L.831, Uni. San. Ass. v. City, 45 OCB 68 (BCB 1990) [Decision No. B-68-90 (IP)]

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

-between-

UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT, AFL-CIO,

Petitioner,

-and- DECISION NO. B-68-90

THE CITY OF NEW YORK, DOCKET NO. BCB-1254-90

Respondent,

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15C, AFL-CIO,

Intervenor.
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In the Matter of the Arbitration :

-between- :

THE CITY OF NEW YORK, :

Petitioner, : DOCKET NO. BCB-1272-90 (A-3383-90)

-and- :

UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT, AFL-CIO, :

Respondent. :
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**DECISION AND ORDER**

On February 28, 1990, the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, AFL-CIO ("USA"), filed an improper practice petition against the Department of Sanitation of the City of New York ("Department" or "City"), docketed as BCB-1254-90, alleging:

> The City ... refused to bargain collectively and in good faith with the [USA] regarding the Department's refusal to utilize sanitation workers and [USA] members to move garbage by means of new equipment at waste disposal sites....

The City filed an answer to the petition on March 15, 1990. On March 19, 1990, the International Union of Operating Engineers, Local 15C, AFL-CIO ("IUOE"), pursuant to Section 13.9 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"),[1] filed a Motion to Intervene in the improper practice proceeding.

On March 21, 1990, the USA filed a Request for Arbitration (Case No. A-3383-90), claiming that the Department's failure to utilize sanitation workers as alleged in the improper practice petition also constitutes a violation of the 1987-90 Collective Bargaining Agreement ("Agreement") between the parties.

On March 26, 1990, USA filed its reply in the improper practice proceeding.

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[1] Section 13.9 of the OCB Rules provides, in relevant part:

> **Intervention - Procedure; Contents; Filing; Service.** A person, public employer or public employee organization desiring to intervene in any proceeding shall file a verified written application ... setting forth the facts upon which such person, employer or organization claims an interest in the proceeding....

On March 28, 1990, the Board granted IUOE's motion to intervene in the improper practice proceeding. On April 11, 1990, IUOE served a "verified Answer of the Intervenor" on all parties.

On April 16, 1990, the City filed a petition challenging the arbitrability of the instant request for arbitration, docketed as BCB-1272-90. Instead of submitting an answer within the time provided under the OCB Rules, a collective bargaining agent representing USA in its request for arbitration (hereinafter referred to as "USA's agent"), informally sought and was granted an extension of time to answer the City's petition, based upon his representation that USA was seeking a settlement of the dispute, encompassing both USA's improper practice petition and its request for arbitration.

Throughout July 1990, the Trial Examiner assigned to these matters made several telephone calls to counsel for USA in the improper practice proceeding and USA's agent in the arbitrability matter, in an attempt to ascertain the status of these cases.[2] On August 1, 1990, the Trial Examiner spoke briefly with USA's agent, who promised but failed to return the call that day. On August 3, 1990, the Trial Examiner wrote to the parties, informing them that USA would be in default in the matter docketed as BCB-1272-90, unless the union filed its answer to the City's petition challenging arbitrability on or before August 13, 1990. No answer was served by that date. In a letter dated August 21, 1990, USA's agent requested an indefinite extension of time. On

[2] USA's counsel indicated that nothing was pending in the improper practice proceeding and referred the Trial Examiner to USA's agent to the extent her inquiry concerned the request for arbitration and the City's petition challenging same. Messages left for USA's agent were not returned.

August 27, 1990, the Trial Examiner wrote to USA's agent, stating, in pertinent part:

> As ... counsel for the [Office of Labor Relations], has indicated her consent, we shall grant you an extension, until September 7, 1990. In the event you wish another extension of time, your request should be in writing, indicating the position of the other party, and received by this office on or before the date sought to be extended.

Nevertheless, to the present date, neither an answer nor a request for an extension of time has been submitted by USA. Therefore, in view of the default by USA, we will consider the matter docketed as BCB-1272-90 solely upon the request for arbitration and the petition challenging arbitrability.[3] The matter docketed as BCB-1254-90, however, will be considered on the basis of USA's improper practice petition, the City's answer, USA's reply, and the pleading of IUOE entitled "Answer of the Intervenor."

