***Local 333, United Marine Division, ILA,* 3 OCB2d 11 (BCB 2010)**
(IP) (Docket No. BCB-2734-08).

***Summary of Decision:*** The Union alleged that the DOT violated § 12-306 (a)(1) and (4) of the NYCCBL by unilaterally implementing changes to the DOT drug testing policy. The City claimed that it revised the drug testing policy to reflect amendments to federal regulations, and that a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board found that although the DOT's requirement that its employees comply with the new federal regulations was not subject to bargaining, the City must bargain over the implementation of those regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure. ***(Official decision follows.)***

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**OFFICE OF COLLECTIVE BARGAINING**
**BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

***-between-***

**LOCAL 333, UNITED MARINE DIVISION,**
**INTERNATIONAL LONGSHOREMAN'S**
**ASSOCIATION, AFL-CIO,**

***Petitioner,***

***- and -***

**THE CITY OF NEW YORK and THE**
**NEW YORK CITY DEPARTMENT OF TRANSPORTATION,**

***Respondents.***

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## DECISION AND ORDER

On December 19, 2008, Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO ("Union") filed a verified improper practice petition which alleges that the

City of New York Department of Transportation ("DOT") and the City of New York ("City") violated § 12-306 (a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally implementing a revised DOT drug testing policy. The City claims that it revised the drug testing policy to reflect amendments to the United States Department of Transportation ("USDOT") regulations, and a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board finds that the DOT's requirement that its employees comply with the new federal regulations is not subject to bargaining, but the City must bargain over the implementation of those regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

## BACKGROUND

Under the Federal Omnibus Transportation Employee Testing Act of 1991, codified at 49 CFR Part 40, and federal regulations, the DOT is required to have a drug and alcohol testing program for DOT employees assigned to work in connection with the Staten Island Ferry. Federal Transit Administration ("FTA") regulation Title 49, Part 655, designates certain employees in "safety sensitive" positions who are subject to mandatory drug and alcohol testing. The regulations governing drug and alcohol testing procedures are set forth in 49 CFR § 655.51, requiring compliance with procedures as set forth in 49 CFR Part 40.

DOT employees who are represented by the Union, and who are subject to federally-

mandated drug and alcohol testing are Deckhands, Marine Oilers, and Terminal Supervisors. The job specifications for Deckhands and Marine Oilers state that employees in these titles are subject to random drug testing. Subsequent to the accident involving the ferry boat *Andrew Barberi* on October 15, 2003, which resulted in passenger injuries and fatalities, the DOT issued a policy titled "Controlled Substance and Alcohol Abuse Policy for Employees Assigned to Work in Connection with the Staten Island Ferry." This revised policy was issued on September 23, 2004, and superseded all previous drug and alcohol testing policies. This policy did not address the mechanics of the specimen collection process, and it did not require that employees expose their genitals or any other part of their bodies during the collection of the specimen under direct observation. An amendment to this policy was issued on June 23, 2006, to maintain compliance with regulations issued by the FTA and the United States Coast Guard.

On June 25, 2008, the DOT became aware that the USDOT was amending 49 CFR Part 40, which governs the procedures for mandatory drug and alcohol testing of certain transportation workers; the revised rules were to take effect on August 31, 2008. The rule changes were directed at insuring the integrity of test results and included two new provisions addressing "Specimen Validity Testing." Specifically, 49 CFR § 40.67(b) and (i) concerned the use of direct observation of specimen collections to reduce the possibility of cheating.

The proposed addition to 49 CFR § 40.67(b) made the use of direct observation of specimen collection mandatory in certain circumstances, where it had previously been discretionary. The revision reads, "[a]s an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test." The required procedure in a specimen collection involving direct observation is described in 49 CFR § 40.67(i) reads:

> As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

USDOT regulations mandate direct observation of specimen collection in certain circumstances where there is heightened risk of cheating or where an attempt to cheat has already taken place. Employers must direct immediate collection under direct observation with no advance notice to the employee when the testing laboratory reports to the medical review officer that a specimen is invalid and without adequate medical explanation (49 CFR § 40.76(a)(1)) or if the medical review officer reports that a positive, adulterated or substituted result had to be discarded when the split specimen could not be tested. (49 CFR § 40.67(a)(2)). Direct observation is required when collectors detect evidence indicating an attempt to tamper with a specimen (49 CFR § 40.67(c)(2)) or if a specimen is out of temperature range (49 CFR § 40.67(c)(3)).

