HHC v. L.30, Inter. Union of Operating Engineers, 49 OCB 2 (BCB 1992)
[Decision No. B-2-92 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

LOCAL 30, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondent.

DECISION NO. B-2-92

DOCKET NO. BCB-1389-91 (A-3732-91)

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**DECISION AND ORDER**

On May 31, 1991, the New York City Health and Hospitals Corporations ("HHC" or "the Corporation") filed a petition challenging the arbitrability of a group grievance filed by Local 30, International Union of Operating Engineers, AFL-CIO ("IUOE" or "the Union"). IUOE filed an answer to the petition on July 10, 1991.[1]

**Background**

On July 2, 1990, IUOE submitted a grievance complaining that certain hospitals and family care centers of the Corporation have failed to comply with the "1984 minimum staffing agreement" that allegedly exists between HHC and the Union. IUOE asserts, as the basis for its claim, a document dated June 1, 1984, entitled "HHC Facilities Power Plant Staffing" ("the Chart").

[1] Counsel for the Corporation indicated, on September 24, 1991, that HHC did not intend to file a reply in this matter.

The Chart is a single-page, unsigned document and consists of a list of 22 HHC facilities and four columns of numbers, under the following subheadings:

> Senior Stationary Engineer
> Stationary Engineer
> Plant Maintainer/Tender
> Plant Maintainer/Oiler.[2]

By a letter dated September 27, 1990, HHC's Deputy Director of Labor Relations denied the grievance, claiming that "the staffing pattern [reflected in the Chart] of 1984 was not a contractual agreement with the Union."

On October 19, 1990, counsel for IUOE filed a Step III grievance with the New York City Office of Labor Relations ("OLR"), alleging a violation of Article XI, Sections 1(A) and (B) of the parties' 1984-87 Non-Economic Collective Bargaining Agreement ("Non-Economic Agreement"), covering employees in the title of Stationary Engineer. The Union alleged that the dispute concerns:

> ... the application or interpretation of an agreement between the parties [i.e., the Chart] and/or the violation, misinterpretation or application of the rules or regulations, written policy or order of the Employer applicable to the Health and Hospitals Corporation.

The Union states, as the basis for its claim that "the written policy of the Corporation ... [is] not being adhered to," a memorandum dated June 4, 1984, from Carlotta A. Brantley, HHC's Vice President-Corporate Affairs and

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[2] The instant request for arbitration was filed on behalf of employees in the following titles represented by IUOE: Senior Stationary Engineer, Stationary Engineer, and Plant Maintainer/Oiler. Employees in the remaining title, Plant Maintainer/Tender, are represented by District Council 37, AFSCME, AFL-CIO ("DC 37").

Rudolph Rinaldi, HHC's Assistant Vice President-Capital Coordinator, which was addressed to all Executive Directors of the Corporation ("the Memorandum"). The Memorandum provides, in relevant part:

> RE: Staff Allocations for Power Plant Operations
>
> As you know, we recently completed implementation of the power plant reorganization and would like to confirm your facility's staffing pattern and advise you of the overtime expenditure monitoring reports we are initiating.
>
> Listed below are the number of employees for the indicated titles which your facility is authorized to have on staff. The staff numbers were determined during the analysis and reorganization of power plant positions utilized in Corporate facilities, performed under the direction of the Central Offices of Corporate Affairs and Engin-eering and Facilities Services, in consultation with administrative staff in your facility....
>
> The need to provide coverage for weekends and holidays, to arrange annual leave and account for sick leave were all factored into this staffing agreement. Appropriate scheduling of staff should, therefore, enable your plant managers to operate the power plant with minimal use of overtime [emphasis added].
>
> When vacancies are filled in the Plant Maintainer titles, positions should carry the designation Oiler or Tender in order to continue the indicated staffing arrangement.
>
> As part of the continuing analysis of the power plant staffing, we are requiring that each facility report on a monthly basis overtime hours worked by employees in the power plant operational titles.... Attached is a format for this report....
>
> Members of our staffs have met with the plant managers and personnel directors of several facilities to discuss their specific problems or concerns regarding the new staffing levels. They will continue to be available to assist your managers in implementing the plan....

