DC37, L.2021, S. Snyder (as Pres. of L.2021) v. OTB, 51 OCB 36 (BCB 1993) [Decision No. B-36-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37 AND ITS AFFILIATED LOCAL 2021, SHIEKIE SNYDER AS PRESIDENT OF LOCAL 2021, AFL-CIO,

Petitioners,

-and-

NEW YORK CITY OFF-TRACK BETTING CORPORATION,

Respondent.
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DECISION NO. B-36-93

DOCKET NO. BCB-1596-93 D.C.37, AFSCME,

INTERIM DECISION AND ORDER

On August 4, 1993, District Council 37, AFSCME, AFL-CIO, on behalf of its affiliated Local 2021 and the Local's president, Shiekie Snyder ("DC 37" or the "Union"), filed a verified improper practice petition against the New York City Off-Track Betting Corporation (the "OTB" or the "Corporation"). The petition charges that the Corporation violated Sections 12-306a.(1), (2), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1] by threatening to reduce the compensation of or lay off Local 2021

[1] NYCCBL §12-306a. provides as follows:

Improper practices; good faith bargaining.

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 (now renumbered as section 12-305) of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of,

(continued...)

members in retaliation for the Union's unwillingness to agree to a reduction in Sunday overtime rates. In its cover letter, the Union asked that the petition be processed on an expedited basis.

By letter dated August 12, 1993, the Deputy Chairman/General Counsel of the Office of Collective Bargaining ("OCB") informed the parties that sufficient cause existed to warrant an expedited determination on the matter. He ordered the ordinary time limits for the filing of responsive pleadings shortened.

The Corporation, appearing on its own behalf, filed a verified answer to the improper practice petition on August 23, 1993. The Union filed a verified reply and a reply memorandum of law on September 3, 1993.

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[1](...continued)
any public employee organization;
(4) 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.

Background

The OTB is a public benefit corporation created under the New York State Racing, Pari-Mutuel Wagering and Breeding Law. The purpose of the Corporation is to establish and maintain a system of off-track pari-mutuel betting on horse races.

District Council 37 is the certified collective bargaining representative for a departmental bargaining unit that includes approximately 370 part-time and 367 full-time OTB Betting Clerks. In concert with its affiliated Local 2021, DC 37 negotiates the terms of the parties' "OTB Unit Agreement." District Council 37 also is the certified bargaining representative for approximately 120,000 employees of the City and its various authorities, boards and corporations, including the OTB. In this capacity, the Union negotiates over economic and other city-wide matters, currently incorporated in the 1992-1995 "Municipal Coalition Agreement," which has a duration of 39 months,[2] and the City-wide non-economic agreement, which expired on June 30, 1992 and is covered by the status quo provisions of Section 12-311d. of the NYCCBL.[3] While negotiations over the Municipal Coalition Agreement were being concluded, DC 37 and its affiliated Local 2021 also engaged in collective bargaining with the OTB on a successor agreement to their 1984-1987 Unit Agreement. These negotiations are ongoing.

Since mid-1975, following the recommendation of a fact-finder, the OTB has been paying its Betting Clerks a premium rate of pay for Sunday work at double the normal rate. This premium rate has been incorporated into a side letter to the Unit Agreement. The Corporation alleges that it recently found that it is in danger of being unable to produce sufficient residual revenues

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[2] See Decision No. B-35-93 for a more thorough discussion on the scope of the Municipal Coalition Agreement and its prohibitions against economic bargaining at the unit level.

[3] Infra, note 4.

to meet its operating expenses, and it began looking for ways to economize on its operations. It decided that one way to close a projected budget shortfall, reportedly in excess of $1.5 million for Fiscal Year 1993-1994, was to reduce or eliminate the double-time pay for Sunday work by Betting Clerks. Accordingly, the Corporation asked the Union, in the contexts of both unit bargaining and the OTB labor-management committee, to agree voluntarily to reduce the existing contractual premium pay rates. When the Union refused, the Corporation, on June 2, 1993, filed a request for the appointment of an impasse panel with this Board. Action on that request is the subject of companion Decision No. B-35-93.