On August 21, 2008, the DOT issued a memorandum titled "Amendment to New York City Department of Transportation's Controlled Substance and Alcohol Abuse Policy for Employees Assigned to Work in Connection with the Staten Island Ferry" to the Union's members, advising them that there was a change in the USDOT regulations concerning drug and alcohol testing and related procedures. On August 26, 2008, the Union asked the DOT to bargain over the modifications to the existing drug and alcohol testing policy. The DOT advised the Union that it would not bargain over any changes to the DOT's drug and alcohol testing policy required by the modified federal regulations.

On August 26, 2008, the USDOT issued a public notice in the Federal Register staying the implementation of the amendments to 49 CFR § 40.67 until November 1, 2008, in order to permit

interested parties to submit comments with respect to the contemplated changes. As a consequence of this delay, the DOT issued a memorandum on September 4, 2008, which rescinded the amendment to the policy dated August 21, 2008, and replaced it with a new amendment, which incorporated all of the USDOT's changes to 49 CFR Part 40 except the change to 49 CFR § 40.67(b). On September 25, 2008, the DOT informed the Union's President that any changes to the drug and alcohol testing policies did not have to be bargained over because the changes were mandated by federal law. The Union again asked to bargain over the changes on October 20, 2008.

On October 22, 2008, the USDOT issued a public notice stating that despite the comments received, the changes contemplated in 49 CFR § 40.67 were going to be implemented. On October 30, 2008, the DOT issued a memorandum stating that it would conduct direct observation specimen collections for all return-to-duty tests and follow-up tests, and that it was adopting 49 CFR § 40.67 as its own policy, specifically, 49 CFR § 40.67(b).

In response to the USDOT's position, BNSF Railway Company, amongst other employers, sought and obtained a court order in the United States Court of Appeals for the District of Columbia Circuit staying implementation of 49 CFR § 40.67(b). (*BNSF Ry Co. v. U.S. Dept. of Transp.*, No. 08-1265 (D.C. Circuit November 12, 2008)). During the time that the stay was in effect, DOT utilized the September 4, 2008 policy, which incorporated the changes to 49 CFR § 40.67(i).

On December 19, 2008, the Union filed the instant verified improper practice petition, challenging the DOT's unilateral implementation of the drug and alcohol policy changes.

On May 15, 2009, the D.C. Circuit Court of Appeals upheld the validity of the USDOT's proposed amendment to 49 CFR § 40.67. *BNSF Ry. Co. v. U.S. Dept. of Transp.,* 566 F.3d 200 (D.C. Cir. 2009). The Court's stay of the implementation of the regulation was officially lifted on

July 1, 2009, and on July 30, 2009, the USDOT re-implemented the change to 49 CFR § 40.67, to be effective August 31, 2009. The DOT promulgated a memorandum incorporating the changes into its drug and alcohol testing policy on August 31, 2009.

The Trial Examiner in this matter, upon being informed that the D.C. Circuit had lifted the stay, directed the parties to submit letter briefs addressing the effect of the lifting of the stay on the parties' original positions.

## POSITIONS OF THE PARTIES

### Union's Position

The Union argues that the DOT failed to bargain in good faith with the certified representatives when it unilaterally implemented rules and policies concerning testing for drugs and alcohol. Drug testing procedures that are not compelled by law are mandatory subjects of bargaining. The DOT's arguments that it cannot bargain over the changes in policy because its policies and procedures are compelled by law fails to acknowledge that there are discretionary components in the federal regulations with respect to procedures and consequences as it relates to chemical testing applicable to the Union's members. Any change in the DOT's policy where the federal government leaves room for discretion is a mandatory subject of bargaining. Some areas where the DOT has discretion include, but are not limited to: the disciplinary consequences that would flow from a positive test result; consequences in cases where medications caused the positive result; the type of collection sites that would be utilized; whether or not the Union could accompany the employee to the collection site; who would pay for so-called "split testing"; whether the same person would act as the collector, observer, and monitor; and the DOT position that any drug

consumption, whether prescription or over-the-counter, precludes a person from performing safety-sensitive functions.

The DOT's changes to the procedures are an unprecedented intrusion into the privacy expectations and interests of Union members with respect to their own bodies, which results in a change in terms and conditions of employment. Because of this, and the fact that the August 2008 DOT amendments to the policy added three new paragraphs that enlarged the definition of what constitutes a refusal to test, the importance of having a Union representative is critical. In particular, in direct observation situations, the failure to follow the observer's instructions to raise clothes and lower clothes and turn around so that the genital and buttock areas could be inspected by the observer is now considered to be a refusal to take the test. In such a context, the choice of laboratory and collection site, and the issue of whether a Union representative could be present are all discretionary and could have been bargained over.