The grievance was heard on February 20, 1991. According to the written decision of the OLR Review Officer dated April 8, 1991, both parties admitted

that the matter of staffing the power plants was discussed prior to issuance of the Chart and Memorandum. However, the parties sharply disagreed on whether the staffing allocation for each HHC facility was the product of negotiations. The Step III Review Officer denied the grievance, finding that because the Chart "shows no characteristics of a binding agreement," issues of staffing remain subjects reserved to management prerogative.

No satisfactory resolution of the dispute having been reached, IUOE filed the instant request for arbitration on April 19, 1991, alleging that the Corporation failed to comply with the "negotiated memorandum" concerning minimum staffing requirements for HHC power plants. The Union cites Article XI, Section 2, Step IV of the Non-Economic Agreement covering Stationary Engineers as the basis for its demand for arbitration.

## Positions of the Parties

### HHC's Position

In its petition challenging the arbitrability of this dispute, the Corporation argues that an alleged violation of either the Chart or the Memorandum is not enforceable vis à vis any collective bargaining agreement between the parties. In support of its argument, the HHC points out that had the Chart been the result of negotiations, the Union would have been certain to obtain a signatory letter from management at that time. As for the Memorandum, HHC submits, "nowhere is there any indication that it is anything more than a directive to Executive Directors. It is neither rule, nor regulation, nor written policy."

The Corporation relies on the fact that the so-called "negotiated memorandum" was not incorporated into any of the parties' collective

bargaining agreements executed subsequent to June 4, 1984, covering the titles at issue in this dispute.[3] HHC contends that in the absence of a contractual limitation on management's statutory right unilaterally to determine "the methods, means and personnel by which government operations are to be conducted,"[4] a dispute concerning staffing levels is not an arbitrable issue.

Finally, the Corporation maintains that unlike employees in the title of Stationary Engineer who are covered by the Non-Economic Agreement, employees in the titles of Senior Stationary Engineer and Plant Maintainer/Oiler are not covered by collective bargaining agreements which contain provisions for grievance procedures.[5] Therefore, HHC argues, the Union may not seek arbitration of this dispute for these classes of employees.

**IUOE's Position**

On the question whether there exists an enforceable agreement between the parties concerning the staffing of the Corporation's power plants, IUOE

[3] The contractual agreements referred to by the Corporation are: 1) the Non-Economic Agreement covering Stationary Engineers; 2) the 1984-87 and 1987-90 Comptroller's Prevailing Wage Determinations covering Stationary Engineers; 3) the 1984-87 and 1987-90 Comptroller's Prevailing Wage Determinations covering Senior Stationary Engineers; and 4) the 1984-87 and 1987-90 Comptroller's Prevailing Wage Determinations covering Plant Maintainers/Oilers.

[4] The Corporation cites Section 12-307b (management rights) of the New York City Collective Bargaining Law ("NYCCBL").

[5] The basic rates of wages and supplemental benefits for these titles are provided for by Comptroller's Determinations, under Section 220 of the Labor Law (see note 3, supra, at 5). These Determinations do not contain a grievance procedure or provide for the arbitral resolution of disputes.

maintains that the Chart represents a "compromise agreement" that was reached between "high level officials" representing OLR, HHC, IUOE, and DC 37 in June 1984.[6] The Union alleges that the negotiations, which began in mid-1983, stemmed from the employer's decision "to eliminate, reduce and/or broadband the employees in the titles of Fireman and Oiler at HHC and reduce the employees in the titles of Stationary Engineer and Senior Stationary Engineer at HHC." There was an obligation to negotiate at that time, IUOE asserts, because the City's proposal "involved matters of safety and sizeable increases of workload and responsibilities for the remaining employees in these titles." The Union states that in addition to the minimum staffing requirements that are reflected in the Chart, employees in the broadbanded titles received wage increases in recognition of the effect of the City's proposal on the bargaining unit.