Meanwhile, the OTB continued pursuing the goal of reducing its Sunday payroll costs unilaterally. It first announced to the Union, by letter dated June 15, 1993, that it would be closing its branches on Sundays effective July 4. That never happened. On July 1, however, after the conclusion of a labor-management committee meeting during which the Corporation again attempted unsuccessfully to convince the Union to agree to a reduction in the Sunday premium pay rate, the President of the OTB notified District Council 37 that, effective September 1, all full-time Betting Clerks would be converted to part-time status, with "a corresponding decrease in salaries." Her notification letter reads as follows:

> As a result of today's Labor Management Meeting and the Union's position concerning double-time on Sundays, please be advised as follows:
>
> Commencing September 1, 1993, OTB will convert all full-time Betting Clerks to part-time Betting Clerks with a corresponding decrease in salaries.
>
> We regret that such actions are necessary, however, as you have acknowledged at the Labor Management Meeting, OTB continues to struggle to regain its financial health.
>
> Should you have any questions or wish to discuss the impact of this decision on your employees, please do not hesitate to contact me or our Labor Relations Department.

This impending unilateral change in Betting Clerks' employment status is what prompted the Union to file its improper practice claim.

Positions of the Parties

Union's Position

DC 37 argues that the NYCCBL prohibits an employer from laying off or taking other detrimental action against Union members, or from threatening to take such action, as a means of coercing employees in the exercise of their collective rights. Yet, according to the Union, this is precisely how the OTB has conducted itself in this case.

Specifically, the Union claims that the Corporation violated Section 12-306a.(4) of the NYCCBL when it threatened to eliminate jobs and acted to downgrade Betting Clerks' titles from full-time to part-time positions, in that these tactics assertedly amount to coercive bargaining. In the Union's view, the OTB's conduct shows the lack of a sincere desire to reach a genuine agreement. Conceding that a single, isolated instance of pressure tactics or hard bargaining may not automatically indicate bad faith, the Union argues that a series of incidents may do so, and it insists that the OTB has violated bargaining norms over the premium pay issue for an extended period of time. The violation is compounded, according to the Union, because the OTB's actions have created an atmosphere "where no genuine compromise is possible."

DC 37 emphasizes that the conversion of titles will severely diminish salary and pension benefits of many employees who have the most seniority. It points out that the parties already had reached agreement on economic issues, incorporating them in the Municipal Coalition Agreement, and it contends that the OTB missed its opportunity to discuss overtime rates during these negotiations. The Union argues that by subsequently insisting on discussing the subject of Sunday overtime rates in the unit bargaining forum and then acting to downgrade titles unilaterally, the OTB assertedly is trying to force a reduction in premium rates by coercion rather than by good faith bargaining.

The Union next contends that the Corporation's unilateral action

constitutes a violation of the status quo provision of the NYCCBL.[4] It notes that the OTB has filed a request for an impasse panel alleging that an impasse on the subject of Sunday premium rates exists. Making a unilateral change in the face of an impasse, the Union maintains, is a violation of NYCCBL §12-311d.

District Council 37 then claims that the Corporation's threats of Sunday closings and its conversion of Betting Clerks' titles have had a chilling effect on employees' exercise of their statutory rights, and are deliberate attempts to interfere with, restrain, and coerce Union members, in violation of Section 12-306a.(1) of the NYCCBL. These actions also assertedly violate NYCCBL §12-306a.(2), in that they allegedly are an effort to dominate and interfere with the administration of the Union by diminishing its ability to represent its members. Finally, DC 37 contends that the Corporation has violated Section 12-306a.(3) of the NYCCBL by discriminating against unit members for the purpose of discouraging their participation in Union activities.

