-two (72) hours notice to the Union.

By letter dated January 21, 1992, OTB informed Local 858 that it was exercising its right under Article IV to unilaterally revoke the flexible work week and, that effective February 29, 1992, OTB

was reinstating the standard 5 days, 7 hours per day work week. By letter dated January 29, 1992, the Union announced its intention to exercise its right under Article V, §3 to a duty free uncompensated meal period of one hour. By letter dated January 31, 1992, OTB informed Local 858 that OTB did not consider itself bound by Article V, §3, since neither OTB nor Local 858 had previously complied with it.

#### POSITIONS OF THE PARTIES

##### Union's Position:

The Union contends that OTB acknowledged its obligation under Article V, §3 to provide all full-time employees with a duty free, uncompensated, one hour meal period when it attempted to modify that provision during contract negotiations in February, 1991. According to the Union, OTB proposed at that time to amend Article V, §3 to provide for a "45 minute uncompensated meal period."

Moreover, the Union alleges that pursuant to Article IV, which provides for a flexible work schedule, almost all Branch Office Managers have worked 4 days, 6 and 3/4 hours per day. The Union claims that individual Managers working under the flexible schedule did not exercise their right under Article V, §3 to a duty free

uncompensated meal period of one hour, since, by eating while working, they could leave after 8 and 3/4 hours, rather than after 9 and 3/4 hours.

The Union contends that at a meeting between Local 858 and OTB representatives on February 10, 1992, Edith Diaz, Deputy General Counsel of OTB, repeated OTB's position that full time employees are not entitled to a duty free uncompensated meal period of one hour. The Union further claims that the parties are currently negotiating a new collective bargaining agreement. The Union notes that no new collective bargaining agreement has yet been signed and no impasse panel has yet been appointed.

The Union contends that OTB has violated its obligation under §12-306 of the NYCCBL to bargain in good faith.<sup>1</sup> The Union further alleges that OTB has violated its obligation under §12-311d of the NYCCBL to refrain from unilateral changes in hours and working conditions.<sup>2</sup> Finally, the Union claims that OTB has willfully

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NYCCBL §12-306a(4) provides that it shall be an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

2 §12-311d of the NYCCBL provides as follows:

**d. Preservation of status quo.** During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement ... the public employer shall refrain from unilateral changes in wages, hours, or working conditions.... For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is

(continued... )

violated its obligation under Section 162 of the New York State Labor Law, which allows its employees at least forty-five minutes for lunch. The Union requests that the Board issue an order (1) directing OTB to cease and desist its attempts to unilaterally amend the Agreement; (2) directing OTB to cease and desist from preventing employees from exercising their rights under Article V, §3; (3) directing OTB to maintain the status quo and allow employees to exercise their rights under Article V, §3; (4) directing OTB to bargain in good faith with Local 858 regarding any proposed amendment to Article V, §3; and (5) directing OTB to respect its obligation under Section 162 of the New York State Labor Law.

In its reply, the Union addresses OTB's argument that it did not violate the "status quo" provision of the NYCCBL. The Union contends "[t]he status quo for the past 12 years has been that all Branch Managers have had an unambiguous contractual right to a one-hour meal period." The Union argues that since OTB has an obligation to respect this continuing contractual right until either a new agreement is reached or an impasse panel has been appointed, the fact that Branch Managers in the past may not have exercised this right is irrelevant. The Union alleges that for the past 12 years OTB allowed its employees to work flexible

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2(... continued)  
filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

schedules and did not exercise its right under Article IV to revoke them. According to the Union, "[i]t is therefore inconsistent ... for OTB to pretend that the NYCCBL's status quo requirement permits OTB to exercise its previously unexercised contractual rights, yet prevents Local 858 from exercising its previously unexercised contractual rights because that would involve change."

The Union also addresses OTB's affirmative defenses. As to OTB's defense that this dispute involves questions of contract interpretation and is therefore outside of the Board's jurisdiction, the Union responds that such an interpretation renders the status quo provision of the NYCCBL meaningless because "[o]ne could always argue that the status quo is defined by the parties' contract and any change in the status quo is merely a question of contractual interpretation and enforcement." As to OTB's defense that it bargained in good faith with the Union, the Union responds that "whatever bargaining efforts OTB may have made, OTB cannot be said to bargain in good faith when it unilaterally changes the contract without having first gained the Union's consent or having bargained to impasse." As to OTB's defense that the Board has no jurisdiction to determine whether OTB violated Section 162 of the New York State Labor Law, the Union distinguishes the cases cited by OTB because those cases involved Section 220 of the Labor Law, which contains an express limitation that it is to be enforced by the Comptroller. Moreover, the Union argues that even if the Board were to decline to exercise

jurisdiction over the labor Law claim, the Board should still consider OTB's violation of Section 162 as further proof that OTB has failed to maintain the status quo and has failed to bargain in good faith.

