

OTB v. L.2021, DC37, 51 OCB 35 (BCB 1993) [Decision No. B-35-93]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----X

In the Matter of

NEW YORK CITY OFF-TRACK BETTING
CORPORATION,

DECISION NO. B-35-93

Petitioner,

DOCKET NO. I-214-93

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO, LOCAL 2021,

Respondent.

-----X

DECISION AND ORDER

On April 17, 1991, the New York City Off-Track Betting Corporation ("OTB") and District Council 37, AFSCME, AFL-CIO, Local 2021 ("DC 37" or "Union") commenced negotiations for a successor agreement to the July 1, 1984 to June 30, 1987 collective bargaining agreement between OTB and the Union ("Unit Agreement"). OTB alleges that the parties met on eight occasions; and that the last session was held on May 14, 1993. On June 2, 1993, the Office of Collective Bargaining ("OCB") received a request from OTB for the appointment of an impasse panel to determine the following issue:

What should be the appropriate rate of compensation for work performed on Sundays?

At present, OTB employees who perform work on Sundays receive "premium pay" at the rate of double-time if they work the preceding Saturday, or time-and-one-half if they do not work the preceding Saturday. OTB, which seeks to eliminate double-time premium pay for Sunday work, maintains that because collective bargaining on this issue has been exhausted, conditions are appropriate for the creation of an impasse panel.

In a letter dated June 25, 1993, DC 37 expressed opposition to OTB's request. As grounds for its objection, DC 37 alleges:

[A] true impasse does not exist since the issues which are the subject of the petition herein have previously been settled by the parties in an economic collective bargaining agreement currently in effect.

Specifically, the Union argues that negotiations on economic issues for citywide titles, which includes OTB employees covered by the Unit Agreement, concluded with the signing, in March 1993, of the 1992-95 Municipal Coalition Agreement ("MCA").¹

¹ It should be noted that since termination of the 1984-87 Unit Agreement and prior to execution of the 1992-95 MCA, the economic terms for OTB employees have been provided for under:

- (1) The 1987-90 Memorandum of Economic Agreement between DC 37 and its affiliated locals and the City of New York ("City"), covering all economic matters for a 39 month term; and
- (2) The 1990-91 Memorandum of Economic Agreement between DC 37 and its affiliated locals and the City, covering all economic matters for a 15 month term.

It should also be noted that the Unit Agreement, at Article I, Section 1, states:

... that for the purpose of salary negotiations, OTB recognizes District Council 37 (DC 37) and its appropriate affiliated locals as the exclusive collective bargaining representative for all employees in titles equated to those City titles represented by said DC 37 and appropriate affiliated locals; and that economic terms of collective bargaining agreements covering City titles to which OTB titles are equated are and shall be applicable in such equated titles.

The 1992-95 MCA, which has a duration of 39 months, states that it covers all economic matters and is to be incorporated into the applicable separate unit agreements.² The MCA further provides, at Section 2:

The terms of the existing separate unit agreements shall be continued except as modified pursuant to this Agreement.

In addition to a general wage increase at Section 5 and a lump sum cash payment at Section 4, the MCA also provides for a specific prohibition against additional economic demands at Section 3, to wit:

No party to this Municipal Coalition Agreement shall make additional economic demands during the term of the Municipal Coalition Agreement or during the negotiations for of [sic] the applicable Separate Unit Agreement, except as provided in Sections 5(d) and 8 hereof.³

DC 37 submits that because the issue of premium pay for work performed on Sundays concerns an additional economic demand within the contemplation of

² The MCA provides, in the Preamble, in pertinent part:

Whereas, the undersigned parties intend by this Municipal Coalition Agreement to cover all economic matters and to incorporate the terms of this Municipal Coalition Agreement into the Separate Unit Agreements,...

³ Section 5(d) of the MCA states that the general increases provided for in Section 5 may be subject to revision or modification in the Separate Unit Agreements only if such revision or modification shall not result in any current or future cost increase or decrease as compared with the cost required to pay the general increases provided for therein.

Section 8 of the MCA, entitled "Equity Fund", grants only the Unions the right to make further economic demands for increased wages or fringe benefits during negotiations for the separate unit agreements, "based on specific compensation inequities of Employees in a bargaining unit."

Section 3 of the MCA, OTB's request for the appointment of an impasse panel should be denied.