The Union disputes the Corporation's claim that it is acting out of economic necessity, pointing out that the OTB has been attempting to negotiate a reduction in premium pay rates since November, 1990. It views with skepticism the Corporations' claim of economic hardship, pointing to a letter dated August 12, 1993, from the Chairman of OTB's board of directors to mayoral candidate Rudolph Giuliani, purportedly attesting to the OTB's fiscal health. It also notes that only one major snowstorm occurred during Fiscal Year 1992-1993, and not two, as the OTB claims.

Finally, the Union argues that the OTB has other options if it must cut

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[4] NYCCBL §12-311d. provides, in pertinent part, as follows:
> **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.

payroll expense, such as attrition, early retirement incentives, and reduction in managerial costs. It points out that the Corporation already has laid off a number of employees represented by District Council 37. If additional reductions are necessary, they assertedly should involve the least senior employees, and not permanently reduce the hours of work for a larger number of employees. In addition the Union contends that since the Corporation uses part-time and per diem Betting Clerks, "it has certain flexibilities in reducing total hours without harming long-term full-time employees." In view of the OTB's alleged failure to explore this option, DC 37 charges that the Corporation's management is more interested in pressuring the Union in bargaining than in resolving its perceived fiscal problems.

OTB's Position

The Corporation denies that it has engaged in bad faith bargaining, or that its actions were designed to interfere with DC 37's ability to represent its members. To the contrary, the OTB claims that its actions were taken for legitimate business reasons.

According to the Corporation, during the past twenty-four months, the OTB has experienced a steadily diminishing "handle" (the amount of money wagered by OTB bettors), exacerbated by two major winter storms. It explains that any drop in handle automatically results in a drop in revenue. This, in turn, requires the Corporation to reduce operating expenses. According to the OTB, labor costs, particularly in the area of overtime expenses, is one place where significant cost reductions can be made in its operating budget. The Corporation further explains that the City's most recent economic agreement with District Council 37 inflated its labor costs. It acknowledges that the wage terms of that agreement are binding on the Corporation, but it notes that the OTB is not a signatory to it, and it asserts that the City did not represent the Corporation's interests "actively" during bargaining.

The OTB stresses that despite having filed an impasse petition with this

Board over the issue of premium pay for Sunday work, it has continued to attempt to renegotiate this item in good faith with District Council 37, but that the Union has been unresponsive. Faced with this "intransigence," the OTB explains that it began searching for other ways to contain operating expenses.

One area of savings that it identified was to decrease the ratio of full-time to part-time Betting Clerks, because of the hourly pay differential of $14.97 for the former versus $14.40 for the latter. According to the OTB, it could function more efficiently and at less cost if all Betting Clerks were part-time employees. It bases this projection on a utilization study of employee-hours that it conducted, which allegedly shows that while the current work force provides approximately 1,053,000 hours of coverage at an estimated cost of $15.5 million, an all part-time work force would provide approximately 990,000 hours of coverage at an estimated cost of $14.5 million, which, the Corporation believes would amount to a substantial savings.

According to the OTB, given its adverse financial situation, it "must" implement the conversion of Betting Clerks titles from full-time to part-time. It maintains that it has the authority to do so, not only by statute under NYCCBL Section 12-307b.,[5] but also by an express agreement with the Union. The OTB notes that under the terms of a letter agreement between the parties, dated March 31, 1989, the Corporation has the right to reduce its complement

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[5] NYCCBL Section 12-307b. the statutory management right clause to which the Corporation refers, reads, in part, as follows:

> b. It is the right of the city, or any other public employer, acting through its agencies . . . to 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 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 . . ..

of full-time Betting Clerks for a number of reasons, including a drop in the handle, provided only that it explain the

reason for the reduction to the Union,[6] which it assertedly has done. Yet, despite its possession of these prerogatives, the OTB claims that it has continued to try to renegotiate the Sunday premium rate because it is mindful of the practical impact such a change will have on its employees -- a position that assertedly remains unchanged.