The terms of the "compromise agreement" reached on June 1, 1984, IUOE alleges, were then noticed to all HHC hospitals and family care centers by the Memorandum. As proof that the Chart constitutes a negotiated settlement, the Union points out that in setting forth the staffing allocation for each facility, the Memorandum contains the phrase "this staffing agreement." Clearly, the Union argues, these facts demonstrate the existence of an agreement, the violation of which is enforceable under the grievance procedure set forth in the Non-Economic Agreement covering Stationary Engineers.

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[6] IUOE identifies the following as representatives of the parties at the alleged negotiating sessions: Harry Karetsky and James Hanley on behalf of OLR; Carlotta Brantley, John O'Reilly and Thomas G. Doherty on behalf of HHC; Martin Ross, William McKenna and Adam Ira Klein on behalf of IUOE; Tom DiNardo, Beverly Gross and Alan Viani on behalf of DC 37.

The Union admits that non-economic agreements do not exist for the titles Senior Stationary Engineer and Plant Maintainer/ Oiler. However, IUOE asserts, there are numerous side agreements between the Union and the City governing titles employed by HHC that have never been incorporated into non-economic agreements or Comptroller's Determinations. In any event, the Union argues, because the parties, until now, have always followed and arbitrated issues involving all three titles under the provisions of the Non-Economic Agreement covering Stationary Engineers, the Board should deny the instant petition challenging arbitrability in all respects.

**Discussion**

In deciding issues of arbitrability, we have repeatedly held that the scope of our inquiry includes ascertaining whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough to include the particular controversy presented. This is a threshold determina-tion which the Board of Collective Bargaining ("the Board") must make.[7]

In the instant matter, Article XI, Section 1 of the Non-Economic Agreement applicable to Stationary Engineers clearly provides that the parties have agreed to submit to arbitration:

> (A) A dispute concerning the application or inter-pretation of the terms of this Agreement or of a Comptroller's Determination applicable to the titles covered by this Agreement.

[7] Decision Nos. B-12-90; B-51-89; B-61-88; B-30-86; B-21-84; B-15-79; B-11-76; B-28-75; B-8-74.

> (B) A claimed violation, misinterpretation or mis-application of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; ...

It is self-evident, however, that the Union's right to obtain adjudication of grievances pursuant to these provisions is subject to a condition precedent. That is, the key to determination of whether an employee or a group of employees is covered by a particular contract is the language in the union recognition clause.[8] The contract upon which IUOE relies as the source of its alleged right to demand arbitral resolution of the instant dispute contains language which is both clear and unambiguous in setting forth "Stationary Engineer" as the only title in the bargaining unit.[9] Accordingly, we find that the Union is precluded from asserting on behalf of Senior Stationary Engineers and Plant Maintainers/Oilers any substantive rights created by a collective bargaining agreement applicable only to Stationary Engineers.

IUOE claims that HHC may not refuse to arbitrate this grievance as it affects Senior Stationary Engineers and Plant Maintainers/Oilers because "the parties have always followed and arbitrated issues involving these titles under the provisions of the Stationary Engineers non-economic agreement." The claim is without merit. While it is the policy of the NYCCBL and this Board to favor the impartial arbitration of grievances, this does not mean that we can create a duty to arbitrate where none exists, or enlarge a duty to

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[8] Decision Nos. B-26-88; B-25-80.

[9] See Article I, Section 1, entitled "Union Recognition and Unit Designation."

arbitrate beyond the scope established by the parties in their contract. A party may be required to submit to arbitration only to the extent it has agreed to do so.[10]

Furthermore, the fact that the Corporation might have arbitrated grievances on behalf of these employees in the past under the Non-Economic Agreement covering Stationary Engineers does not constitute a waiver of HHC's present right to challenge the arbitrability of this matter.[11] In any event, we note that IUOE has not identified any prior dispute that was arbitrated under the Stationary Engineer's contract on behalf of these other titles.