As part of its investigation of OTB's impasse request, the OCB asked OTB to respond to the facts and arguments set forth in the Union's letter. In addition, because DC 37's position relied, in part, on the MCA, which was negotiated with the City's Office of Labor Relations ("OLR"), OLR was invited to submit a statement of position if it so desired. OTB submitted its response on July 12, 1993. OLR did not respond.

In its response, OTB claims that Sunday premium pay is neither a citywide economic term falling within the purview of coalition economic bargaining, nor a matter "common to all the Unions."⁴ Rather, OTB contends, premium pay for work performed on Sundays "is a uniquely OTB measure of compensation not found in any other agency, board or public authority or corporation."⁵ In support of its position, OTB submits that premium pay for Sunday work was determined through a mediation process that took into account the uniqueness of OTB operations.⁶ OTB also states that there is a difference

⁴ In this connection, OTB cites a prior Coalition Economic Agreement, dated June 5, 1978, which provides:

WHEREAS, the parties intend by this Agreement to cover those economic matters which are common to all the Unions, and that this Agreement shall be incorporated into the Separate Unit Agreements ... [emphasis added].

⁵ OTB contends that Sunday is a "volunteer" work day and that time worked on Sundays does not count towards the accrual of leave balances, pension service credits, disability benefits or unemployment insurance. OTB also alleges that because employees are not required to work on Sundays, Sunday absences are not treated as are other infractions for disciplinary purposes.

⁶ The issue of premium pay for Sunday work first arose when
(continued...)

between the "potential" for earning premium pay for Sunday work, which is subject exclusively to changes in OTB operations, and the contractually guaranteed weekly rate of pay, which is negotiated through coalition bargaining. For all of these reasons, OTB asserts, the matter should be "treated as a bargaining unit 'terms and conditions' issue rather than a citywide economic one."

In addition, OTB claims that the bargaining history concerning premium pay for Sunday work supports a conclusion that bargaining on this issue is "outside the scope of either Citywide or MCA bargaining." In this connection, OTB argues that DC 37 did not interpose any procedural barriers to a similar OTB demand made during unit bargaining in 1985, when the 1984-87 Municipal Coalition Economic Agreement was in effect; nor when the parties were engaged in unit bargaining in 1991, when the 1990-91 Memorandum of Economic Agreement was in effect. In further support of this argument, OTB offers two documents: The first is a letter to DC 37 from OTB, dated August 23, 1991, purportedly in response to the Union's request for data underlying OTB's demand concerning Sunday compensation. The second is a letter to the City's Commissioner of Labor Relations from OTB, dated February 13, 1992, which reads as follows:

⁶(...continued)

horse racing at New York tracks was authorized for eleven consecutive Sundays in June 1975, on an experimental basis. The Union and OTB were in dispute over the rate of compensation of bargaining unit cashiers (Betting Clerks) assigned to work on those Sundays. When direct negotiations failed to produce a settlement, the parties asked for mediation assistance (Docket No. M-109-75). The existing scheme for premium pay for Sunday work was established as the result of a non-binding fact finding recommendation, dated June 4, 1975.

It is noted that the contractual source of the right to premium pay for Sunday work is grounded in a side letter to the Unit Agreement, dated August 3, 1981.

While no one from your office has yet to advise us whether Citywide contract talks over a new economic agreement with DC 37 have begun I wish to nevertheless convey to you OTB's specific demands for your consideration. These demands have already been communicated to Local 2021 during bargaining unit negotiations. However, due to the economic impact of these proposals, DC 37 has requested that they be made part of the Citywide discussions. [Emphasis in original.]

Refer to the attached page containing the specific demands and kindly keep us informed of the progress of these discussions.⁷

According to OTB, these documents demonstrate that the Union has taken inconsistent positions regarding this matter.

Finally, OTB disputes DC 37's claim that the subject of the request for impasse has already been disposed of by the terms of the MCA, arguing that the Union's contention is "factually incorrect". In this regard, OTB points out that the MCA (to which it is not a signatory) is, on its face, silent on the issue of premium pay for work performed on Sundays. Therefore, OTB argues, the existence of the MCA does not remove, eliminate, resolve or dispose of the issue; nor constitute a waiver of OTB's right to negotiate on an issue that was never brought before the coalition.

