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

-between-

JAMES LaRIVIERE, DIRECTOR, N.Y.
INLAND AND HARBOR CONTRACTS,
DISTRICT #1 - PACIFIC COAST DECISION NO. B-36-87
DISTRICT, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION, DOCKET NO. BCB-967-87

Petitioner,

-and-

HENRY F. WHITE, JR., DEPUTY
COMMISSIONER, BUREAU OF TRANSIT
OPERATIONS, CITY OF NEW YORK,
DEPARTMENT OF TRANSPORTATION,

Respondent.
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INTERIM DECISION AND ORDER

On June 2, 1987, James LaRiviere, Director, New York Inland and Harbor Contracts, District #1 - Pacific Coast District, Marine Engineers' Beneficial Association (hereinafter "MEBA" or "the Union") filed an improper practice petition in which it is alleged that the Bureau of Transit Operations of the New York City Department of Transportation (hereinafter "the City" or "the Department") is making a unilateral change in working conditions aboard the Staten Island ferry boats in that it is creating a new schedule calling for tours of duty on weekends which ex-

ceed the eight-hour tours prescribed in the 1984-1987 collective bargaining agreement between the parties ("the Agreement"). On June 26, 1987, the City appearing by its Office of Municipal Labor Relations ("OMLR"), filed a motion to dismiss the petition and an affirmation in support thereof, asserting that the petition (a) fails to state a cause of action, (b) seeks an inappropriate and anticipatory remedy, and (c) is raised in the wrong forum. On July 15, 1987, the Union filed a response to the City's motion and, on July 22, 1987, OMLR filed a reply to MEBA's response.[1]

The Petition

At the time this proceeding was commenced in June 1987, MEBA and the City were parties to a collective bargaining agreement which was due to expire on June 30, 1987.

[1]The Revised Consolidated Rules of the office of Collective Bargaining ("OCB Rules") do not provide for the submission of a reply by the moving party to "answering affidavits" filed by a petitioner. See, OCB Rules §13.11. However, in the present case, no objection was interposed by MEBA and the contents of the reply do not prejudice any rights of the petitioner. Accordingly, we have accepted the additional pleading.

Article V of the Agreement provided as follows:

> ARTICLE V - WORK DAY, WORK WEEK, AND WORK YEAR
>
> Section 1.
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> The rates prescribed in article IV of this Agreement shall constitute compensation in full for the regular work week for the operation of ferryboats as practiced in various agencies; that is, four (4) eight-hour (8) tours per week which shall be consecutive, and 206 eight-hour (8) days per annum and effective July 1, 1985 for 207 eight-hour (8) days per annum of which 198 eight-hour (8) days are work days (representing 1484 hours work at straight time pay plus 100 hours worked at overtime pay), and eight (8) eight-hour days of which [sic] are paid holidays (representing 64 hours of holiday pay at straight time). Effective July 1, 1985 nine (9) eight-hour days are paid holidays (representing 72 hours) of holiday pay at straight time).
>
> Section 2.
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> Any regular work week may include work on a Saturday and/or Sunday at no additional compensation, it being understood that the rates set forth in this Agreement include Saturday and Sunday work.

According to petitioner, in May 1987, District #1 Director LaRiviere learned that the City had formulated a plan to change certain tours of duty on some of its ferry boats and that, pursuant to the plan, the following schedule, would be implemented:

Friday	--	7:00 A.M. - 3:00 P.M.	8 hrs.
Saturday	--	10:00 A.M. - 9:00 P.M.	11 hrs.
Sunday	--	10:00 A.M. - 9:00 P.M.	11 hrs.
Monday	--	3:30 P.M. - 11:30 P.M.	8 hrs.

Since Article V, Section 1 of the Agreement, quoted in full supra, prescribes a work schedule of "four (4) eight-hour (8) tours per week," petitioner asserts that the eleven-hour tours of duty on Saturday and Sunday under the new plan, violate the contract. MEBA alleges that bidding on jobs for the next fiscal year was to take place on June 17, 1987, and that the new duty tours were to be implemented during the weekend of July 11, 1987.

Petitioner also asserts that, on February 9, 1987, it filed a bargaining notice seeking to negotiate a successor agreement on behalf of all the titles in the unit.[2] It is argued that the implementation of the new schedule in July 1987 therefore would violate the statutory obligation, pursuant to Section 1173-7.0d of the New York City Collective Bargaining Law ("NYCCBL"), to maintain the status quo during the period of negotiations.[3]

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[2]The bargaining unit represented by MEBA is composed of persons employed in the titles Captain, Assistant Captain, Mate, Chief Marine Engineer and Marine Engineer. These employees are referred to collectively as "Licensed Officers." 1984-87 Agreement, Article 1, Sections 1 & 2.