The OTB denies that its actions are in violation of the NYCCBL's status quo provisions. Reiterating its contention that it has the managerial authority to convert positions from full-time to part-time status, the Corporation argues that Section 12-311d. of the NYCCBL, by its terms, allows the public employer to continue to exercise its management rights during the status quo period.

The Corporation also denies that the issue of Sunday premium pay is reserved exclusively to city-wide bargaining. It points out that the subject has neither been incorporated in any city-wide agreement, nor discussed during the preceding negotiations. From the Corporation's perspective, Sunday

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[6] The letter agreement referred to by the Corporation reads, in pertinent part, as follows:

> As a result of numerous labor-management meetings between OTB and Local 2021 concerning the elimination of Betting Clerk Pools and the use of Hourly Employees year-round, the following is agreed on.
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> * * *
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> 5. It is OTB's intention to maintain the total combined level of full-time Betting Clerks and part-time Betting Clerks (permanent Betting Clerks) that existed as of March 1, 1988. OTB agrees that no less than 53% of its permanent Betting Clerks will be full-time employees. If business conditions (i.e. drop in handle) or, improved productivity, or significant branch closing suggest a reduction in that full-time complement, OTB will first meet with Local 2021 to explain the change.
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> * * *

premium pay for Betting Clerks is related exclusively to the bargaining relationship between the OTB and District Council 37's affiliated Local 2021.

Finally, the OTB contends that this Board lacks jurisdiction to address District Council 37's claim. It contends that both the parties' Unit Agreement and their 1989 letter agreement covers the conversion of full-time Betting Clerks to part-time status. The Corporation maintains that, to the extent that there is a dispute over its right to convert titles, it involves a matter of contract interpretation and should be subject to the grievance procedures found in Article VI of the Unit Agreement.

Discussion

The announced intention of the OTB to convert "all full-time Betting Clerks to part-time Betting Clerks" was the event that prompted District Council 37 to file its improper practice petition in this case. In justifying and defending their positions, the parties have raised numerous issues -- some highly relevant and others collateral or tangential. We shall address the preliminary issues of city-wide bargaining and contract bar first, and then we shall discuss the substantive issues involving the scope of bargaining over title conversions, status quo, and the representational rights of DC 37 under Section 12-306a. of the NYCCBL.

NYCCBL Election and City-wide Bargaining Restrictions

The NYCCBL covers both municipal agencies and any other public employer that elects to make the law applicable to its employees, subject to approval by the mayor.[7] The OTB made such an election on January 7, 1970, which then

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[7] Section 12-304c. of the NYCCBL reads, in pertinent part, as follows:

> §12-304 Application of chapter. This chapter shall be applicable to:
> a. all municipal agencies and . . .
> * * *

(continued...)

Mayor John V. Lindsay acknowledged and approved by letter dated January 11, 1971. The sole purpose of this election is to substitute NYCCBL coverage and OCB jurisdiction instead of coverage under the Public Employees' Fair Employment Act ("Taylor Law") and Public Employment Relations Board ("PERB") jurisdiction.

Overtime rates and premium rates of pay are self-evident economic issues. As such, they are covered by the 1992-1995 Municipal Coalition Agreement, which bars the submission of additional economic demands during its term or during negotiations for the successor to the Unit Agreement. OTB acknowledges that it is bound by the terms of the Municipal Coalition Agreement, but it notes that it is not a signatory to it, and it complains that its interests were not represented "actively" in its negotiation.