The above-described arbitrability and improper practice proceedings have been consolidated for decision herein as they, in large part, involve the same parties, events and underlying factual circumstances.[4]

## Background

In 1989, USA became aware that the Department intended to change the method and means by which it would conduct its operations in the Fresh Kills Landfill ("Fresh Kills"), located on Staten Island, New York. There is no dispute that the Department decided unilaterally to construct a paved road

[3] See Decision Nos. B-29-83; B-32-80 and B-40-80 (Motion to Vacate Default and Reopen Decision No. B-32-80 denied).

[4] See e.g., Decision Nos. B-31-85; B-10-85.

from the barge unloading site at Fresh Kills to the "active" dumping site, which was over a mile away, and to utilize self-contained tractor-trailers rather than "Athey" wagons pulled by tractors, to haul garbage to the active site.

In the initial phase of its plan, the Department assigned employees who operated the tractors ("Tractor Operators"), to test various types of new equipment. The Tractor Operators are represented for collective bargaining purposes by IUOE.[5] There is no dispute that the Department intended to permanently assign Tractor Operators to operate whichever type of waste-hauling vehicle the Department found was most suitable for the job. In this connection, the Department decided that "large, self-contained tractor-trailers"[6] which ran on rubber tires rather than tracks, were the vehicles of choice.

It is apparent from the record in this matter that, in 1989, USA and the Department discussed the City's intention to assign Tractor Operators represented by IUOE, instead of USA's members, to operate the new equipment. In a letter dated January 3, 1990, Brendan Sexton, Commissioner of the Department, responded to USA President, Edward Ostrowski, as follows:

> I know that you, on behalf of Local 831, have expressed a strong desire to have sanitation workers operate the new rubber tired vehicles to be used in the Fresh Kills Landfill.

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[5] Pursuant to an election held on June 19, 1970, IUOE and Local 246, SEIU, AFL-CIO, were jointly certified as "the exclusive representatives for the purposes of collective bargaining of all Tractor Operators ... employed by the [City]." See Board of Certification Decision No. 50-70.

[6] City's Answer to USA's improper practice petition, at 2.

Therefore, I am writing to inform you of the Department's position both as to the training you have sought for sanitation workers as well as the eventual assignment of the work. As indicated in your meeting with Deputy Commissioner John Doherty, the Department wishes to continue utilizing the employees presently performing these duties. Given this decision, training sanitation workers to operate the new equipment might mislead them into thinking they would eventually operate the equipment.

It is not the Department's intention to cause or become involved in either a jurisdictional issue or an

Article XX[7] situation with respect to unions representing its employees. To this extent the duties will continue with the title that has customarily performed those duties.

While I know that this is not the answer you are seeking, I am sure that as the President of a union, you will appreciate jurisdictional issues and the Department's position. In the future, we can continue the cooperative efforts we have made which have resolved many issues in the past.

By a letter dated January 10, 1990, USA filed a grievance with Commissioner Sexton directly at Step 5, pursuant to Article IX, Section 2(c)

[7] Article XX of the AFL-CIO Constitution, commonly referred to as the "No Raiding Clause" provides, in pertinent part:

**SETTLEMENT OF INTERNAL DISPUTES**

Section 1. The principles set forth in this Article shall be applicable to all affiliates of this Federation, and to their local unions and other subordinate bodies.

Section 2. Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate....

Section 3. Each affiliate shall respect the established work relationship of every other affiliate. For purposes of this Article, an "established work relationship" shall be deemed to exist as to any work of the kind which the members of an organization have customarily performed at a particular plant or work site.... No affiliate shall by agreement or collusion with any employer or by the exercise of economic pressure seek to obtain work for its members as to which an established work relationship exists with any other affiliate....

of the Agreement.[8] Therein, the gravamen of USA's complaint is stated, in relevant part, as follows:

> The Department has recently informed the Union that it will shortly be introducing a new type of equipment into the landfill operation. The equipment will be utilized to transport waste material from barges. This job clearly fits within the job specification cited above.[9] The Department erroneously contends that the work should be performed by non-sanitation worker personnel.

