SUPREME COURT: NEW YORK COUNTY
IAS : PART 10

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APPLICATION OF
THE NEW YORK CITY OFF-TRACK BETTING CORPORATION,

INDEX #45321/92-001

Petitioner,

FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CPLR

-against-

THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING AND LOCAL 858 IBT,

Respondent.

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SHAINSWIT, J.:

In this Article 78 proceeding, petitioner The New York City Off-Track Betting Corporation ("OTB")seeks a judgment annulling a decision of respondent The New York City Board of Collective Bargaining (the "Board"), which granted an "improper practice" petition (New York City Collective Bargaining Law [NYCCBL], Administrative Code of the City of New York §12-306(a) (4), filed before it by respondent Local 858, International Brotherhood of Teamsters (the "Union").

OTB and the Union were parties to a 1984-1987 collective bargaining agreement. That agreement provided in 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, in Article IV, that the normal work week is five days, 7 hours per day, but that the Union and OTB can agree on a flexible work week or work day. If they so agree, that flexible schedule may be unilaterally revoked by the Union upon one month's notice, and by OTB upon 72 hours notice to the Union.

In February 1991, the parties began formal negotiations for a new collective bargaining agreement. On January 21, 1992, OTB informed the Union that it was unilaterally revoking the flexible work week, effective February 29, 1992, and reinstating the five day, seven hours a day schedule. The Union then asserted its intention to exercise its right, under Article V, §3, to a duty free uncompensated meal period of one hour. OTB informed the Union that ut did not consider itself bound by that provision, as neither party had previously complied with it.

On February 26, 1992, the Union filed an improper practice petition, pursuant to NYCCBL §12-306(a) (4), with the Board. On April 13, 1992, OTB answered the petition.

By decision dated September 301, 1992 (Decision No. B-38-92, the Board granted the improper practice petition; it directed OTB to comply with NYCCBL §12-311d (the status quo provision), and to 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. It also directed the parties to negotiate in good faith concerning a lunch period (Exh. E to Petition). In rendering its

decision, the Board reviewed both parties' positions and determined, based inter alia on prior Public Employment Relations Board ("PERB") decisions, that the subject of a lunch period constitutes a mandatory subject of bargaining. It found that OTB's admitted actions, after February 29, 1992, of unilaterally prescribing two paid 15 minute breaks and an additional 30 minute uncompensated meal period for all Branch Managers, when such combination of breaks had not existed previously,[1] constituted a unilateral change in Branch Managers, meal periods, a working condition. It determined that this constituted an improper practice, that OTB must bargain with the Union over this matter, and that it cannot unilaterally impose a new lunch period.

The Board considered and rejected OTB's argument that the dispute involved a matter of contract interpretation that was beyond the Board's jurisdiction. It found that the Union's petition was not based on violation of, Article V, §3 of the agreement, but rather on OTB's implementation of a unilateral change in a mandatory subject of bargaining as an improper practice. The Board also determined that OTB's action constituted a violation of §12-311d of NYCCBL, which requires an employer to maintain the status quo until a new collective bargaining agreement is negotiated or an impasse proceeding concluded.

Petitioner seeks to annul the Board's decision as in excess of

[1] The Board found that most of the employees did not claim a right to a one-hour duty free meal period because they worked flexible hours and were satisfied to leave work an hour early instead.

its jurisdiction, On the ground that the dispute is contractual in nature, involving interpretation of Article V, §3 of the agreement. OTB asserts that the Board's decision effectively abrogated a separate provision of the agreement, Article V, §6, which states, inter alia, that where there are two Branch Managers on duty at the same time, one of the managers shall be permitted to leave the branch premises during his or her scheduled break. OTB also argues that the Board's decision was arbitrary and capricious because it allegedly contained no support for the conclusion that the dispute did not originate from a contract violation. It further argues that the Board abused its discretion in determining that OTB violated §12-311 of the NYCCBL. Finally, OTB urges that the Board incorrectly concluded that the Union's petition complied with Title 61 of the Rules of the City of New York §1-07 (e) (61 RCNY §1-07[e]).

In opposition, the Union contends that OTB's petition is untimely, as it was not commenced until November 20, 1992, 31 days after OTB admittedly received the Board's order on October 20, 1992. The Board and the Union assert that this dispute was within the Board's jurisdiction, as the issue raised in the Union's petition did not originate with a violation of the agreement and did not require an interpretation of it. Rather, they note, the petition specifically alleges the implementation of a unilateral change in a mandatory subject of bargaining, which is within the scope of the Board's jurisdiction. They contend further that the decision is rationally based, did not involve any abuse of

discretion by the Board and was consistent with applicable laws.

Section 12-309 (a) (4) of the NYCCBL empowers the board of collective bargaining' "to prevent and remedy improper public employer and public employer practices, as such practices are listed in section 12-306 of this chapter." Section 12-306 (a) (4) states 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 employees." Thus, if a public employer alters a term or condition of employment without prior good faith negotiations, it violates this section. (See Levitt b. Board of Collective Bargaining, 79 NY2d 120, 126 [1992]).

The Union and the Board are correct that the petition is untimely.

Section 12-308 (a) provides in relevant part that any order of the Board with respect to any improper practice specified in §12-306 shall be reviewable under Article 78 of the CPLR "upon petition filed by an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party." Courts have enforced statutory limitation periods shorter than the four month period provided in CPLR 217 in Article 78 proceedings. See, e.g., King v. Chmielewski, 139 Misc2d 529 (Sup. Ct. Albany Co. 1988), aff'd. 146 AD2d 102 (3d Dept. 1989), aff'd. 76 NY2d 182 (1990) (30 day limitations period of Town Law §282 for challenging Town Planning Board's decision is enforced); Obedian v.

New York State Dept. Environ. Conservation, 108 AD2d 749 (2d Dept. 1985) (30 day limitation period of Environmental Conservation Law §25-0404 enforced; petition served on 33rd day dismissed as untimely) .

In the instant case, petitioner OTB admits that it received a copy of the Board's decision on October 20, 1992 (OTB's Memorandum in Support at p. 3). The petition was served on respondents on November 20, 1992 (Aff. of Service annexed to Petition). Because this proceeding was commenced between July 1, 1992 and December 31, 1992, under the New Commencement by Filing Law (Chapter 216 of the Laws of 1992), petitioner could commence the action and start the statute of limitations running from either service as under the prior law or filing. Petitioner did not file until November 23, 1992. In either case, the proceeding was commenced more than thirty days after service of a copy of the Board's order. Therefore, it is untimely.

Accordingly, the petition is denied and dismissed.

The foregoing constitutes the judgment of the court.

Dated: September 26, 1993.

J. S. C.