L.831, IBT v. City, Dep't of San., 39 OCB 6 (BCB 1987) [Decision No. B-6-87 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, I.B.T.,

Petitioner,

-and-

DECISION NO. B-6-87
DOCKET NO. BCB-768-85

THE CITY OF NEW YORK and THE DEPARTMENT OF SANITATION OF THE CITY OF NEW YORK,

Respondents.
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DECISION AND ORDER

On March 18, 1985, the Uniformed Sanitationmen's Association ("USA" or "the Union"), by its President Edward Ostrowski, filed a verified improper practice petition alleging that the Department of Sanitation ("the Department") has ordered Sanitation Workers to perform duties not provided for in the job specification for their title or in the collective bargaining agreement between the parties, in violation of Sections 1173-4.2a(4) and 1173-7.0d. of the New York City Collective Bargaining Law ("NYCCBL") On March 29, 1985, the City of New York ("the City"), by its office of Municipal Labor Relations ("OMLR"), filed a verified answer to the petition. The USA filed a verified reply on April 9, 1985, in response to which the City filed a verified sur-reply on April 12, 1985.[1]

[1]The Office of Collective Bargaining accepted the City's sur-reply over an objection by the Union, noting

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At the joint request of the parties, the Deputy Director for Disputes of the Office of Collective Bargaining ("OCB") attempted, during a period of more than one year, to mediate the underlying dispute in this matter. Although progress was made, a settlement was not achieved. As it appears to the Board that further mediative efforts will not be productive, we have determined that the parties will best be served by the issuance of a Decision and Order resolving the legal issues in their dispute.

Background to the Dispute

The USA contends that, commencing on or about February 15, 1985 and continuing as of the date the instant petition was filed, the Department of Sanitation has ordered employees serving in the title "Sanitation Worker" to tow abandoned

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that while the Board discourages the submission of sur-replies, it has accepted such submissions where a sur-reply is responsive to additional facts or new matter contained in a reply. As the Union's reply in this case contains legal argument based upon additional facts not asserted in the petition, the Board deemed it appropriate to accept the City's response to these matters by way of a sur-reply.

cars from New York City streets, which task is not included either in the job specification for Sanitation Worker or in the most recent collective bargaining agreement between the parties. The Union alleges that the towing function previously was performed exclusively by private companies under contract with the City. The City maintains that the towing function is among the duties and responsibilities of the title Sanitation Worker, which is evident from the Notice of Examination for that title.[2] Further, the City alleges that the practice of assigning Sanitation Workers to tow abandoned cars is not a new one; Sanitation Workers regularly were assigned to perform towing duties prior to the 1970s and such assignments have continued to be made periodically since 1970.

Positions of the Parties

USA's Position

The USA contends that the assignment of towing duties to Sanitation Workers is a unilateral change in a term or condi-

[2]Notice of Examination (Sanitation Worker), Exam No. 1012 (1983), states in relevant part:

> DUTIES AND RESPONSIBILITIES: Under direct supervision, performs the work and operates the equipment involved in street cleaning, waste collection, snow removal and waste disposal, performs related work.

tion of employment and an alteration of a past practice concerning which the Department was obligated to negotiate with the Union before implementation. The USA asserts that, although it specifically indicated its willingness and availability to negotiate with the Department, the latter refused. According to the Union, the City's Unilateral change in a term or Condition of employment, its alteration of a past practice, and its refusal to negotiate concerning these matters constitute Improper practices within the meaning of Section 1173-4.2a(4) of the NYCCBL.[3]

A further basis for the Union's improper practice petition is the allegation that the assignment of towing duties to Sanitation Workers occurred during the "status quo period",[4]

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[3]NYCCBL Section 1173-4.2a(4) provides:

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

[4]NYCCBL Section 1173-7.0d speaks of a "period of negotiations", which is defined as:

> the period commencing on the date on which a bargaining notice is filed and ending on

(continued...)

a period during which, the USA asserts, the City must refrain from making unilateral changes in terms and conditions of employment.