OTB's Position:

OTB acknowledges that the parties began formal negotiations in February, 1991. OTB contends that it made several proposals for modification of the collective bargaining agreement, including a proposal to modify Article V, §3. OTB claims that ongoing negotiations over that provision continued until February 29, 1992 when OTB reduced the hours of its branch operations.

OTB contends that Managers have never utilized a one-hour uncompensated meal period. OTB claims that it was necessary for the Union to give formal written notice of its intent to exercise its rights under Article V, §3 "because a one-hour duty free uncompensated meal period was never a condition of employment." OTB further alleges that despite several proposals by OTB, the Union refused to negotiate any change in the language of the agreement.

OTB claims that Managers combined two paid 15 minute breaks as their meal period. OTB contends that the Union's proposal during negotiations that those breaks be duty free demonstrates its consent to this practice. OTB explains that the few managers who did not work flexible schedules, when such were permitted, worked a 5 day/7 hour work schedule with two paid 15 minute meal

breaks and no additional one-hour uncompensated meal period. OTB states that after February 29, 1992, all Managers were placed on a 5 day/ 7 hour work schedule with two paid 15 minute breaks and an additional thirty minutes uncompensated meal period.

OTB contends that this dispute involves a matter of contract interpretation, which falls outside the scope of the Board's jurisdiction.

OTB also argues that the Union has failed to describe how OTB has not bargained in good faith in violation of the NYCCBL. OTB alleges that it acknowledged its obligation to negotiate over the lunch hour issue and, in fact, engaged in ongoing negotiations from February, 1991 until February, 1992. OTB asserts that the Union did not allege that OTB refused to meet and bargain with the Union regarding changes to Article V.

OTB further argues that it has maintained the status quo. OTB alleges that its former practice was to provide an "uncompensated meal period of undetermined duration" and a "combined compensated 30 minute break" and that it "endeavored to maintain the status quo ... when it incorporated the [previously] described meal period" into its present one.

Finally, OTB asserts that as the Board is without jurisdiction to interpret, administer or enforce the provisions of the New York State Labor Law, the Union's claim that OTB violated §162 of the New York State Labor Law is outside the scope of the Board's jurisdiction.

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DISCUSSION

Section 12-306a(4) of the Now York City Collective Bargaining Law ("NYCCBL") provides that it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Section 12-307a of the NYCCBL further defines this obligation by establishing those subjects that are within the scope of mandatory collective bargaining.<sup>3</sup> Indeed, the essence of both the Taylor Law and the NYCCBL is the obligation placed upon public employers to negotiate with and enter into written agreements with recognized and certified public employee organizations regarding wages, hours, and terms and conditions of employment for unit employees.<sup>4</sup>

In determining whether a public employer's alleged unilateral change in its employees' lunch period constitutes an improper practice, we must first determine whether the subject of a lunch period constitutes a mandatory subject of bargaining. In this regard, it is instructive not only to review the NYCCBL and our own prior decisions delineating the scope of matters subject to

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<sup>3</sup> NYCCBL Section 12-307a provides that "public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages.... hours (including but not limited to overtime and time and leave benefits) [and] working conditions...."

<sup>4</sup> Decision No. B-5-90.

mandatory bargaining, but also to consider how the Public Employment Relations Board ("PERB") has dealt with this question. In Addison Central School District,<sup>5</sup> PERB held that a school district's unilateral reduction in its teachers' lunch period constituted a violation of its bargaining obligation. PERB reasoned that since the lunch period constitutes time off for employees, and time off is a term and condition of employment, a change in the lunch period therefore constitutes a mandatory subject of bargaining. Furthermore, in Hammondsport Central School District,<sup>6</sup> PERB declared it well settled that the duration and location of meal breaks are mandatory subjects for negotiation. This finding is consistent with §12-307a of the NYCCBL and our prior decisions delineating matters subject to mandatory bargaining.<sup>7</sup> Accordingly, we also conclude that meal periods are mandatory subjects of bargaining.

We thus must determine whether OTB's actions regarding Branch Managers' meal periods constitute a unilateral change. We note that the parties agree that most employees did not claim a right to a one-hour duty free meal period when they worked flexible schedules, allegedly because they were satisfied to leave work an hour early instead. However, once OTB reduced the hours of its

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<sup>5</sup> PERB ¶13060 (1980).