In matters of city-wide bargaining, the City of New York, through its Office of Labor Relations, negotiates on behalf of itself as well as all other public employers who have elected coverage under the NYCCBL pursuant to Section 12-304c. thereof. Therefore, as a consequence of its 1970 election, a principal-agent relationship exists between the OTB and the City for purposes of city-wide bargaining. By its signing of the Municipal Coalition Agreement, the City of New York bound itself and all other covered public employers. Thus, the OTB has no right to demand a modification in wages in the unit bargaining forum, unless the issue is raised within the context of Section 5(d) of the Municipal Coalition Agreement, which allows the parties to modify the Agreement's general wage increases provided such modification does not increase or decrease overall costs.

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[7](...continued)

> c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to approval by the mayor . . . .

Contract Bar

The provisions of paragraph 5. of the parties 1989 letter agreement (supra, note 6) creates a potential foundation for a contractual and, arguably, an arbitrable issue. Alleged contractual violations may be subject to various forms of redress, but they may not be rectified by this Board in the exercise of its jurisdiction over improper practices. Section 205.5(d) of the Taylor Law[8] precludes us from exercising jurisdiction over a claimed violation of a collective bargaining agreement that does not otherwise constitute an improper practice.[9]

In this case, however, DC 37's petition did not assert that a contractual violation had occurred or was about to occur. The question arose only after the OTB asserted it as a defense in its answer. Since the Union did not contend that the conversion of Betting Clerks' job titles from full-time to part-time status constituted a violation of contract, but, rather, claimed only that it constituted a violation of the improper practice provisions of the NYCCBL, our jurisdiction over this matter does not conflict with Taylor Law Section 205.5(d).[10]

Conversion of Job Titles As a Mandatory Subject of Bargaining

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[8] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides, in pertinent part, as follows:

> . . . the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[9] Decision Nos. B-46-92; B-61-91; B-47-89; B-46-88; B-35-88; B-55-87; B-37-87; B-29-87; and B-6-87.

[10] See Decision No. B-61-91.

Public employers and employee organizations have a statutory duty or obligation, under Section 12-307a. of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions. Section 12-306a.(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on matters within that framework. A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Taylor Law. It has been held, under both statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable statute.[11]

This does not mean, however, that every decision of a public employer that may affect a term and condition of employment automatically becomes a mandatory subject of negotiation. To the contrary, Section 12-307b. of the NYCCBL (supra, note 5) expressly reserves to management the authority to determine the standards of services to be offered by city agencies, and the methods, means and personnel by which governmental operations are to be conducted.

Under this statutory prerogative, we have held that decisions to hire and deploy personnel,[12] to relieve employees from duty,[13] to broadband or create new job titles,[14] and to revise job specifications,[15] relate to matters

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[11] Decision Nos. B-22-92; B-25-85; B-6-82; and B-5-80. See also: Village of Rockville Center, 18 PERB ¶3082 (1985); City of Batavia, 16 PERB ¶3092 (1983); Board of Education, City of Buffalo, 6 PERB ¶3051 (1973); and Board of Education Union Free School District #3, 4 PERB ¶3018 (1971).

[12] Decision Nos. B-66-88 and B-10-71.

[13] Decision Nos. B-23-75; B-21-75; B-18-75; B-3-75; and B-4-71.

[14] Decision Nos. B-36-90; B-14-83; B-2-81; and B-3-69.

[15] Decision Nos. B-38-89; B-47-88; and B-2-81.

of managerial prerogative over which the employer has no obligation to bargain. In short, management has the unilateral right to assign work in the way that it deems necessary to maintain the efficiency of governmental operations.[16]

On the other hand, the grant of managerial prerogative is not unlimited. We have held, for example, that management must bargain over the total number of hours in a work day and work week,[17] and over employees' freedom to moonlight.[18] Thus, although the public employer has an arguable managerial right to decide whether and when it should convert job titles and positions from full-time to part-time status, its right is not without limitations. Unilateral management action in such matters may not be permitted to denigrate existing employee rights in matters of wages, hours and/or working conditions. Here, however, the focus of DC 37's objections is not the OTB's right to convert the job titles in question, but the claim that management's action is improperly motivated and is intended to coerce the Union in bargaining. DC 37 has not raised a claim of improper practice based upon a unilateral change in wages, hours and working conditions, and, thus, we do not address that issue.