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[8] Article IX, Section 2(c) of the Agreement provides:

> Any grievance of a general nature affecting a group of several or more employees shall be filed at the option of the President of the Union at Step 5 of the grievance procedure without resort to previous grievance steps.
>
> Step 5 provides, in relevant part, "... the President of the Union and/or the President's duly designated representative shall have the right to process the grievance with the Commissioner of [the Department] or the Commissioner's duly designated representative.

[9] The job specification for employees in title code No. 70112, entitled "Sanitation Worker," provides, in relevant part:

> General statement of 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.
>
> Examples of Typical Tasks
>
> Operates all types of motorized equipment used in connection with street cleaning, waste collection, snow removal, and waste disposal operations.
>
> * * *

On February 28, 1990 and March 21, 1990, USA filed the instant improper practice petition and request for arbitration, respectively. USA seeks an order from the Board of Collective Bargaining ("Board") directing the City to bargain with the union "regarding operation of the new equipment to be utilized at waste disposal and landfill operations" or, in the alternative, an order from an arbitrator directing the Department "to utilize sanitationmen in connection with waste disposal operations."

On April 11, 1990, the IUOE intervened in the improper practice proceeding, claiming that USA has no standing to demand collective bargaining over the work in dispute. Thus, IUOE seeks an order from the Board dismissing USA's improper practice petition.

## Positions of the Parties

### USA's Position

In its improper practice petition, USA maintains that the Department, by refusing to bargain or alter its decision to utilize non-USA members to "perform tasks within the scope of [its members'] traditional and contractually protected work duties and responsibilities," has, in effect, unilaterally changed a term and condition of employment of Sanitation Workers.

In support of its position, USA points out that: 1) the operation of "motorized equipment" at waste disposal sites falls within the scope of duties and responsibilities set forth in the job description of Sanitation Workers;[10] 2) the job description of Tractor Operators does not include the operation of

[10] Supra, note 10 at 8.

this type of equipment;[11] and 3) the Department's decision to assign Tractor Operators to perform this work is not unfettered since it "threatens the traditional duties of [S]anitation [W]orkers."[12]

USA maintains that the City is not insulated from Board scrutiny of its decision because the new policy would bear upon a condition of employment should work force reductions become a necessary part of the City's decision. In this connection, USA submits that the Board "must 'determine if the real thrust of the management decision in question is the pursuit of [the] basic mission of the enterprise or if the decision, written as if to pursue such goals, is really about conditions of employment.'"[13]

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[11] The job specification for employees in title code No. 91215, entitled "Tractor Operator," provides, in pertinent part:

> General Statement of Duties and Responsibilities
>
> Under general supervision, operates and does minor maintenance on diesel powered tractors, compactors, dump wagon equipment and other tractor drawn equipment at landfills and other projects of the City of New York; performs related work.
>
> Examples of Typical Tasks
>
> Operates a diesel powered tractor hauling empty or loaded dump wagons.
>
> * * *

[12] USA's Reply, at 3.

[13] Id., at 3 (quoting Levitt v. Board of Collective Bargaining of the City of New York, 140 Misc. 2d 727, 732 531 N.Y.S.2d 703 (Sup. Ct. N.Y. Co. 1988), appeal filed, (1st Dept. to be argued Dec. term 1990)).

Moreover, USA argues, the City asserts no compelling reasons for the unilateral implementation of its new policy, other than some "vague apprehension of a 'situation' involving a 'jurisdictional issue' between [USA and IUOE]," which only serves to undermine its "affirmative defense" that the Department's decision was premised on a managerial objective, i.e., "to maintain the efficiency of governmental operations."[14]

Accordingly, USA urges the Board to direct the City to bargain with USA with respect to this issue or, in the alternative, direct a fact-finding hearing that will enable the Board to "discern the City's true motivations, the relative interests of the parties, and the impact of the challenged decision."[15]

In its request for arbitration, USA maintains that because the work at issue is embodied within the job description of Sanitation Workers, failure of the Department to assign these duties to its members violates the Agreement. In support of this argument, USA contends that this dispute is a matter about which the parties have agreed to arbitrate, insofar as the Agreement, inter alia, defines a grievance as "a dispute concerning the application or interpretation of ... the terms of a personnel order of the Mayor."[16] In this connection, USA claims that the Sanitation Workers' job description is tantamount to a "personnel order of the Mayor."