[3]Section 1173-7.0d of the NYCCBL provides that:

> During the period of negotiations between a public employer and a public em-

(continued...)

(...continued)

ployee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. 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 filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

As a remedy, MEBA requests an order re-establishing the status quo "because the public employer has announced unilateral changes of hours and working conditions."

Positions of the Parties

City of New York

In support of its motion to dismiss the petition, respondent argues that at the time the petition was filed petitioner was unable to demonstrate a unilateral change in working conditions, because the Department had not effectuated any change in the ferry boat work schedule at that time. Citing Matter of District 2, Marine Engineers Beneficial Association, AFL-CIO and Isbrandtsen Company, Inc., 226 N.Y.S. 2d 883 (Sup. Ct., Kings Co. 1962), the City contends that the instant controversy is not actionable because the allegations are only speculative and because the petition seeks an advisory opinion.

Respondent also asserts that the petition should be dismissed because the only relief it seeks is a "return to the current practice" which, respondent contends, is the present practice; petitioner cannot be heard to demand by way of remedy that which it already has. Moreover, as the Agreement was not due to expire until June 30, 1987, respondent maintains that the reference to Section 1173-7.0d of the statute and a demand for an order preserving the status quo is inappropriate.

Notwithstanding the above, however, and a general denial of the allegations set forth in MEBA's affidavit

in support of its response to the City's motion, respondent states that, commencing July 11, 1987, it did alter the amount of overtime work assigned to some employees on the Saturday and Sunday tours. The City avers that the affected employees are paid for the additional time in accordance with the overtime provisions of the Agreement.

Finally, respondent asserts that the petition should be dismissed because it alleges violations of contract which are not appropriate for resolution in the improper practice forum. The City notes that Article XV of the Agreement provides for the adjustment of disputes through a grievance and arbitration procedure, and that MEBA has filed a grievance at Step III of the procedure alleging the same facts and the same contract violations as are alleged herein.

Marine Engineers' Beneficial Association

In opposition to the motion to dismiss the petition, MEBA argues that there is no legal requirement that a unilateral change alleged to constitute an improper practice be fully implemented before a violation of statute can be found. Petitioner argues moreover that its request for relief is appropriate as it seeks to prevent the City from implementing a new duty tour plan which will violate the Agreement.

MEBA contends that respondent's arguments relating to the alleged violation of the status quo, if accepted by the Board, would produce the anomalous result that unilateral changes in the status quo prior to the expiration of the agreement are permissible but that post-expiration changes in the status quo violate the statute. In any event, petitioner observes in its response to the City's motion, job bidding for the next fiscal year has taken place and the plan will be fully implemented as of the July 11, 1987 weekend, at which time the Agreement will have expired.

Finally, petitioner asserts, even if the grievance procedure is a proper forum for resolution of the instant dispute, nothing in the NYCCBL precludes the union from processing an improper practice petition before the Board.

Discussion

For purposes of evaluating a motion to dismiss, we must deem the factual allegations of the petition to be true and limit our inquiry to whether, taking the facts as alleged by the petitioner, a cause of action under the NYCCBL has been stated. In the present case, therefore, we take as true MEBA's assertion that the City planned to imple-

ment, as of July 11, 1987, a new work schedule which would require some employees to work in excess of the eight-hour tours prescribed by the Agreement.

Although not cited by petitioner, we note that Section 1173-4.2a(4) of the NYCCBL defines an improper public employer practice to include a refusal "to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees," and that this provision may be violated by an employer's unilateral adtion on a mandatory subject of bargaining.[4] However,-the Board's jurisdiction under Section 1173-4.2&1,4) may not be in-!oked if the claimed statutory violation derives solely from the alleged violation of a provision of a collective bargaining agreement. 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.[5] In the present case,

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[4]Decision No. B-25-85. See, National Labor Relations Board v. Katz, 369 U.S. 736 (1962).

[5]Decision No. B-29-87. Section 205.5(d) of the Taylor Law, which is applicable to the Board pursuant to Section 212 of that law, provides that:

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we cannot find that a cause of action under Section 1173-4.2 (4) has been stated because the sole basis for the alleged violation of statute is a claimed failure to comply with the terms of Article V of the Agreement.