Status Quo

The status quo provision of the NYCCBL (supra, note 4) prohibits management from making unilateral changes in mandatory subjects of bargaining during the period of negotiations. In Decision No. B-7-72, we extended the applicability of the status quo provision to include nonmandatory subjects of bargaining for which contract terms exist in the expired contract. We held that such contract terms covering voluntary subjects of bargaining continue by

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[16] NYCCBL §12-307b.; Decision Nos. B-56-88; B-37-82; B-35-82; and B-5-80.

[17] Decision Nos. B-45-92; B-4-89; B-7-77; B-2-77; B-24-75; B-23-75; B-10-75; and B-5-75.

[18] Decision Nos. B-43-86 and B-4-75.

operation of law in full force and effect during the status quo period.[19]

We cautioned, however, that status quo does not have an unlimited reach. We said that the City remains free to act unilaterally on subjects that are generally within the scope of its managerial prerogative and as to which no specific contractual restriction has been shown to exist. We also held that status quo was not intended to deny to the City the right to take action during the status quo period on subjects outside the scope of mandatory collective bargaining, or on permissive subjects that had not actually been incorporated into the expired contract. We observed that any other interpretation would prohibit management from acting during the status quo period on subjects that it normally could decide unilaterally. This would have the practical effect of completely immobilizing the City in its labor or personnel decisions during potentially lengthy bargaining periods. We hereby reaffirm these principles.

Paragraph five of the 1989 Letter Agreement between the parties has been cited herein for purposes of defining the existing conditions of employment of unit employees with specific regard to the extent of management's obligation to maintain existing levels of full time employment of Betting Clerks and the pertinent circumstances under which it would arguably have the right to make changes in such levels. We have considered the cited language for the limited purpose of determining whether it bears upon the question whether there has been a violation of the status quo provisions of the NYCCBL. We find that paragraph five, on its face, does not constitute a contractual restriction upon the OTB's management prerogatives to convert job titles and/or to change full-time positions to part-time positions. Without further defining or adjudicating the rights and obligations of the parties under paragraph five of the 1989 Letter Agreement, we therefore find that OTB has not acted in

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[19] Reaffirmed in Decision No. B-36-87, taking notice of the codification of the so-called Triborough Doctrine. See also Decision Nos. B-38-88 and B-57-87.

violation of NYCCBL Section 12-311d.

Claimed Improper Practice Violations

District Council 37's principal allegation in this case is that the OTB is threatening to convert Betting Clerks' job titles from full-time to part-time status in retaliation for the Union's refusal to negotiate a decrease in the rate of pay for Sunday work. In its view, the Corporation's threat to convert the titles, unless the Union capitulates on the Sunday pay rate issue, amounts to coercion, and, as such, violates Section 12-306a. of the NYCCBL.

The basic facts are not in dispute. The Corporation admits that it wants to renegotiate the double-time rate for Sunday work as an economy measure, and, if the Union continues to refuse, it acknowledges that it intends to change OTB Betting Clerks' employment status unilaterally.

NYCCBL Section 12-306a.(1) forbids an employer from interfering with, restraining or coercing public employees in the exercise of their rights granted in Section 12-305. Any prohibited interference by an employer with the rights of employees to organize, to form, join or assist a public employee labor organization, to bargain collectively, or to refrain from any of these activities is a violation of this section. Thus, §12-306a.(1) provides a broad prohibition on employer interference that is derivatively violated whenever an employer commits any of the other improper practices found in Sections 12-306a.(2), (3), or (4) of the law.[20] Although §12-306a.(1) may be independently violated by such improper employer conduct as threatening employees for their union activity, for example, there has been no demonstration in this case that the OTB interfered with the exercise of any rights of employees or of their organization granted in NYCCBL Section 12-305. We will, therefore, consider the Union's claims raised in the petition as alleged violations of other more specific sections of the statute, rather than

[20] Decision No. B-47-88.

as separate violations of §12-306a.(1).