The refusal to take the test or a positive result leads to termination under the DOT's policies, and in light of that all-or-nothing approach having a procedure for quickly obtaining Union representation for a subject can mean the difference between loss of employment or continued employment. The Union also believes that a representative's presence would avoid or reduce any feelings of violation or humiliation that the subject may feel as a result of being subjected to a direct observation drug/alcohol test. The Union also claims that by promulgating the new drug/alcohol testing policy, the DOT also violated NYCCBL § 12-306(a)(1) independently by interfering with the rights of public employees in the exercise of self-organization.

In its letter brief addressing the lifting of the stay and the new policy, the Union's position is that the stay did not have an impact on the instant proceedings. The Union explains that this is

because the issue is whether the employer refused to bargain in good faith over those areas not explicitly prescribed by the relevant statutes, and that has not changed. The only relevance of the stay is that demonstrates that even after it was implemented, and the DOT was not required to comply with the regulations, the DOT still chose to substantially comply with those regulations that were not mandated without bargaining in good faith.

**City's Position**

The City argues that the language of 49 CFR § 40.67(I) imposes an affirmative obligation on the City to implement a particular procedure under particular circumstances, affording the employer no discretion as to the procedures an observer must follow when conducting a direct observation collection. Under these circumstances, a new policy or procedure that was heretofore a mandatory subject of bargaining, like here, becomes a non-mandatory one. Based upon the explicit statutory mandates that govern DOT's policy regarding drug and alcohol testing procedures for workers assigned in connection with the Staten Island Ferry, the City is under no obligation to negotiate the policy and, consequently, it did not violate NYCCBL § 12-306(a)(4), or § 12-306(a)(1), derivatively.

The City argues that during the period in which the federal stay was in effect, the DOT had no obligation to bargain over the revised policy as it related to 49 CFR § 40.67(b), as that portion of the policy had been withdrawn to conform to reflect the USDOT's own withdrawal of the amended sections, along with their federally-mandated changes. The City also argues that there is no independent violation of NYCCBL § 12-306(a)(1), as the Union did not allege any fact in support of that claim.

In its letter brief, the City withdrew its second defense, that the Union's claim was, in

essence, not yet ripe, since it had withdrawn the policy during the pendency of the federal stay. Further, the City noted that the non-discretionary nature of the federal regulations were re-asserted by the USDOT in a recent statement that employers and employees do not have the authority to agree to avoid compliance with the requirements of federal law.

## **DISCUSSION**

The petition challenges the DOT's unilateral imposition of its own version of USDOT regulations regarding drug and alcohol testing on the Union's members. The DOT argues that the application of the federal regulations is a matter fixed by law and may not be bargained. While compliance with the federal regulations is required of the DOT, the City must bargain over the changes to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

While our authority does not extend to the administration of statutes other than the NYCCBL, a public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law. *COBA*, 43 OCB 72, at 11 (BCB 1989); *COBA*, 41 OCB 39, at 17. Even if management action is taken pursuant to another statute, certain obligations–for example, bargaining over mandatory subjects–may arise under our law. *DC 37,* 77 OCB 34, at 14-15 (BCB 2006) (procedures adopted pursuant to federal mandate nonetheless subject to bargaining where not specifically mandated by statute); *DC 37, Local 2507 & Local 3621*, 73 OCB 7, at 17-18 (BCB 2004); *PBA*, 39 OCB 41, at 6 (BCB 1987). In *Committee of Interns and Residents,* 35 OCB 25 (BCB 1985), although we

refused to address the validity or applicability of Section 822 of the New York City Charter to HHC employees, we found that HHC had certain bargaining obligations regarding implementation of that statute. Similarly, in *Doctors Council,* 69 OCB 31, at 10-11 (BCB 2002), while we found that the question of applicability of City Charter, Chapter 68, to the employees of HHC was beyond the Board's jurisdiction, we held that the union could seek bargaining over procedures for implementation of that statute to the extent that such negotiations were not inconsistent with the statute. *See LBA*, 63 OCB 23 (BCB 1999), *aff'd*, *City of New York v. Lieutenants Benevolent Assn.*, 285 A.D.2d 329 (1st Dept. 2001) (City's procedure to process refunds of excess moneys paid by non-resident union members pursuant to New York City Charter § 1127 is a mandatory subject of collective bargaining).