DISCUSSION

⁷ The following was appended to OTB's February 13, 1992 letter:

Economic Agreement
between the New York City
Off-Track Betting Corporation ("OTB")
and Local 2021, District Council 37
AFSCME/AFL-CIO
1992

OTB PROPOSALS

1. Elimination of double-time rates of compensation for work performed on Sundays. (Reduce to time and one-half). * * *

It is undisputed that Section 3 of the 1992-95 Municipal Coalition Agreement bars the submission of additional economic demands during its term or during negotiations for the successor to the Unit Agreement. DC 37 contends that the subject of OTB's request for impasse is such a prohibited additional economic demand. Ordinarily, the question whether a particular demand in unit bargaining constitutes an additional economic demand within the meaning of the MCA would be a matter to be submitted to arbitration under the dispute resolution provisions of Section 16 of the MCA.⁸ However, given the fact that this question is intertwined with a request for the declaration of impasse and that both parties have requested that this Board determine this matter, we find that in the exercise of our authority under NYCCBL Section 12-311c(2),⁹ we may address this question.¹⁰ In addition, we conclude that there

⁸ Section 16 of the MCA, entitled Resolution of Disputes, provides, in pertinent part:

a. [A]ny dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this Municipal Coalition Agreement ... shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining....

⁹ NYCCBL §12-311c(2) provides, in pertinent part:

If the board of collective bargaining, upon recommendation of the director, determines that collective bargaining negotiations (with or without mediation) between a public employer and a certified or designated employee organization have been exhausted, and that conditions are appropriate for the creation of an impasse panel, it shall promptly instruct the director to appoint such a panel.

¹⁰ Cf. Decision No. B-36-86.

is sufficient basis in the record of this case to decide this matter without further proceedings.

Clearly, the subject of OTB's request for impasse involves wages. There is no dispute that OTB's demand to eliminate double-time premium pay for work performed on Sundays calls for a decrease in wages for those employees who work on those days. It is also clear that OTB does not put forth this demand within the context of Section 5(d) of the MCA, which allows the parties to modify the general wage increases provided under the MCA so long as such modification does not increase or decrease overall costs. Inasmuch as only "the Unions" are entitled to make further economic demands pursuant to Section 8 of the MCA (concerning the Equity Fund), a conclusion that this is an "additional economic demand" within the prohibition of Section 3 of the MCA is inescapable.

OTB does not deny that the economic terms of the MCA apply to it.¹¹ It simply claims that because the MCA is silent on the question of premium pay for Sunday work, a demand concerning the subject is not precluded by Section 3 of the MCA. We do not agree. Section 2 of the MCA provides that "[t]he terms

¹¹ We note that a pay order issued by OLR on May 17, 1993, directed payment of the lump sum payment, provided under Section 4 of the MCA, to OTB employees.

We further note that although OTB is not a signatory to the MCA (nor to any prior economic coalition agreement), the Resolution in which OTB elected to be bound by the terms of the NYCCBL, dated January 6, 1971, provides, in pertinent part:

RESOLVED, that collective bargaining agreements negotiated by the Office of Labor Relations of the City of New York shall be applied to those employees of the Corporation who may be equated to employees of the City in city-wide titles.

of the existing separate unit agreements shall be continued except as modified pursuant to this Agreement [emphasis added]."

Moreover, OTB submitted its economic demands to the City's Commissioner of Labor Relations on February 13, 1992,¹² at which time it requested that they be made part of the "Citywide discussions." Negotiations on economic issues for citywide titles were held and concluded with the signing of the MCA in March 1993. As a result, the City, including OTB, became bound by an overall economic package having a duration of 39 months. Pursuant to Section 3 of the MCA, OTB has no right to demand a modification in wages during negotiations of the successor to the Unit Agreement, unless raised within the context of Section 5(d) of the MCA.

Accordingly, we find that there is no basis for the appointment of an impasse panel as requested by OTB herein.

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 request for the appointment of an impasse panel, filed by the New York City Off-Track Betting Corporation, be, and the same hereby is, denied.

DATED: New York, New York
September 22, 1993

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU

¹² See OTB's letter to the Commissioner of Labor Relations, supra, at 6.

MEMBER

DANIEL G. COLLINS

MEMBER

CAROLYN GENTILE

MEMBER

THOMAS J. GIBLIN

MEMBER

STEVEN H. WRIGHT

MEMBER