Section 12-306a.(2) of the NYCCBL makes it unlawful for a public employer to "dominate or interfere with the formation or administration of any public employee organization." A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.[21] In this case there is nothing that would lead us to believe that a conversion of Betting Clerks' titles was intended to, or that it did, interfere with or dominate the internal functions of District Council 37. The Union produced no evidence to sustain a finding of employer domination, interference, or grant of unlawful assistance to an employee organization. We find, therefore, that the OTB's conversion plan does not violate §12-306a.(2), and we will dismiss the petition's alleged violation of this section.

With regard to the Union's claim alleging a violation of NYCCBL Section 12-306b.(4), in view of the absence of allegation or proof that the subject is mandatorily bargainable, we find that the OTB was not obligated to bargain collectively on the issue of employment status conversion for Betting Clerks. We do so without prejudice to DC 37 filing a scope of bargaining petition in the future seeking to bargain over the impact of the conversion. In this regard, we note that the Corporation stipulates that it is "prepared to negotiate over the practical impact of any conversion to a part-time work force of Betting Clerks -- including, without limitation, the changes in

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[21] Decision No. B-47-88.

employee schedules occasioned by said conversion."

The final issue remaining before us is whether the OTB violated NYCCBL Section 12-306b.(3). It is clear that the refusal to reopen a collective bargaining agreement is a right protected by the Taylor Law.[22] Thus, the statute protects DC 37 against being forced to reopen and renegotiate the Sunday rate of pay for Betting Clerks. Section 12-306a.(3) of the NYCCBL and Section 209-a.1. of the Taylor Law makes it an improper practice for an employer to discriminate against a union for having conducted lawful activity within the protection of the law.[23] The heart of the matter before us, therefore, comes down to the question whether the OTB's actions were motivated by legitimate business reasons, or whether it is retaliating against the Union for exercising its lawful right to refuse to bargain over a premium pay rate.

Under a variety of circumstances, it is possible that an otherwise proper and legal action of the employer may have a detrimental effect upon the Union and can be perceived as being retaliatory. This does not necessarily mean that the action constitutes an improper practice, unless the Union can show that the employer acted with intent to do it harm, or that the action was a pretext for interference with employees' statutory organizational rights.[24] Only then would we sustain the element of improper motivation essential to a finding of improper practice. Thus, under the OTB's plan to convert its approximately 367 full-time Betting Clerks to part-time status, to establish a violation of NYCCBL Section 12-306a.(3), DC 37 must show that the Corporation knew that the Union was engaging in the exercise of protected rights, that its action would adversely affect Betting Clerks' representational rights, and that the negative impact on those rights was a motivating factor behind its

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[22] AFSCME Local 826 and Village of Endicott, 23 PERB ¶3053 (1990).

[23] City of Mount Vernon and Uniformed Firefighters, 12 PERB ¶3108 (1979).

[24] Decision Nos. B-25-89; B-59-88; B-46-88; and B-43-82.

decision to make the conversions.[25] Once the Union has satisfied both parts of this test, the employer bears theburden of showing that the same action would have taken place even in the absence of protected conduct.[26]

Clearly the OTB had knowledge of the Union's assertion of its contractual rights, and that the Corporation's announced intention of converting Betting Clerks from full-time to part-time employees was a response to DC 37's unwillingness to reopen negotiations on this issue. Based upon the evidence in the record, however, we cannot conclusively determine whether the OTB's actions were motivated by legitimate business reasons, namely, out of the need to counteract an economic turndown and loss of revenue; or whether the Corporation was motivated by a desire to retaliate against DC 37 because of its exercise of its protected right to refuse to bargain over the rate of pay for Sunday work, or to coerce DC 37 into bargaining on that subject.