With respect to petitioner's allegation that a unilateral change in the work schedule of ferry boats officers violates the status quo provision (Section 1173-7.0d) of the NYCCBL, we agree with MEBA that the filing of a bargaining notice on February 9, 1987 triggered respondent's duty pursuant to that section to "refrain from unilateral changes in wages, hours, or working conditions." In dealing with alleged violations of this section of the statute, it has long been our practice to determine on a case-by-case basis the means to be employed to resolve a given controversy - either as a failure of full faith compliance with the provisions of the statute or as a matter to be referred to arbitration in accordance with the arbitration procedures of the

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(...continued)

> the board shall not have authority to enforce an agreement between a public 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.

prior contract between the parties. In the latter circumstance, we have reasoned that the collective bargaining agreement is the best guide as to the "wages, hours or working conditions" which are not to be altered during the status quo period and that the grievance and arbitration procedure which applied during the contract term provides the most appropriate mechanism for resolving the controversy.[6] Until now we have not considered an alleged unilateral change during the status quo period, to state a claim of improper practice.

We note however that, in 1982, the Taylor Law was amended to add a new subdivision "(e)" to the improper practice section of the law.[7] Section 209-a.l(e) provides that:

> [i]t shall be an improper practice for a public employer or its agents deliberately... (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article [prohibition of public employee strikes].

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[6] E.g., Decision Nos. B-6-70; B-1-72; B-13-74; B-12-75;-B-26-75; B-13-76.

[7] Laws of 1982, Ch. 868 §1 (eff. July 29, 1982); Laws of 1982, Ch. 921 §1 (eff. Dec. 20, 1982).

This amendment codified and extended the so-called "Triborough Doctrine" which resulted from a decision of the State Public Employment Relations Board holding that an employees unilateral change in terms and conditions of employment during negotiations for a new contract was an improper practice under Sections 209-a.l(a) and (d) of the Taylor Law.[8] Although the NYCCBL has not been similarly amended, Section 212 of the Taylor Law, which authorizes local governments in New York State to enact their own labor relations provisions and procedures to supplant the provisions of the State law, mandates that certain sections of that law continue to apply to such local jurisdictions. Section 209-a is among these. Therefore, we now hold that a claimed refusal to continue all the terms of an expired agreement until a new agreement is negotiated also states a claim of improper practice in our jurisdiction. Accordingly, we find that the petition filed by MEBA alleging a violation of status quo states a prima facie cause of action under the Taylor Law.

With respect to respondent's remaining arguments in support of its motion to dismiss, i.e., that the petition

[8]Triborough Bridge and Tunnel Authority, 5 PERB ¶3037 (1972).

improperly seeks an advisory opinion and an inappropriate remedy, we note that the Board will not decide an issue where no real controversy exists or where the requested relief cannot be granted.[9] However, this does not appear to be such a case. There is no doubt that MEBA filed its petition in anticipation of the City's implementation of a change in the working conditions of Licensed Officers. However, as we consider petitioner's allegations to be true for purposes of this interim decision, we conclude that the action complained of was, as alleged, soon to be taken. Thus, Matter of District 2, Marine Engineers Beneficial Association, cited by the City, is not applicable here. In that case, the court found that the dispute presented was not arbitrable because at the time arbitration was sought the question to be presented to an arbitrator involved matters that were contingent upon the occurrence cf future events, one of which was not even within the control of a party to the dispute. As the parties had not consented in their agreement to an arbitrator's award that would be in the nature of an advisory opinion, the court denied the application as premature.[10] In the instant case, it should be em-

[9]Decision No. B-22-79.

[10]226 N.Y.S. 2d 883, 887 (Sup. Ct. Kings Co. 1962).

phasized, although the petition was filed before the event complained of occurred, we accept petitioner's allegation that such event was imminent and find that the petition is not merely speculative.

For the aforementioned reasons, we shall deny the City's motion to dismiss the petition in this matter and direct that an answer be served and filed within ten days after receipt of this decision by respondent. After joinder of issue, we shall be in a position to evaluate whether the action complained of in the petition has occurred and, if so, whether any improper practice has been committed.

O R D E R

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

DETERMINED, that the petition filed herein by the Marine Engineers' Beneficial Association states a prima facie claim of improper practice within the meaning of Section 209-a.l(e) of the Taylor Law; and it is hereby

ORDERED, that the motion of the City of New York to dismiss the improper practice petition be, and the same hereby is, denied in all respects; and it is further

ORDERED, that the City of New York shall serve and file an answer to the improper practice petition within ten (10) days of receipt of this Interim Decision and Order.

DATED: New York, N.Y.
August 27, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

CAROLYN GENTILE
MEMBER