In the absence of any showing by the Union that the Corporation is bound, by contract or otherwise,[12] to submit to arbitration disputes

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[10] Decision Nos. B-18-91; B-43-90; B-26-88; B-24-86; B-20-85; B-28-82; B-36-80, B-12-77.

[11] Cf., Decision No. B-14-77, wherein the union sought to arbitrate a dispute under a long-expired memorandum of understanding. In granting the City's petition challenging arbitrability in that case, we held: "The fact that the City in the past might have arbitrated union grievances arising under the Agreement subsequent to its expiration date, does not constitute a waiver of its present right to challenge arbitrability." (Since no attempt to negotiate a new contract had been made, we found that the union was not entitled to the protection that the preservation of the status quo affords.)

[12] We note that Executive Order No. 83 ("EO 83"), dated July 26, 1973, sets forth grievance/arbitration procedures applicable to all mayoral agency employees eligible for collective bargaining, which govern in the absence of a contract containing same. We also note that HHC, which is not a mayoral agency, provides in its enabling statute at Section 7390(5) of the Unconsolidated Laws of New York, that Executive Order No. 52 (which has been superseded by EO 83) "shall apply in all respects to the corporation ... except that paragraph seven [Joint Labor Relations Committees] and paragraph eight [Grievance Procedures] of said executive order shall not be applicable to the

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concerning Senior Stationary Engineers and Plant Maintainers/Oilers, we shall grant HHC's petition as to these titles. Therefore, the remainder of our inquiry concerns only whether IUOE has met its burden of establishing that Article XI of the Non-Economic Agreement contemplates an alleged violation of the Chart and/or Memorandum on behalf of Stationary Engineers.

At the outset, we note that Article XI, Section 1(A) specifically refers to "a dispute concerning the application or interpretation of this Agreement [emphasis added]." Here, the alleged violation of Article XI, Section 1(A) arises not under the terms of the Non-Economic Agreement but under the terms of the Chart, which, on its face, bears no indication that the document was intended by the parties to be a rider to the Non-Economic Agreement between the parties. Nevertheless, IUOE attempts to bring its claim within the above-quoted definition of a grievance by characterizing the Chart as a collectively bargained modification of the contract and points to certain language in the Memorandum to support its position. In contrast, HHC flatly denies that the Chart is a product of negotiations.

It is undisputed that the parties did discuss, prior to implementation, the City's plan to broadband the titles at issue and, thereby, to reduce the number of employees serving in those titles at each HHC facility.[13] Although

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[12](...continued)
corporation [emphasis added]."

[13] The Corporation maintains that "the matter of staffing was discussed with the Union at labor management meetings." (See Step III Decision of the OLR Review Officer.) In this connection, we note that Article VI of the Non-Economic Agreement provides for the formation of labor-management committees in each agency having at least fifty employees covered by the agreement.

the Corporation did not identify IUOE as one of the entities consulted in the Memorandum, we have no doubt that the Union participated in the development of the staffing levels that are set forth in the Chart and Memorandum. The question before us, therefore, is whether the Chart constitutes a valid contract between the parties and whether their agreement to arbitrate covers the particular subject matter covered by the Chart. These are matters of substantive arbitrability and, as such, are properly within the jurisdiction of this Board.[14]

It is a well-established principle of our national labor relations law that technical rules of contract do not control the question whether a collective bargaining agreement has been reached.[15] Once the parties have agreed to the substantive terms and conditions of a contract, they can be held to those terms even in the absence of a formally executed written agreement.[16] Furthermore, we have recognized the existence of various types of supplemental agreements, intended to resolve disputes arising during the course of collective bargaining agreements, and have deemed them to constitute additions or amendments to the contracts which underlie them.[17] For the following reasons, however, we must reject the Union's argument that the Chart constitutes an agreement and/or modification which is enforceable under the terms of Article XI, Section 1(A) of the Non-Economic Agreement.

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[14] Decision Nos. B-19-72; B-8-68.

[15] See Decision No. B-19-87 and the cases cited therein.

[16] Id.

[17] See Decision No. B-6-76 and the cases cited therein.

We find that the Non-Economic Agreement was executed on August 17, 1987 (more than three years after the alleged "1984 minimum staffing agreement" was reached) and makes no reference to the Chart or to the subject matter that it addresses. We also take administrative notice of the parties' successor agreement, covering the term July 1, 1987 - June 30, 1990, which is equally silent on the subject. Moreover, the Chart itself contains no manifestation of the mutual assent of the parties to be bound by its terms. The fact that the parties discussed the employer's decision to broadband titles and, thereby, to reduce the numbers of the Union's members employed by each of its facilities does not compel a finding that they also agreed to submit disputes concerning any deviation from the staffing levels set forth in the Chart to arbitration.

Clearly, staffing and manning levels are within the scope of management rights under Section 12-307b of the NYCCBL.[18] It is well-settled that

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

> 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

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whenever a management rights defense to a request for arbitration is asserted, the burden will not only be on the Union ultimately to prove its allegations, but also to establish at the outset that a substantial issue under the contract is presented.[19] An agreement which limits the employer's right to determine staffing and manning levels would have to be expressly stated in order to restrict the employer's exercise of management prerogative in this area.[20] On the basis of the facts before us, we are unable to conclude that the parties intended to incorporate the terms of the document entitled "HHC Facilities Power Plant Staffing" in their basic agreement. Accordingly, we shall deny IUOE's request for arbitration which is based on Article XI, Section 1(A) of the Non-Economic Agreement.

Next, we turn to the Union's argument that this dispute is arbitrable because it concerns the alleged violation of a "written policy" of the employer, which, it claims, is set forth in the Memorandum. The Corporation maintains that the Memorandum constitutes neither rule, regulation nor written policy within the contemplation of Article XI, Section 1(B) of the Non-Economic Agreement. The issue presented, therefore, is whether the Memorandum will be accorded the status of a written policy of the Corporation, the

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[18](...continued)
employees, such as questions of workload or manning, are within the scope of collective bargaining.

See e.g., Decision No. B-4-89.

[19] Decision Nos. B-5-88; B-16-87; B-5-87; B-8-81.

[20] Decision Nos. B-11-81; B-22-80.

claimed violation of which is subject to arbitration under the parties' agreement.

We have always made such determinations on a case-by-case basis.[21] In prior decisions, we have held that:

> [w]ritten policy generally consists in a course of action, a method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are to be governed thereby.[22]

In more recent decisions, we have held that a written statement by the employer will not be accorded the status of a written policy of the employer unless it is "addressed generally to the department and sets forth a general policy applicable to affected employees."[23]

Applying these criteria to the instant matter, we find that the contractual definition of the term "grievance," as defined by Article XI, Section 1(B) of the Non-Economic Agreement, does contemplate an alleged violation, misinterpretation or misapplication of the type of document cited. By HHC's own characterization, the Memorandum is a unilateral "directive" to its Executive Directors, advising them of a new staffing pattern for their facilities designed to achieve adequate coverage of its power plant operations with minimal use of overtime. Clearly, such a course of action is in

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[21] E.g., Decision Nos. B-39-89; B-28-83; B-3-83; B-34-80.

[22] Decision Nos. B-67-89; B-28-83.

[23] Decision Nos. B-74-90; B-59-90.

furtherance of the employer's mission. While the Memorandum does not indicate that IUOE was one of the entities consulted, HHC cannot deny that its decision was communicated to the Union.[24] Finally, there can be no dispute that the guidelines set forth in the Memorandum apply generally to all HHC employees in the affected titles. For all these reasons, we find that the Memorandum embodies a written policy of the employer.

Accordingly, the only remaining issue is whether IUOE has sufficiently demonstrated that the Memorandum creates any substantive rights in Stationary Engineers. That is, we must determine whether the Memorandum arguably creates a right or benefit for unit employees which, in effect, places a limitation on the Corporation's managerial right to deviate from the staffing levels set forth therein. In this regard, we have held:

> In every exercise of its management prerogative, the public employer does not incur the duty of disproving that the purpose of the action was to vest new rights in the Union or in unit employees. Rather it is for the Union to show that such a right has been created; and it is in part in expression of this principle that we have held that it is the duty of the party seeking arbitration to identify the source of the asserted right and to establish a nexus between the source of the right and the act complained of.[25]

In Decision No. B-29-85, a case similar to the matter presently before us, we held that a letter from the Chief Fire Marshal to Base Commanders requiring the assignment of one Supervising Fire Marshal whenever more than nine Fire Marshals were assigned to field investigations at the same time,

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[24] See note 13, supra, at 12.

[25] See Decision No. B-40-85.

constituted a "directive" which embodied an existing policy of the employer.[26] We also found that an alleged violation of this directive stated an arbitrable claim because the union was able to show that the Fire Department's policy of maintaining a minimum level of staffing arguably imposed a limitation on the employer's managerial right to assign its personnel.

In the instant matter, although the Memorandum does not state that the figures represent the "least" number of employees each facility is authorized to have on staff, we find the facts alleged are sufficient to make tenable the Union's claim that the Memorandum created minimum levels of staffing for its members. We base this conclusion on the Corporation's decision in 1984 to broadband and reduce the numbers of employees in each of the affected titles; the simultaneous implementation of a system to monitor the utilization of overtime; the reference to coverage for weekends, holidays, annual and sick leave as a factor in its consideration of the plan; and its expressed intent to provide on-going advisory staff to the Executive Directors to deal with "specific problems or concerns regarding the new staffing levels." On the basis of this record, it appears to us that the Corporation's intention may have been to staff its power plants with the least number of employees practicable.

It is well-settled that once an employer unilaterally adopts a written policy concerning a managerial prerogative, that subject, to the extent so covered, becomes arbitrable under contracts which render employer non-

[26] In Decision No. B-29-85, the applicable definition of the term grievance encompassed an alleged violation of "existing policy," whether written or unwritten.

compliance with written policies grievable and arbitrable.[27] Therefore, because we find that the Memorandum creates an arguable limitation on the Corporation's managerial right to further reduce the levels of staffing of Stationary Engineers in its facilities, an alleged failure to maintain those levels constitutes an arbitrable claim.

This threshold determination of arbitrability, however, is not intended to reflect, in any manner, the Board's view on the merits of this dispute. Questions concerning whether the Memorandum does, in fact, prescribe "minimum" levels of staffing relate to the merits of the grievance and are, therefore, matters to be resolved in the arbitral forum.[28]

Accordingly, we find that IUOE has established a sufficient nexus between its allegations and the Corporation's alleged actions to support the conclusion that this dispute is within the scope of the parties' agreement to arbitrate under Article XI, Section 1(B) of the Non-Economic Agreement on behalf of employees in the title of Stationary Engineer. In all other respects, however, the Union's request for arbitration shall be denied.

**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 request for arbitration filed by the International Union of Operating Engineers on behalf of Stationary Engineers, which alleges

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[27] Decision Nos. B-75-90; B-29-85; B-3-83; B-34-80.

[28] Decision Nos. B-30-89; B-4-83; B-15-80.

a violation of Article XI, Section 1(B) of the Non-Economic Agreement covering Stationary Engineers be, and the same hereby is, granted; and its is further

ORDERED, that the petition challenging arbitrability filed by the New York City Health and Hospital Corporation be, and hereby is, granted in all other respects.

DATED: New York, New York
January 29, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

DEAN L. SILVERBERG
MEMBER

GEORGE B. DANIELS
MEMBER