On the one hand, a report issued in July 1993 by the Governor's Task Force on Public Sector Compensation, entitled "Report on Compensation at the New York Racing Association and Off-Track Betting Corporations," submitted by the Union in its reply, supports the OTB's projection of a serious budget shortfall for Fiscal Year 1993-1994. The report, one of a series on public sector compensation, states the following:

> In 1992, NYC OTB handled $731.8 million on thoroughbred races and $127.2 million on harness races, for a total of $859 million. Total corporate handle for 1992 decreased by $45 million, or 5% from 1991.

The report goes on to show that City OTB payments to the state as a percentage of handle decreased from 1.6% in 1991 to 1.5% in 1992, and that total local OTB benefits decreased from 4.7% ($42,391,312) in 1991 to 4.6% ($39,698,997) in 1992. The report also finds that the "net handle per employee [in New York

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[25] Decision Nos. B-20-93; B-16-92; B-36-91; B-4-91; B-50-90; B-47-89; B-17-89; B-8-89; B-7-89; B-46-88; B-12-88; and B-51-87.

[26] Decision Nos. B-25-89; B-17-89; B-46-88; B-12-88; and B-51-87.

City OTB] in 1992 was the highest of all OTBs." This lends credibility to the OTB's claim that the refusal of DC 37 to renegotiate the premium pay rate for Sunday work heightened the Corporation's already tenuous fiscal condition, thus precipitating the proposed change in the Betting Clerks' employment status.

On the other hand, the OTB Chairman's letter of August 12, 1993, to mayoral candidate Rudolph Giuliani seems to suggest that economy measures have compensated for most or all of the drop in OTB revenue:

> In the 1992-1993 fiscal year that just closed, NYCOTB's gross revenue was $195.4 million. After operating expenses of $95.6 million were deducted, $99.8 million net revenue was distributed to the racing industry, New York State and New York City. . . . [U]nder the previous administration . . . operating expenses were $107.5 [million], which have been reduced by Ms. Dukes to $95.6 million, compensating for the drop in handle that the entire racing industry is experiencing.

Given these competing reports of the Corporation's fiscal well-being, it is impossible for us, on the existing record, to evaluate the OTB's business necessity defense. Therefore, to establish a more complete record upon which this issue can be determined, we shall order that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining on an expedited basis, to give the parties the opportunity to submit additional evidence on the financial status of the New York City Off-Track Betting Corporation, and whether that financial status was the motivation underlying the decision to convert the Betting Clerk title from full-time to part-time status.

In conclusion, we find that the Union has not proved its claims that the OTB has violated the status quo provision in NYCCBL §12-311d., or that the Corporation interfered with the Union's organizational rights under NYCCBL §12-306a.(2) or §12-306a.(4). Inasmuch as the record is insufficient to permit us to determine the validity of DC 37's claim of retaliatory action, in violation of NYCCBL §12-306a.(1) and §12-306a.(3), and of the Corporation's

business reason defense thereto, we shall order

that a hearing be held expeditiously for submission of additional evidence to support or oppose the Corporation's business necessity claim.

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 portion of the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, its affiliated Local 2021, and Shiekie Snyder as President of Local 2021, alleging violations of Sections 12-306a.(2), 12-306a.(4), and
12-311d. of the New York City Collective Bargaining Law, be, and the same hereby is, dismissed; and it is further

ORDERED, that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which this Board may determine whether there has been a violation of Section 12-306a.(3) of the New York City Collective Bargaining Law as alleged by the Petitioners herein; and it is further

ORDERED, that inasmuch as the parties have requested an expedited decision in this matter, said hearing will take place

as soon as the parties are able to prepare their witnesses and evidence, but in no event will the commencement of the hearing be delayed beyond October 13, 1993.

DATED: New York, N.Y.
September 22, 1993

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

STEVEN H. WRIGHT