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[14] Id., at 4.

[15] Id., at 5.

[16] See Article IX, Section 2(a) of the Agreement.

In further support of the arbitrability of this dispute, USA argues that the Department's unilateral decision violates Article I, Section 1 of the Agreement, entitled "Union Recognition and Unit Designation."[17]

**City's Position**

In opposition to USA's improper practice petition, the City submits that the Board has repeatedly construed Section 12-307b of the NYCCBL, to "guarantee the City the unilateral right to assign and direct employees, to determine what duties employees will perform during worktime, and to allocate duties among unit and nonunit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement [emphasis in original]."[18]

The City argues that USA cannot point to anything in the Agreement which arguably limits its managerial right in this area or which would support USA's claim that a job specification guarantees that work falling within a specification must be performed by employees in that title. Furthermore, the City submits, management prerogative includes the right to establish and alter job specifications.

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[17] Article I, Section 1 of the Agreement provides:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below ....
>
> SANITATION WORKER

[18] City's Answer, at 4 (citing Decision No. B-37-87, at 4-5 and Decision No. B-56-88, at 12-13).

Therefore, the City contends that the improper practice petition fails to state a claim upon which relief may be granted and must be dismissed in its entirety.

In its petition challenging the arbitrability of this dispute, the City argues that the instant grievance cannot be maintained because USA waived its right to submit the same claim to arbitration. Citing Section 12-312(d) of the NYCCBL,[19] the City submits that because USA filed an improper practice petition concerning the same underlying dispute, USA is not capable of submitting a valid waiver with its subsequent request for arbitration.

The City also claims that USA has failed to cite a provision of the Agreement which is even arguably related to the violations alleged. In this connection, the City submits that to the extent the request for arbitration "alleges a violation of a 'Mayor's Personnel Order,' it does not specify which 'Mayor's Personnel Order' has been violated, nor is a copy of any such Personnel Order attached to the Request."[20] Rather, the City submits, USA only recites a portion of the job specification for Sanitation Worker.

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[19] Section 12-312(d) of the NYCCBL provides, in pertinent part:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration ... the grievant ... and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant ... and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

[20] City's Answer, at 5.

Additionally, the City claims that the facts alleged by USA fail to constitute a substantive violation of Article I, Section 1 of the Agreement, which is merely the "recognition clause."[21]

Therefore, the City argues, because USA has not demonstrated a nexus between the Department's decision and any provision in the contract which could be the source of the right alleged, there is no basis upon which this dispute may be sent to arbitration.

**IUOE's Position**

IUOE, as intervenor in the instant improper practice proceeding, seeks dismissal of USA's petition on the ground that USA has no standing to seek the assignment of the duties at issue to its members since Sanitation Workers have no traditional or contractually protected right to these jobs. Rather, IUOE argues, Tractor Operators, who have been performing essentially the same work "for over 35 years at the [City's] land fill operation at Fresh Kills,"[22] have a far greater right to and interest in maintaining these assignments.

Moreover, IUOE asserts, as the certified collective bargaining representative of Tractor Operators who are currently performing the duties in question, only it has standing to demand bargaining over any impact that the introduction of new equipment may have on their terms and conditions of employment.

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[21] Supra, note 18, at 12.

[22] Answer of the Intervenor, at 2.

**Discussion**

In consolidating these two proceedings, we recognize that a controversy arising from the same set of facts may involve related but separate and distinct rights. That is, a particular dispute may encompass rights which derive both from the NYCCBL and from a collective bargaining agreement and, as a result, present alternative theories for recovery. In such cases, we will defer a dispute to the arbitral forum if the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter.[23] We find that permitting a dispute to proceed first to arbitration is consistent with the declared policy of the NYCCBL "to favor and encourage ... final, impartial arbitration of grievances between municipal agencies and certified employee organizations,"[24] with the following proviso:

> [I]n the event that, either the issue raised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, we shall, upon demand, reassert jurisdiction in this matter to hear and determine the allegations of improper practice.[25]

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[23] See e.g., Decision Nos. B-31-85; B-10-85; B-10-80. Cf., Decision No. B-19-90 (In deferring a disciplinary matter to arbitration, the Board recognized that potentially, the finding of the arbitrator could call into question an essential element of the petitioner's improper practice claim.)