These cases comport with the Court of Appeals' decision in *Matter of City of Watertown v. State of New York Pub. Empl. Rel. Bd.*, 95 N.Y.2d 73 (2000), which addressed a dispute arising under General Municipal Law § 207(c) and decided that while the municipality's initial determination of disability status was a non-mandatory subject of bargaining, the procedures for challenging the determinations, as they affected terms and conditions of employment, had to be negotiated. The Union was afforded the right to "negotiate the forum–and procedures associated therewith–through which disputes related to such determinations are processed." 95 N.Y.2d at 73, 76 (citations omitted).

Similarly here, we find that the DOT's requirement that its employees must comply with the new federal regulations presents a question of law which does not implicate collective bargaining, but further find that the City must bargain over the implementation of those regulations to the extent that its implementation permits discretion in how to achieve compliance. *See DC 37, supra* at 14-15.

It is beyond question that procedures applicable to drug testing are mandatory subjects of bargaining. Procedures themselves may include testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions of retesting, reporting and recording of test results, due process protections, and disciplinary consequences. *See DC 37,* 57 OCB 16 (BCB 1996) (procedures for implementing drug testing, including testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, and reporting and recording of test results are all mandatory subjects of bargaining); *DC 37,* 67 OCB 25 (BCB 2001) (employer's actions in unilateral broadening of the definition of "prohibited substances" under its drug policy, so as to encompass lawful commercially available products, eliminated the affirmative defense that a positive result was the result of ingesting legally available products, altered the disciplinary procedures by precluding valid defenses, and was an improper practice because it impacted available defenses); *see CEA,* 77 OCB 38 (BCB 2006), *aff'd, Matter of City of N.Y. v. Patrolmen's Benev. Assn.,* 56 A.D.3d 70 (1st Dept. 2008), *lv. granted,* 12 N.Y.3d 707 (2009); *DEA,* 77 OCB 37 (BCB 2006); *CWA,* 67 OCB 26 (BCB 2001); *CWA*, 61 OCB 25 (BCB 1996).

The Union has shown that the implementation of the new testing regulations directly relates to employees' terms and conditions of employment. Therefore, the Union had the right to request bargaining over the implementation of these and other requirements of the DOT drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure. The regulations leave room for employer discretion in certain subject areas, such as the

selection of "observers" (as opposed to "collectors") and the presence of Union representatives at the collection site, and are thus bargainable.[1] Therefore, as examples, the parties may bargain over: criteria and/or qualifications for the selection of the observer if one other than the collector is to be present; and whether a Union representative may accompany an employee summoned for direct observation urine testing and be present at the collection site in areas other than the urination facility.

The Union does not allege that an employee was subjected to testing involving direct observation during the period that the stay was in effect, or for that matter, to the date that the letter briefs were submitted. Therefore, our remedy would be the same had the employer implemented the policy during the stay or not: we order that the City bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with them permits discretion in how to achieve such compliance, and grant the Union's petition as it relates to NYCCBL § 12-306(a)(4). We also find that the City violated derivatively, NYCCBL §12-306(a)(1). *See DEA,* 2 OCB2d 9, at 13 (BCB 2009); *see also DC 37*, 75 OCB 13, at 12 (BCB 2005); *UFOA*, 71 OCB 6 (BCB 2003). The Union, in its papers, alleges that the City violated § 12-306(a)(1) independently, but does not explain how the City has interfered, restrained, and coerced public employees in their exercise of self-organization rights. As a result, we dismiss that aspect of the Union's claims.

Accordingly, we grant the Union's petition in part and deny it in part, and order the City to

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[1] The federal DOT regulations deal at length with the qualifications and training of "collectors," but CFR § 40.67(g) states that "the observer can be a different person from the collector and need not be a qualified collector." No criteria or training requirements are specified in the regulations for persons who are "observers." In addition, 49 CFR § 40.43(e)(1) provides that employee representatives authorized by the employer pursuant to a collective bargaining agreement are permitted in a collection site.

bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

## 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 improper practice petitions docketed as BCB-2734-08, and the same hereby are, granted as to all claims arising under NYCCBL § 12-306(a)(1) and (4), and it is further

ORDERED, that the improper practice petition docketed as BCB-2734-08, be and the same hereby is, dismissed as to any claim that the DOT violated NYCCBL § 12-306(a)(1) independently, and it is further

ORDERED, that the City bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

Dated: New York, New York
February 25, 2010

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent. M. DAVID ZURNDORFER

MEMBER

I dissent. PAMELA S. SILVERBLATT
MEMBER