As a third basis for its improper practice petition, the Union asserts that the assignment of towing functions to Sanitation Workers will have a practical impact on working conditions, in that the performance of such tasks will:

> "(i) create manning problems on those tasks which sanitationmen [sic] are traditionally and contractually required to perform;
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> (ii) increase and change the workload of those sanitationmen [sic] assigned to tow abandoned cars and those men performing other tasks which will become undermanned because of personnel reassignment; and
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> (iii) increase threats to employee safety resulting from the performance of a job task which sanitationmen [sic] have not been trained to perform."[5]

The Union notes that NYCCBL Section 1173-4.3b specifically provides that "questions concerning the practical impact" that

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> the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

The "period of negotiations" is commonly referred to as the status quo period."

[5]Union reply ¶ 11.

management decisions will have on public employees "are within the scope of collective bargaining."

The USA requests that an evidentiary hearing be held on the issue of the Department's refusal to bargain. As a remedy for the alleged improper practices, the Union seeks an order directing the City to cease and desist from assigning Sanitation Workers to tow abandoned vehicles, unless the City first negotiates in good faith and reaches agreement on the matter with the USA.

City's Position

The City asserts that the Union has failed to state an improper practice within the meaning of the NYCCBL. First, OMLR notes that Section 1173-4.3b of the statute reserves to the City certain management Prerogatives concerning which it may act unilaterally without consulting the Union. The City[6]

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[6]NYCCBL Section 1173-4.3b provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job

(continued...)

asserts that matters encompassed within its statutory prerogatives are not terms and conditions of employment and are not within the scope of bargaining. According to the City, job content and the ability of management to direct its employees to perform specific job functions are among the rights reserved to it under the statute. Furthermore, OMLR asserts, the statutory rights prescribed by Section 1173-4.3b apply with equal force during the period when a collective bargaining agreement is in effect and during the status quo period.

OMLR acknowledges that management may be found to have waived its rights under the NYCCBL. However, the City asserts, the standard set forth in prior Board decisions for a finding

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> classifications; take all necessary actions to carry out its mission in emergencies; 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, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

of waiver has not been met here.[7] Specifically, OMLR contends that the abandonment of a past practice, even if proven, does not establish a waiver of management right.

The City asserts that the USA's allegations of practical impact should be dismissed because:

> (a) a claim of practical impact is not an improper practice pursuant to the NYCCBL; and
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> (b) the Union has not, in any event, stated a prima facie claim of practical impact within the standards previously established by the Board, either with respect to work-load or with respect to safety.

For all the aforementioned reasons, OMLR requests that the Board issue an order dismissing the petition in its entirety.

Discussion

Section 1173-4.3b of the NYCCBL reserves to the City the exclusive right and sole discretion to act unilaterally through its agencies in certain enumerated areas which therefore are

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[7]The City cites Decision Nos. B-5-80 and B-26-80 as requiring that:

> "a claim of right more directly to limit management's exercise of its statutory rights must be based upon clear and explicit management waiver in the form of contractual provisions or statutory limitations."

not within the scope of collective bargaining. It is clear from the statute that the City has the right, pursuant to this section, to "determine the content of job classifications." Furthermore, this Board has repeatedly construed NYCCBL section 1173-4.3b to guarantee to the City the unilateral right to assign its employees.[8]

In spite of the above, the USA asserts that the assignment of Sanitation Workers to perform a task which, the Union alleges, is not within the job specification for the title Sanitation Worker constitutes a change in a term or condition of employment which must be negotiated with the Union. The City counters that the duties and responsibilities set forth in the Notice of Examination encompass the task of towing abandoned cars from City streets and therefore justify the assignment. In any event, OMLR argues, the action complained of lies within its management prerogatives under the NYCCBL.

For purposes of this case, we do not determine whether the Department was authorized, by a job specification, a Notice of Examination or otherwise, to assign Sanitation Workers to perform towing duties. we agree with the City that the Department has the right under Section 1173-4.3b

[8]Decision Nos. B-5-84; B-4-83; B-5-75; B-3-75; B-16-74; B-2-73; B-7-69.

of NYCCBL unilaterally to determine the job assignments of its employees and that its decisions on such matters are not within the scope of collective bargaining. We note that the State Civil Service Law and most collective bargaining agreements between municipal unions and the City of New York contain provisions that forbid assignments to "out-of-title" work and prescribe appropriate remedies therefor. However, the Jurisdiction of this Board to prevent and remedy improper practices is defined by and limited to the matters dealt with in Section 1173-4.2 of the NYCCBL. Violations of other laws or of the terms of collective bargaining agreements are subject to various forms of redress, but may not be rectified by this Board in the exercise of its jurisdiction over improper practices. Our holding here is limited to a finding that management's decision to assign its employees to perform towing duties is not a mandatory subject of bargaining and therefore that management's unilateral action in the matter was not a refusal to bargain under Section 1173-4.2a(4) of our law.[9] This decision does not prevent the

[9]We note that management may voluntarily limit its right to take unilateral action on a matter of Management prerogative by negotiating with a union and reaching an agreement which is incorporated in a collective bargaining agreement. In such cases, we consistently have held that the provisions of that agreement are enforceable. In the instant matter, however, the Union itself points out that the parties' agreement contains no provision either authorizing or proscribing the assignment of Sanitation Workers to perform towing duties.

Union from pursuing such other remedies as may be available in other forums.

The USA also alleges that the City's alteration of a past practice whereby private companies were engaged by, the City to perform the towing duties in question constitutes an improper practice under the statute. Such argument could have merit, however, only if the practice alleged to have been altered involved a term or condition of employment of Sanitation Workers. In the present case, the practice alleged to have been altered involved a management prerogative concerning which, we have held, the City may act unilaterally pursuant to the NYCCBL. It necessarily follows that since management had the right to establish the practice at issue here, it had the right to alter such practice without surrendering its statutory protection.[10] We therefore hold that, even if the Union were able to demonstrate that there was a change in a past practice relating to the removal of abandoned vehicles from City streets, it would not have established a violation of the duty to bargain under the NYCCBL.

We turn now to the allegation that the assignment of towing duties during the status quo period constitutes an improper practice under the NYCCBL. Section 1173-7.0d, the status

[10]An exception may exist where it is established that a "practical impact" on employees results from a management decision in an area reserved in section 1173-4.3b. The USA's allegations of practical impact in this matter are considered below.

quo provision of the law, provides in pertinent part:

> [d]uring 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. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, ... [emphasis supplied].

We have previously stated that the meaning and purpose of the status quo provision of the NYCCBL is to maintain the respective positions of management and labor and the relationship between them essentially unchanged during periods of negotiation.[11] We have observed that there is a need in the public sector, where employees are not given the right to strike, to redress the resulting imbalance in power between the parties so as to ensure that collective bargaining takes place. The status quo provision is designed to meet that need. However, that provision, by its terms, permits the public employer to continue to exercise its management rights during the statutory period, forbidding only non-negotiated changes in terms and conditions of employment. Since we have found that the action complained of in the present case

[11]Decision No. B-1-72.

entails the exercise of a management right and is not a term or condition of employment, we conclude that the City did not violate the status quo provision when it assigned Sanitation Workers to towing duties during the period of negotiations.

Finally, we consider the Union's allegation that the City violated Section 1173-4.2a(4) by refusing to negotiate concerning the practical impact of its decision to assign Sanitation Workers to perform towing duties. The USA contends that the additional job assignments will create manning problems, increase workload, and present a risk to employee safety. It is OMLR's position that a claim of practical impact does not state an improper practice under the NYCCBL and that, in any event, the Union has failed to state a prima facie case of practical impact as defined by the decisions of this Board.

Although Section 1173-4.3b of our statute reserves certain areas of exclusive managerial control to the City and its agencies, that section also recognizes that employer action taken pursuant thereto may have an adverse effect on employees which may be subject to alleviation through collective bargaining.[12] We have consistently held that the duty to bargain concerning a practical impact does not arise until the Board has deter-

[12]Section 1173-4.3b of the NYCCBL is quoted in full supra at note 6.

mined that a practical impact exists.[13] The existence of a practical impact is a question of fact, the determination of which may require the holding of a hearing. However, we will not direct that a hearing be held for the purpose of determining practical impact on the basis of a bare allegation that an impact has occurred or will occur. The burden is on the petitioner to allege to the Board sufficient facts to establish a prima facie case of practical impact.

In the instant case, the USA claims that there will be an "increase and change'' in the workload of Sanitation Workers assigned to tow abandoned vehicles as well as in the workload of employees performing usual Sanitation Worker tasks. Where a managerial decision results in an unreasonably excessive or unduly burdensome workload as a regular condition of employment, we have found that there is a practical impact on employees.[14] However, in the present case, the Union has failed to demonstrate how the assignment of Sanitation Workers to tow abandoned vehicles in any way results in an increased workload for its members. The failure to specify the details of an alleged impact requires that we dismiss this claim.[15]

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[13]Decision Nos. B-38-86; B-36-86; B-23-85; B-37-82; B-16-74; B-9-68.

[14]Decision Nos. B-41-80; B-2-76; B-23-75; B-18-75; B-9-68.

[15]See, Decision Nos. B-38-86; B-23-85; B-37-82; B-27-80; B-16-74.

The USA has also alleged that an increase in threats to employee safety will result from the assignment of duties which Sanitation Workers have not been trained to perform. While we have previously held that a clear threat to employee safety resulting from a management decision constitutes a per se practical impact which gives rise to a duty to bargain at the time of the proposed implementation of such decision,[16] a union must establish the existence of a threat to safety before the Board will require bargaining.[17] In the instant matter, the Union has failed to offer any evidence or persuasive argument to support its claim that the assignment of Sanitation Workers to perform towing duties will result in threats to employee safety. The fact that employees are being assigned to tasks for which they allegedly have not been trained does not, in and of itself, implicate safety considerations. Since it is not apparent to the Board that the assignments in question will constitute a threat to employee safety, we shall dismiss the USA's allegation of a practical impact on safety.

We emphasize that our dismissal of claims of practical impact in this case is based upon a lack of sufficient plead-

[16]Decision Nos. B-41-86; B-38-86; B-37-82; B-16-81; B-6-79.

[17]Decision Nos. B-43-86; B-41-86; B-37-82; B-34-82.

ing and therefore is without prejudice to the filing of a petition which is supported by evidence of specific, identified practical impact resulting from management's action.[18]

Finally, we address the City's contention that a claim of practical impact does not state an improper practice under the NYCCBL. We have long held that the authority for Board determination of questions of practical impact derives from our statutory mandate to decide whether a matter is within the scope of collective bargaining.[19] As it is the policy of the Board to eschew strict adherence to technical rules of pleading, however, we have considered claims of practical impact asserted in an improper practice petition even though the proper mechanism for bringing on a dispute of this type is a scope of bargaining petition. Consistent with this policy, we have considered the allegations of practical impact presented in the USA's improper practice

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[18]With respect to any further pleading of safety impact, consistent with prior Board decisions, the Union need not offer evidence that an impact on safety has occurred but it must specifically state how the management action complained of threatens the safety of its members. See, decisions cited supra at note 17.

[19]NYCCBL Section 1173-5.0a(2) provides that the Board shall have the power and duty:

> (2) on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining; ....

petition in the instant matter. However, we reiterate that a scope of bargaining proceeding is the proper forum for the resolution of questions of practical impact.

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

ORDERED, that the improper practice petition filed by the Uniformed Sanitationmen's Association, Local 831, I.B.T. be, and the same hereby is, dismissed in its entirety, without prejudice to the filing of a scope of bargaining petition containing specific allegations of practical impact upon the workload or safety of Sanitation Workers resulting from the management action complained of herein.

DATED: New York, N.Y.
March 25, 1987

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