[24] Section 12-302 of the NYCCBL.

[25] Decision No. B-31-85; See also, Decision Nos. B-45-86; B-10-80.

We have held that the waiver provision of the NYCCBL,[26] the purpose of which is to prevent unnecessary or repetitive litigation, is not defeated by our deferral of a dispute which is pending in two different forums, to one of the requested forums.[27] In particular, we have applied a prearbitral deferral policy in cases alleging a failure to bargain in good faith when the underlying dispute is subject to, and resolvable by a contractual grievance and arbitration procedure.[28]

Applying these principles to the instant matter, we will first determine whether deferral of this dispute to arbitration is appropriate. We note that USA relies, in part, on an excerpt from the job specification for the title "Sanitation Worker,"[29] as the source of an alleged right to arbitrate the City's refusal to assign USA's members to perform one of the Typical Tasks enumerated therein. Although USA failed to submit a copy of the document at issue with its request for arbitration, it claims that the Department violated a "Mayor's Personnel Order as embodied in the job specification Code No. 7001."[30] First, we note that no such numbered job specification for the title

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[26] See Section 12-312(d) of the NYCCBL, supra, note 19, at 14.

[27] Decision Nos. B-72-89; B-35-88; B-31-85; B-10-85.

[28] Decision Nos. B-10-85; B-10-80; See also, Collyer Insulated Wire, 77 LRRM 1931 (1971); Board of Education of the City of New York, 6 PERB ¶3006 (1973).

[29] Supra, note 10, at 8.

[30] When job specifications are issued by the City's Department of Personnel, they are referred to as "class specifications."

Sanitation Worker exists. In any event, there is no merit to the argument that the actual job specification for the Sanitation Worker title (Code No. 70112), constitutes a "personnel order of the Mayor" within the contemplation of Article IX, Section 2(a) of the Agreement,[31] as USA urges. Rather, when a title in the competitive class of the civil service is established, it is pursuant to Chapter 35, Section 813a.(2) of the New York City Charter, which empowers the City Personnel Director:

> To make studies in regard to the grading and classifying of positions in the civil service, establish criteria and guidelines for allocating positions to an existing class of positions, and grade and establish classes of positions.[32]

By contrast, Chapter 35, Section 813a.(10) of the New York City Charter, provides that personnel orders of the Mayor, issued upon the recommendation of

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[31] Article IX, Section 2(a) of the Agreement provides, in its entirety:

> The term "grievance" shall mean a dispute concerning the application or interpretation of the terms and provisions of this Agreement or of the terms of a personnel order of the Mayor.

[32] In this connection, we note the definition of the following terms, as set forth in the Rules and Regulations of the City Personnel Director:

> "Class of Positions" as: a group of positions substantially similar with respect to duties, responsibilities, qualifications and examination requirements to the extent that the same title may be used to designate such positions and the same salary grade may be equally applied thereto;
>
> "Position" as: a particular office or employment in the civil service; and
>
> "Title" as: the designation of a position based upon its duties and functions.

the City Personnel Director, authorize the creation, modification and abolition of salaries for new and existing titles. Personnel orders of the Mayor also address "standard rules governing working conditions, vacations and leaves of absence." Thus, personnel orders of the Mayor do not constitute the source of the right to grieve an alleged violation of a job or, more precisely, class specification.

Furthermore, in the rare instances where job descriptions are set forth or incorporated by reference in City of New York labor contracts,[33] the effect of such inclusion or incorporation may be that the work they describe is reserved to the bargaining unit for the duration of the agreement.[34] Examination of the instant Agreement, however, fails to reveal any intent by the parties, either express or implied,[35] to include or to incorporate the job description at issue.

In the absence of any such arguable claim that the instant parties have agreed to reserve certain work to the bargaining unit represented by USA, and because Article I, Section 1 of the Agreement (Union Recognition and Unit

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[33] Pursuant to Section 12-307b of the NYCCBL (infra, note 39, at 21), the content of a job specification is an express management right and, thus, is a permissive subject of bargaining. See Decision Nos. B-59-89; B-4-89; B-43-86; B-24-72; B-7-69; B-3-69.