<sup>6</sup> PERB ¶14647 (AIJ 1985). See also, 24 PERB ¶13029 (1991).

<sup>7</sup> Decision Nos. B-63-91; B-16-91; B-5-90.

branch operations and required employees to work 5 days a week, 7 hours per day, that change affected the value of the lunch period to employees. Moreover, OTB concedes that after February 29, 1992, it unilaterally prescribed two paid 15 minute breaks and an additional 30 minute uncompensated meal period for all Managers. There is no allegation that such a combination of breaks existed previously. Based upon these facts, it is clear that OTB unilaterally implemented a change in Branch Managers' meal periods. We find that this action by OTB constituted an improper practice, in violation of §12-306a(4) of the NYCCBL. OTB must bargain with the Union over this subject and cannot impose a lunch period unilaterally.

OTB maintains that this dispute involves a matter of contract interpretation and therefore falls outside the scope of the Board's jurisdiction. It is well established that the Board's jurisdiction under Section 12-306a of the NYCCBL may not be invoked if the claimed statutory violation derives solely from an alleged violation of a provision of a collective bargaining agreement.<sup>8</sup> The Board is without authority to enforce the terms of an agreement and may not exercise jurisdiction over an alleged violation of an agreement unless the acts constituting such violation would otherwise constitute an improper practice.<sup>9</sup>

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<sup>8</sup> Decision Nos. B-60-88; B-55-88; B-36-87.

<sup>9</sup> Decision Nos. B-36-87; B-29-87; B-8-85.

Although Article V, Section 3 of the agreement provides that all full-time employees shall be entitled to a duty free uncompensated meal period of one hour, the dispute as framed by the Union does not originate from a violation of this provision and its resolution does not require an interpretation of it. Rather, the petition herein alleges a statutory violation by the employer, specifically the implementation of a unilateral change in a mandatory subject of bargaining, and therefore falls within the scope of the Board's jurisdiction.

OTB's second and third affirmative defenses -- that it bargained in good faith and maintained the status quo -- are similarly without merit. As we have already determined that OTB's actions, specifically its unilateral implementation of a change in its employees' lunch period, constitutes a unilateral change in a mandatory subject of bargaining, its conduct during negotiations is irrelevant. Moreover, the change unilaterally implemented by OTB in violation of §12-306a(4) also constitutes a violation of §12-311d of the NYCCBL, which requires an employer to maintain the status quo until a new collective bargaining agreement is negotiated or an impasse proceeding is concluded.

We agree with OTB's fourth affirmative defense, however, that the Union's claim that OTB violated Section 162 of the New York State Labor Law falls outside the scope of the Board's jurisdiction. It is well established that the Board's authority does not extend to the administration of any statute other than

the NYCCBL.<sup>10</sup> The Board is without jurisdiction to interpret, administer or enforce the provisions of the New York State Labor Law. Therefore, the alleged violation of this statute is a matter which is misplaced in a petition addressed to the Board.<sup>11</sup>

Thus, a reading of Sections 12-307a, 12-306(4) and 12-311d of the NYCCBL and this Board's decisions interpreting these provisions, as well as the decisions of the Public Employment Relations Board, support the conclusion that a public employer's unilateral change in employee lunch periods constitutes an improper practice. The public employer's duty to bargain in good faith encompasses the obligation to refrain from making unilateral changes in mandatory subjects of negotiation. Accordingly, we find that the failure of OTB to bargain before implementing a unilateral change in the employee's designated lunch period constitutes an improper practice within the meaning of 12-306a(4) of the NYCCBL. We therefore shall order OTB to bargain regarding the meal period.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law ("NYCCBL"), it is hereby

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<sup>10</sup> Decision Nos. B-1-83, and B-2-82.

<sup>11</sup> Decision No. B-20-83.

ORDERED, that the improper practice petition filed herein be, and the same hereby is, granted; and it is further

DIRECTED, that the Off-Track Betting Corporation comply with the status quo provisions of §12-311d of the NYCCBL and cease and desist from failing to provide employees with a one-hour duty free uncompensated meal period until a new collective bargaining agreement is reached or impasse panel proceedings are concluded; and it is further

DIRECTED, that the parties negotiate in good faith concerning a lunch period.

Dated: September 30, 1992  
New York, NY

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MALCOLM D. MacDONALD  
CHAIRMAN

GEORGE NICOLAU  
MEMBER

DANIEL G. COLLINS  
MEMBER

CAROLYN GENTILE  
MEMBER

JEROME E. JOSEPH  
MEMBER