[34] Decision Nos. B-4-89; B-17-79.

[35] For example, the Agreement herein does not define a grievance as "a claimed assignment of duties substantially different from those stated in their job classifications," which, we have found, would encompass a claim that employees in a different title have been improperly assigned work within the grievants' duties and functions. See Decision Nos. B-19-90; B-11-88; B-12-77; B-1-71; B-2-70.

Designation) cannot be read as having that effect,[36] it must be concluded that there is no basis for an exclusive work jurisdiction claim by USA.

USA having failed to demonstrate an arguable basis for its contractual claim, there can be no arbitrable issue and no basis for deferral to arbitration. The City's petition challenging arbitrability, docketed as BCB-1272-90, will therefore be granted. This conclusion is based, not on USA's failure to answer the City's petition challenging arbitrability, but on its failure to demonstrate that the Agreement, by its terms, obligates the parties to submit a dispute of this nature to arbitration.[37]

USA claims that the Department committed an improper practice when it made a unilateral decision affecting a condition of employment of Sanitation Workers. USA argues that the subject matter of the Department's action is a mandatory subject of bargaining pursuant to Section 12-307 of the NYCCBL,[38]

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[36] See e.g., Decision Nos. B-35-89; B-6-81 (wherein, the Board declared that a recognition clause "is not and does not purport to be either a job description or a grant of exclusive work jurisdiction.") Cf., Decision No. B-5-80.

[37] In Decision No. B-29-83, although the Union defaulted in answering a petition challenging arbitrability, the Board held that it had a responsibility to ascertain the prima facie sufficiency of the City's petition before granting the relief it requested. Therefore, the Board, in granting the City's petition challenging arbitrability, did so based on the entire record before it.

[38] Section 12-307 of the NYCCBL provides, in relevant part:

> **Scope of collective bargaining; management rights.**
> a. Subject to the provisions of subdivision b of this section ..., public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not

(continued...)

and claims that in refusing to bargain over its decision, the City has violated Section 12-306a(4) of the NYCCBL.[39]

The City, also relying on Section 12-307 of the NYCCBL, and in the absence of anything in the Agreement which limits its managerial rights

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[38](...continued)
limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions ....

b. 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 governmental operations are to be conducted; determine the content of job 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.

[39] Section 12-306a(4) of the NYCCBL provides:

It shall be an improper practice for a public employer or its agents:

(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.

conferred therein, maintains that the petition fails to state a cause of action upon which relief may be granted. The intervenor, IUOE, in support of its position in this matter, also claims that assignment of the work in question is within the City's managerial prerogative.

It is well-settled that the City has the right, under Section 12-307b of the 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.[40] We have long held that the creation of job titles is an exercise of the City's right under Section 12-307b of the NYCCBL unilaterally to determine the methods, means and personnel by which governmental operations are to be conducted, as well as the right to determine the content of job classifications.[41] Similarly, the selection of equipment is a management prerogative.[42] Although the City may voluntarily agree to circumscribe these rights in a collective bargaining agreement,[43] we have already determined, infra, that the Agreement herein is devoid of any such limitation.

We reject USA's contention that, pursuant to Levitt v. Board of Collective Bargaining, 140 Misc. 2d 727, 531 N.Y.S.2d 703 (Sup. Ct. N.Y. Co. 1988), appeal filed, (1st Dept. to be argued Dec. term 1990), "[a] careful balancing of the interests involved" to determine if the City's decision "is

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[40] Decision Nos. B-56-88; B-37-87; B-23-87; B-15-87; B-6-87; B-5-84; B-4-83; B-5-75; B-3-75; B-16-74; B-2-73; B-7-69.

[41] E.g., Decision No. B-3-69.

[42] Decision Nos. B-4-89; B-43-86; B-3-75.

[43] Decision Nos. B-4-89; B-43-86.

really about conditions of employment,"[44] is called for here. On the contrary, it is abundantly clear to this Board that the Department's decision to continue to assign Tractor Operators to duties they have performed for more than 35 years, albeit with slightly different equipment, is not a matter which has a direct, significant or material affect on terms and conditions of employment of Sanitation Workers. This is not a matter where "the work in question has been performed exclusively by the unit claiming the right of retention."[45] Rather, USA is claiming entitlement to work that its members have never before performed. Moreover, we find USA's reliance on Levitt misplaced, inasmuch as the court there held that "managerial decisions which impinge only indirectly and tangentially upon the employment condition, will generally be treated as exempt from mandatory collective bargaining."[46]

Finally, we find that the City's expressed desire to avoid becoming a party to a jurisdictional dispute, pursuant to Article XX of the AFL-CIO Constitution,[47] does not support USA's conclusory allegation that the City's motivation is questionable. Indeed, in the private sector, where

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[44] USA's Reply, at 3-4.

[45] Compare with, Decision No. B-6-90 (In this case, we considered whether the City's decision to subcontract unit work was a mandatory subject of bargaining. There, we found that because the union could not demonstrate that the work had been performed exclusively by the unit, it did not "have a reasonable claim of entitlement to preservation of the work.")

[46] Levitt, at 706. Compare, Decision No. B-1-90 (Where we held that the employer's new tenant committee policy affects a condition of employment because [of] the potential to terminate the continued employment of employees who [were] subject to it.)

[47] Supra, note 8, at 7.

jurisdictional disputes are more commonly encountered, "employer preference and past practice" and "economy and efficiency of operation" are factors favorable to the NLRB's award of the work in dispute to one of two competing unions.[48] In the absence of any probative showing that the City's decision to assign the work to members of IUOE was motivated by reasons prohibited by NYCCBL,[49] we find that the petition does not warrant a hearing to inquire further into the City's motivations.[50]

Thus, we find that USA has failed to demonstrate that the City's actions constitute either a contractual violation or a refusal to bargain on a mandatory subject of bargaining and we shall therefore grant the City's petition challenging the arbitrability of the matter docketed as BCB-1272-90, and dismiss USA's improper practice petition docketed as BCB-1254-90. Under these circumstances, we find that the City's decision is an exercise of an express management right, limited only by the constraints that a practical impact, as set forth in Section 12-307b of the NYCCBL, might impose.[51] USA's

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[48] Plumbers Local 612 and Mechanical Inc. v. Laborers' Local 109, 298 NLRB 112, 134 LRRM 1157 (1990).

[49] See Sections 12-306a(1)-(3) of the NYCCBL.

[50] E.g., in Decision No. B-14-80, a case challenging the "civilianization" of certain job functions, we found that the union failed to establish a prima facie showing of improper practice, where there is no proof of anti-union animus or that any employee represented by the union had been or would be laid off, fired or otherwise subjected to any hardship.

[51] Ordinarily, a practical impact claim presents a question of fact which should be initiated by a scope of bargaining petition. Unless the exercise of a management prerogative is deemed to have an impact per se, a refusal to bargain charge may
(continued...)

vague and speculative claim that an impact might occur "should workforce reductions become necessary in part due to the City's decision,"[52] is insufficient, on its face, to support a claim of practical impact. However, nothing in this decision shall constitute prejudice to the right of USA prospectively to file a scope of bargaining petition concerning this matter, which is supported by evidence of specific, identified practical impact on its members resulting from the City's actions.[53]

**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 petition challenging arbitrability filed by the City of New York, docketed as BCB-1272-90 be, and hereby is, granted; and it is further

[51](...continued)
not be brought until we have first, determined that a practical impact exists, and second, found that the employer has not acted, pursuant to our finding of impact, to relieve the impact unilaterally or to negotiate changes in wages, hours or working conditions. See Decision Nos. B-59-89; B-26-89; B-41-80.

[52] USA's Reply, at 4.

[53] See e.g., Decision Nos. B-59-89; B-6-87.

ORDERED, that the request for arbitration filed by the Uniformed Sanitationmen's Association, docketed as BCB-1272-90 be, and the same hereby is, denied; and it is further

ORDERED, that the improper practice petition filed by the Uniformed Sanitationmen's Association, docketed as BCB-1254-90 be, and the same hereby is, dismissed.

DATED: New York, New York
October 17, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER