

CEU, L. 237, IBT, 11 OCB2d 19 (BCB 2018)

(IP) (Docket No. BCB-4250-17)

Summary of Decision: The Union alleged that the Taxi and Limousine Commission violated NYCCBL § 12-306(a)(1) and (4) when it discontinued the enforcement of “Dollar Vans” in a joint operation with the NYPD. It further alleged that such change required the City to bargain over the resulting practical safety impact on its unit members. The City argued that the Union failed to demonstrate a substantive change in how unit members perform enforcement duties regarding Dollar Vans. It also asserted that the Union has not demonstrated any practical safety impact resulting from the alleged change. After a hearing, the Board found that the City did not have an obligation to bargain over the decrease in joint NYPD Dollar Van enforcement operations. Further, the record does not establish a practical safety impact on unit members. Accordingly, the petition was dismissed. (*Official decision follows.*)

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

In the Matter of the Improper Practice Proceeding

- between –

**CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,**

Respondents.

DECISION AND ORDER

On October 3, 2017, City Employees Union, Local 237, International Brotherhood of Teamsters (“Union” or “Local 237”) filed a verified improper practice petition against the City of

New York (“City”) and the New York City Taxi and Limousine Commission (“TLC”). The Union alleges that the TLC violated NYCCBL § 12-306(a)(1) and (4) when it discontinued enforcing “Dollar Van” regulations (“Dollar Van enforcement”) in a joint operation with Police Officers from the New York City Police Department (“NYPD”). It further alleges that such change required the City to bargain over the resulting practical safety impact on its unit members. The City argues that the Union failed to demonstrate a substantive change in how unit members perform enforcement duties regarding Dollar Vans. It also asserts that the Union has not demonstrated any practical safety impact resulting from an alleged change in enforcement duties. After a hearing, the Board finds that the City did not have an obligation to bargain over the decrease in NYPD joint operations. Further, the record does not establish a practical safety impact on unit members. Accordingly, the petition is dismissed.

BACKGROUND

The Trial Examiner held two days of hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts set forth below.

The TLC is responsible for licensing and regulating medallion taxicabs, for-hire vehicles, commuter vans, and paratransit vehicles. The Union represents TLC employees in the titles of Taxi and Limousine Inspector (“Inspector”), Associate Taxi and Limousine Inspector Level I (“Lieutenant”), and Associate Taxi and Limousine Inspector Level II (“Captain”) (collectively “TLC Officers” or “Officers”), among others. The Union and the City are parties to a memorandum of agreement covering the period of September 26, 2010 to March 25, 2018.

TLC Officers work in the TLC’s Enforcement Division taking enforcement action against licensed and unlicensed for-hire passenger vehicles within the City who violate established

regulations and standards. Among other duties, TLC Officers perform stops on unlicensed vehicles when they have a reasonable belief that they are operating for hire. TLC Officers also perform inspections and safety checks on licensed vehicles. When conducting enforcement activities, TLC Officers operate in a squad of between five and nine individuals. Each TLC Officer is equipped with a badge, a baton, handcuffs, pepper spray, a bullet-resistant vest, and a communication radio that connects them to the TLC's Central Radio Division.

TLC Officers are designated by the NYPD Police Commissioner as Special Patrolmen pursuant to § 14-106 of the New York City Administrative Code and, as such, are Peace Officers pursuant to the NYS Criminal Procedure Law, § 2.10 (27). Upon hire, they are trained at the TLC Academy.¹ They receive training on conducting car stops; how to use a baton, pepper spray, and handcuffs; and what to do if they encounter a firearm while performing their duties.² TLC Officers are authorized to make arrests and receive training in how to do so. They also learn defensive tactics and how to de-escalate conflicts. In addition, TLC Officers receive periodic recertification training to ensure that they are up to date with best practices. This training provides TLC Officers with instruction on how to reduce the risk to their own safety when conducting car stops, according to one City witness.

The TLC licenses for-hire vehicles that can seat 20 or fewer passengers. One such vehicle, the commuter van, provides commuter route service in areas that may not have ample public transportation options. A "Dollar Van" is a colloquial term for a type of commuter van that is

¹ On at least one occasion, TLC Officers have also received training at the NYPD Academy on how to handle emotionally disturbed individuals.

² The TLC's protocol is to abandon the operation and contact the NYPD in the event a TLC Officer encounters a weapon in a vehicle.

common in New York City.³ TLC Officers are responsible for enforcing the City's regulations against unlicensed for-hire vehicles, such as Dollar Vans, and other commuter vans. Generally, Dollar Vans have four or five rows of seats, with each row capable of holding four or five people, and can transport at least 20 people at a time.

The issue here concerns an alleged change in how TLC Officers are assigned to conduct Dollar Van enforcement. According to the City's witnesses, joint NYPD/ TLC operations are typically initiated by the NYPD, although the TLC could also request the joint operation. The NYPD provides the TLC with a proposed schedule of dates to conduct enforcement with the TLC, and the agencies jointly set a schedule for the operation. TLC supervisors then assign squads to a precinct area. TLC First Deputy Chief Louis Molina testified that during these operations some TLC Officers are assigned to the same vehicle as NYPD Officers while other TLC Officers in the squad are expected to conduct Dollar Van enforcement within the precinct but without NYPD accompaniment. He further testified that this practice, in which the remaining TLC Officers in the squad conduct enforcement during joint operations without NYPD accompaniment, existed prior to the summer of 2017. These remaining TLC Officers and their supervisors in the field are able to communicate through the TLC's Central Command Communications Center, if they need assistance. The Communications Center can communicate directly with the NYPD's Citywide Radio, in the event police assistance is needed.

Generally, the Union's witnesses testified that prior to the summer of 2017, Dollar Van enforcement activities were conducted with NYPD assistance. Inspector Cawthorne testified that

³ The TLC defines commuter vans as "vans that provide service for passengers through pre-arrangement within specified geographic zones throughout the [C]ity outlined by the Department of Transportation." (Ans. ¶ 55) Dollar Van enforcement in this Decision refers to unlicensed vehicles.

prior to the summer of 2017, he always conducted Dollar Van enforcement in a joint operation with the NYPD. Lieutenant Alvarez testified that he recalled conducting Dollar Van enforcement with the NYPD prior to the summer of 2017, but that these joint operations depended on whether NYPD Officers were available to assist them. When there were no NYPD Officers available to accompany TLC Officers on Dollar Van enforcement, the TLC would instruct its Officers to focus enforcement efforts on standard-sized vehicles. When TLC Officers performed Dollar Van enforcement with NYPD Officers, the Union witnesses explained that a squad of TLC Officers was assigned to a particular police precinct. According to Insp. Cawthorne, the entire squad would be paired off with NYPD Officers. Lt. Alvarez stated that the NYPD Officers and TLC Officers went into the field together, and either the TLC Inspector would ride in a police car or the Police Officers would ride in the TLC vehicle. Upon stopping a Dollar Van, the Police Officer normally made the initial approach to the driver and asked for his credentials. The TLC Inspector remained behind the Police Officer and would then interview the passengers leaving the vehicle to determine if the driver was working for hire.

Both Chief Molina and TLC Chief of Patrol Ronald Sobers testified that TLC Officers performed Dollar Van enforcement without NYPD accompaniment prior to the summer of 2017. According to Chief Molina, the NYPD is available to provide assistance to all TLC enforcement operations. In addition, TLC squad supervisors regularly notify the NYPD precinct in which the squad is conducting enforcement to make it aware of the squad's presence and insure that Police Officers are available to assist the TLC.

The Union maintains that in the spring or summer of 2017, the TLC changed its policy regarding Dollar Van enforcement by eliminating joint operations with the NYPD. Derek Jackson, Director of the Union's Law Enforcement Division, testified that he learned of this change when

he began receiving complaints from TLC Officers in the summer of 2017 that conducting Dollar Van enforcement had become “even more dangerous” than in the past because they were no longer accompanied by the NYPD. (Tr. 82) TLC Officers told Jackson that they were concerned about their safety because Police Officers have weapons such as firearms, mace, and tasers that TLC Inspectors do not carry. In addition, TLC Officers do not get the respect or invoke the “fear that police officers bring.”⁴ (Tr. 83)

Insp. Cawthorne and Lt. Alvarez testified that since the TLC stopped the joint NYPD operations they have conducted Dollar Van enforcement primarily without accompaniment by the NYPD.⁵ However, Lt. Alvarez testified that “now and then” since the spring of 2017, the TLC has conducted Dollar Van enforcement in a joint operation with the NYPD. (Tr. 73) Insp. Cawthorne similarly testified that he currently performs Dollar Van enforcement with the NYPD “on occasion.” (Tr. 35)

Chief Molina and Chief Sobers testified that the TLC does not have a “van enforcement policy.” They further testified that there is no difference in the way Dollar Van enforcement with the NYPD was conducted before versus after the summer of 2017. Chief Molina testified that since he started at the agency in June 2017, TLC Officers “regularly” conduct Dollar Van enforcement operations without the NYPD, but that they have also done so with an NYPD presence

⁴ Jackson raised the TLC Officers’ concerns with TLC management, which resulted in a labor-management meeting. He asked management to cease the practice of sending TLC Inspectors out without the NYPD. Jackson testified that the TLC rejected his request.

⁵ Insp. Cawthorne testified that, around the time of the alleged policy change, TLC Inspectors asked their supervisors during roll call whether they were going to have NYPD accompaniment and were informed that they would not. Lt. Alvarez testified that he heard that the reason that the NYPD accompaniment ceased was that the TLC’s management wanted to “separate us a little bit more from NYPD.” (Tr. 69)

during this period. (Tr. 119) The determining factor, he testified, is whether the NYPD requests a joint operation.

It is undisputed that around the summer of 2017, the TLC began using an additional enforcement strategy. Chief Sobers described these as “surge” operations that focused enforcement in a narrow, distinct location. One such operation, the “Flatbush Corridor,” involved the assignment of three TLC squads, as opposed to the typical one or two. The TLC notified the NYPD in advance of the exact location of the operation, provided a tactical plan to the TLC Officers, and informed them that the NYPD precinct had been advised of the operation. The TLC Officers then conduct the surge operation for a consecutive number of days.

Union witnesses testified that conducting Dollar Van enforcement without NYPD accompaniment presents certain risks to TLC Officers safety. They maintain that these risks existed both prior to and following the alleged policy change in Dollar Van enforcement. Inspector Cawthorne testified that Dollar Vans operate in “[p]retty tough neighborhoods.” (Tr. 28) He stated that because the Dollar Van driver carries large amounts of cash, he is generally accompanied by a “money man.” (*Id.*) “[M]ost of the time,” the money man has a weapon to protect the driver. (*Id.*) He has seen guns and machetes in Dollar Vans.⁶ These vans usually have dark tinted windows that are at eye level or an advertisement on the outside that makes it hard for anyone to see into the vehicle but easy for passengers to see out of it. According to Insp. Cawthorne, this makes it challenging for Inspectors to determine the number of passengers inside the vehicle.

Insp. Cawthorne testified that he and his colleagues do not feel safe doing enforcement without the NYPD because they encounter large numbers of passengers in Dollar Vans, who are

⁶ Insp. Cawthorne also testified that he’s witnessed the sale of marijuana and cocaine inside Dollar Vans.

often upset that their commute has been interrupted and will refuse to answer the Inspector's questions.⁷ (Tr. 48) When a TLC Inspector stops a Dollar Van, passengers will exit the vehicle, particularly if they are trying to get to work during the morning commute. According to Lt. Alvarez, when he makes a stop without NYPD accompaniment, sometimes the driver "is really irate, screaming, telling us that we're not NYPD." (Tr. 70) Insp. Cawthorne also stated that when TLC Inspectors perform Dollar Van enforcement without the NYPD, the driver tends to be less compliant, and the encounter can be contentious. He testified that often when TLC Officers attempt to stop a Dollar Van, the driver will flee. Other drivers will typically argue that the TLC Inspector is not authorized to make the stop because he's not an NYPD Officer. In those situations, Insp. Cawthorne calls for a TLC Lieutenant or Captain, who will respond and attempt to persuade the driver to produce his license and registration.

In addition, the Union witnesses stated that without Police Officers present, bystanders who observe the enforcement action will argue with the Inspector, questioning him as to why he is stopping the driver and encouraging the driver not to comply with the Inspector's directive. Insp. Cawthorne testified that, when the NYPD is not present, bystanders tend to be more vocal. He conceded that he receives similar reactions from passengers and bystanders when he stops other non-licensed for-hire vehicles. As to the money men, he stated that they know that TLC Officers are not armed, so they don't fear them; however, he noted that the money men tend to leave the scene when the Dollar Van is pulled over, regardless of whether the NYPD is present.

The City's witnesses disputed the assertions that performing Dollar Van enforcement without NYPD assistance presented greater safety risks to the TLC Officers. Chief Sobers has

⁷ According to Insp. Cawthorne, there is no significant big difference in how passengers react when the NYPD is present.

conducted stops on commuter vans, including Dollar Vans, since 1992. He has never recovered a firearm while performing a van stop nor has he witnessed drug activity while conducting Dollar Van enforcement. He testified that he has not seen a money man in a Dollar Van since the early 2000s. Moreover, TLC Officers detain vehicles other than Dollar Vans that also have tinted windows, and some TLC-licensed vehicles are comparable in height to Dollar Vans. Chief Sobers stated that he also does not believe that a firearm is necessary to enforce the TLC regulations, nor is he certain that a TLC Officer would be safer conducting a vehicle stop if he had a firearm for self-defense purposes. He has performed enforcement on vehicles other than Dollar Vans and has not found the enforcement of Dollar Vans to be more dangerous than that of other types of vehicles. Similarly, Chief Molina testified that while vehicle stops are “inherently a risk,” that he does not believe that the risks of stopping a car versus a van or a licensed vehicle versus an unlicensed vehicle are any different. (Tr. 136)

Chief Sobers further testified that TLC Officers can request police assistance in a situation where they encounter a “non-compliant” driver. (Tr. 190) He has heard TLC Officers express concerns about the timeliness of the NYPD’s response to their requests for assistance, although not necessarily for Dollar Van enforcement. He is also aware of reports by TLC Officers who have been threatened when conducting vehicle enforcement, but does not know of any incidents that occurred specifically while the Officer was performing Dollar Van enforcement.

POSITIONS OF THE PARTIES

Union’s Position

The Union argues that the TLC made an affirmative decision to cease its policy of conducting Dollar Van enforcement in a joint operation with the NYPD, and that this decision

significantly increased the risk of “serious injury” to TLC Inspectors and obligated the TLC to bargain over the practical safety impact of its decision. (Union Br. at 1) It asserts that the TLC’s refusal to bargain is a violation of NYCCBL § 12-306(a)(1) and (4) because it rejected the Union’s attempts to negotiate over the alleviation of the impact. The Union contends that if the Board disagrees that the TLC’s actions constitute an improper practice, it should convert the petition to a scope of bargaining petition and order immediate bargaining over the practical safety impact. The Union emphasizes, however, that given the *per se* nature of the practical impact on employee safety, the Board should order “immediate bargaining” rather than affording the TLC the opportunity to alleviate the impact through unilateral action. (Union Br. at 12)

The Union contends it has established that there was a policy change in how Dollar Van enforcement was conducted before and after April 2017 that warrants bargaining. It asserts that its own witnesses, Insp. Cawthorne and Lt. Alvarez, offered the only credible testimony regarding the TLC’s change to the Dollar Van enforcement policy. These witnesses provided consistent testimony, based on personal knowledge, that they were always accompanied by NYPD Officers when conducting Dollar Van enforcement prior to April 2017. In contrast, the Union argues, the testimony of the City’s witnesses on this issue was unpersuasive. Specifically, Chief Molina had no personal knowledge of TLC policies or practices prior to his June 2017 arrival at the agency. Chief Sobers’ testimony was consistent with that of the Union’s witnesses that prior to 2017, Dollar Van enforcement was conducted as a joint operation with the NYPD, and that on the day of the joint operation, TLC Inspectors would meet with NYPD Officers at a particular precinct to conduct Dollar Van stops in the same vehicle. The Union contends that while Chief Sobers testified that TLC Inspectors who were not in the same vehicle as NYPD Officers were still expected to perform that same enforcement, he did not testify that they in fact did so. Moreover,

the Union argues, Chief Sobers did not provide specific examples of occasions prior to 2017 when TLC Inspectors conducted Dollar Van enforcement without NYPD Officer assistance or an approximate number of instances where, prior to 2017, he was in the field while TLC Inspectors were engaged in Dollar Van enforcement without an NYPD presence.

The Union asserts that it has demonstrated that the TLC's change to the Dollar Van enforcement policy resulted in a practical safety impact on its unit members. It argues that an employer's decision to alter the staffing composition of employees responsible for interacting with the public and enforcing legal requirements creates a practical safety impact on those employees. (Union Br. at 10) The Union analogizes the instant matter to a case in which the Board found that the NYPD's implementation of a policy requiring Sergeants and Lieutenants to engage in "solo supervisory patrols" in place of a prior policy in which they were assisted by a Police Officer, resulted in a practical safety impact. (*Id.* (quoting *SBA*, 23 OCB 6 (BCB 1979)) It contends that the Board should find that the TLC's policy change similarly created a practical safety impact when it required TLC Inspectors who were formerly "always accompanied" by NYPD Officers on Dollar Van enforcement, to now perform that duty without the "additional assurance of safety" created by the NYPD.⁸ (Union Br. at 10-11) Further, Insp. Cawthorne's and Lt. Alvarez's testimony established that Dollar Van enforcement is particularly dangerous, citing: the Dollar Vans' size, the large number of passengers who are "often irate" when the vehicle is stopped by a TLC Inspector, the difficulty in seeing into the Dollar Van due to the window height and tint, the

⁸ The Union also contends that in the cited decision, the Board found it significant that the NYPD attempted to mitigate the safety impact of its policy change by implementing a "trigger concept" that would govern when a solo supervisory officer was dispatched to an "incident location." (Union Br. at 11) It argues that the TLC similarly implemented the "surge" concept in conjunction with Dollar Van enforcement by increasing the number of TLC Inspectors assigned to Dollar Van enforcement operations in an attempt to mitigate the safety risks due to the NYPD's absence. (*Id.*)

presence of an “often-armed” money man, the large amount of money that may be at stake for the driver and money man, and the propensity of Dollar Van drivers to flee.

The Union asserts that two additional facts prevent the City from disputing the practical safety impact resulting from its Dollar Van enforcement policy change. First, prior to 2017, when no NYPD Officers were available to perform Dollar Van enforcement, the TLC Inspectors were instructed to conduct enforcement operations on standard sized vehicles instead. Second, when Dollar Van stops are conducted with the NYPD, the procedure is for the NYPD Officer to approach the vehicle first. The Union argues that the “obvious” reason for this procedure is because everyone involved, including the TLC, recognizes that NYPD Officers are better trained and equipped than TLC Officers to safely handle the potentially dangerous situations that may arise. (Union Br. at 12)

City’s Position

The City argues that the Union has failed to establish that the TLC violated NYCCBL § 12-306(1) and (4) by substantively changing the way it conducts Dollar Van enforcement. It emphasizes that a duty to bargain over a claimed practical impact does not arise until the Board has found that such an impact exists and the employer refuses to bargain over it. The City asserts that even if the Board finds there was a change in how the TLC conducts Dollar Van enforcement, the Union has failed to establish any practical safety impact over which the City is or could be obligated to bargain.⁹

The City argues that the evidence presented at the hearing conclusively establishes that there was no change in how Dollar Van enforcement is conducted. Contrary to the Union’s

⁹ The City argues that the instant improper practice petition may be converted to a scope of bargaining petition but must still be dismissed because the Union fails to identify any practical safety impact on its members.

allegations, joint operations with the NYPD did not cease on or about the summer of 2017. The City asserts that witnesses for both parties testified that they conducted Dollar Van enforcement without the NYPD prior to 2017 and with the NYPD since the spring or summer of 2017. In addition, the record reflects that the TLC has no standard operating procedure or any other documents requiring that enforcement must be performed with the NYPD or any other law enforcement agency.

Assuming *arguendo* that the Board determines there was a change in how the TLC enforces Dollar Vans, the Union has failed to establish any practical safety impact on TLC Officers. At the outset, the City asserts that there is no *per se* impact on TLC Officers' safety because such a concept applies only where the determination that a practical impact exists is based solely on the pleadings and without the benefit of a hearing. Since a hearing was held, the *per se* concept is not applicable in this matter. The City argues that the Union has put forth only conclusory allegations of a practical safety impact that are unsupported by the factual record. Therefore, the Union has not met its burden of proof.

The City contends that while vehicle stops in general may carry an inherent risk of danger, stopping Dollar Vans without the physical presence of the NYPD does not pose any new or unique safety risks for TLC Officers. It argues that the record is devoid of factual support for the contention that the size and physical features of Dollar Vans or their passengers and operators display any of these risks. The City asserts that the height of a Dollar Van's windows and their tint level is not unique to that type of vehicle. The TLC regulates other vehicles that are similar in height to Dollar Vans. Moreover, there is no physical difference between licensed commuter vans and Dollar Vans.

To the extent a money man is present in a Dollar Van, the record establishes that such an individual is nonconfrontational and therefore presents no safety risk to TLC Officers. Insp. Cawthorne admitted that when a Dollar Van is stopped, the money man walks away. The City notes that Insp. Cawthorne is the only witness who testified that he had ever encountered a firearm while stopping Dollar Vans, and that Chief Sobers testified that he had not encountered a firearm while stopping a van during his many years of service. Similarly, only Insp. Cawthorne testified to having witnessed drug activity in Dollar Vans. Regarding Dollar Van passengers, there is no record evidence that they form an “angry mob” when stopped by TLC Officers. (City Br. at 33) Rather, Lt. Alvarez testified that normally passengers are a little upset, some do not talk to the TLC Officers, and others simply question why the van was stopped is not equivalent to being confronted by an angry mob. Moreover, while TLC Officers may get yelled at or occasionally threatened by Dollar Van drivers, Chief Sobers testified that these incidents are not unique to Dollar Vans.

Finally, the City argues that the TLC has already adopted sufficient measures to offset any potential threat posed by Dollar Vans to TLC Officers. Every TLC Officer receives training prior to commencing their duties to ensure that they are provided with “appropriate decision-making tools” to safely perform any type of car stop. (City Br. at 34) They are also issued equipment that promotes their safety. This includes a radio so that they can be in contact with the TLC’s Central Radio Division, in addition to a bullet-resistant vest, a baton, and pepper spray. Further, the TLC has put additional measures in place to protect TLC Officers while they are in the field, including the availability of direct assistance by the NYPD even when they are not physically present.

DISCUSSION

The Union contends that the City failed to bargain in good faith, in violation of NYCCBL § 12-306(a)(1) and (4), over the TLC's unilateral change to its policy of assigning TLC Officers to conduct Dollar Van enforcement in a joint NYPD operation and the practical safety impact of this change. After careful consideration of the evidence adduced at the hearings, as well as the pleadings, exhibits and post-hearing briefs, the Board finds that there was a decrease in the frequency of assignment of TLC Officers to conduct Dollar Van enforcement with the NYPD, but that the record does not support the existence of a practical impact on safety as a result of this reduction.

Under NYCCBL § 12-307(a), public employers and public employee organizations have the duty to bargain in good faith over wages, hours, and working conditions. "It is an improper practice under § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining." *SSEU, L. 371*, 2 OCB2d 16, at 10 (BCB 2009) (citing *NYSNA*, 71 OCB 23, at 11 (BCB 2003)). However, pursuant to § 12-307(b), the City has the managerial right to act unilaterally in certain enumerated areas that are outside the scope of mandatory bargaining. "[I]t is well-settled that § 12-307(b) . . . gives management the express right to determine what duties should be included in a job specification and which employees should be assigned to perform particular jobs." *Local 1182, CWA*, 5 OCB2d 41, at 7 (BCB 2012) (quoting *DC 37, L. 1549*, 69 OCB 37, at 6 (BCB 2002)). Consequently, the City may act unilaterally in those areas unless the parties have agreed to limit that right in their collective bargaining agreement. *See Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 12 (BCB 2012).

Here, it is undisputed that no provision in the parties' collective bargaining agreement limits the TLC's right to determine and assign the duties its employees will perform. Therefore,

we find that the alleged change to the TLC's Dollar Van enforcement policy falls within the City's right under NYCCBL § 12-307(b) to act unilaterally to assign and direct employees. *See NYSNA*, 71 OCB 23, at 11 (public employer's right to assign or reassign its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, fall within NYCCBL § 12-307(b), unless the parties themselves limited that right in their collective bargaining agreement).

Notwithstanding the TLC's ability to direct or redirect its Officers in the way they conduct enforcement pursuant to NYCCBL § 12-307(b), if this right is exercised "in a manner that has an adverse effect on terms or conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact." *Local 1182, CWA*, 5 OCB2d 41, at 8 (quoting *NYSNA*, 71 OCB 23, at 11). "However, there is no duty to bargain – and therefore no violation of NYCCBL § 12-306(a)(4) by way of refusal to bargain – arising out of a claim of practical impact until the Board has first found that a practical impact exists as a result of the exercise of a management prerogative pursuant to NYCCBL § 12-307(b)." *Local 1182, CWA*, 5 OCB2d 41, at 8 (citations omitted).¹⁰

We review the record to determine whether the TLC modified the way its Officers conduct Dollar Van enforcement with regard to NYPD joint operations. As we have long held, "it is not enough to allege a threat to employee safety . . . it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision or action, or inaction in the face

¹⁰ Although a scope of bargaining petition is the proper procedural mechanism through which to assert a claim of practical impact, we have historically exercised discretion to consider practical impact claims alleged in an improper practice petition. *See, e.g., Local 1182, CWA*, 5 OCB2d 41, at 8, *NYSNA*, 71 OCB 23, at 12. Therefore, we will consider the Union's scope of bargaining claims.

of changed circumstances.” *UFA, L. 94*, 5 OCB 2d 2, at 22 (BCB 2012) (quoting *UFA*, 37 OCB 43, at 17-18 (BCB 1986)). In addition, the petitioner “must demonstrate that the exercise of a management right has created a ‘clear and present or future threat to employee safety’”. *UFOA*, 3 OCB2d 50, at 18 (BCB 2010) (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)); *see also UFA, L. 854*, 49 OCB 39, at 37 (BCB 1992). If a change occurred, we must then assess whether the change resulted in a practical safety impact on TLC Officers.

Here, the testimony and documentary evidence do not support the conclusion that the policy of conducting Dollar Van enforcement in a joint operation with the NYPD was discontinued after the spring or summer of 2017. At the outset, the record reflects that prior to the summer of 2017, TLC Officers conducted Dollar Van enforcement in a joint operation with the NYPD; however, testimony from both Union and City witnesses confirms that TLC Officers also conducted Dollar Van enforcement in the absence of NYPD Officer accompaniment during this period.¹¹ Accordingly, the testimony demonstrated that prior to summer 2017, Dollar Van enforcement was not limited to joint operations with the NYPD.¹²

Similarly, it is undisputed that after the spring or summer of 2017, enforcement of Dollar Vans was performed both in a joint operation with the NYPD and without NYPD accompaniment. Indeed, Lt. Alvarez testified that since the spring of 2017, the TLC has conducted joint operations for Dollar Van enforcement with the NYPD “now and then.” Insp. Cawthorne echoed that

¹¹ There is no record evidence to quantify the percentage of the time TLC Officers spent conducting Dollar Van enforcement in a joint operation with the NYPD versus without them prior to the summer of 2017.

¹² To the extent Insp. Cawthorne’s testimony that he performed Dollar Van enforcement exclusively in an NYPD joint operation prior to the spring or summer of 2017 was intended to convey that Dollar Van enforcement was never conducted without NYPD accompaniment, this testimony is inconsistent with the testimony of other witnesses and therefore unreliable.

testimony, stating that he currently performs Dollar Van enforcement with the NYPD “on occasion.” (Tr. 35) In light of this evidence, we find that the assertion that the TLC changed its policy from one in which TLC Officers always conducted Dollar Van enforcement in a joint operation with the NYPD to one in which they never performed it with NYPD accompaniment after the spring or summer of 2017, is not borne out by the record.

However, the record does reflect that around the spring or summer of 2017, the frequency in which TLC Officers conducted Dollar Van enforcement in a joint operation with the NYPD decreased. Jackson, the Union official, testified that around that time he began receiving complaints from TLC Officers that they were no longer accompanied by NYPD Officers when performing Dollar Van enforcement. In addition, the evidence shows that the TLC began employing a “surge” strategy after the summer of 2017, which served as a method of conducting enforcement by engaging large number of TLC Officers in lieu of NYPD accompaniment. Accordingly, we conclude that a change, in the form of a decrease in the frequency in which TLC Officers conduct Dollar Van enforcement with the NYPD took place around the spring or summer of 2017.

Having established that a change occurred, we review the record to determine whether this change in assignments had a practical safety impact on TLC Officers. We have long held that the petitioner has the burden to demonstrate that a practical impact on safety exists and “must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain.” *UFOA*, 8 OCB2d 13, at 27 (BCB 2015) (quoting *EMS SOA*, 79 OCB 7, at 30 (BCB 2007)); *see also LEEBA*, 3 OCB2d 29, at 44 (BCB 2010). While the petitioner need not show any actual injury to establish a practical impact on safety, it must show “more than simply a change in the way things are done.” *UFA*, 5 OCB2d 2, at 24. In making its

determination, this Board has taken into consideration, along with other factors, whether employees' adherence to management procedures and guidelines would obviate any safety concerns. *See UFOA*, 8 OCB2d 13, at 27; *EMS SOA*, 79 OCB 7, at 30-31. We have also considered whether the employer has adopted measures that offset any potential threat to safety. *See EMS SOA*, 79 OCB 7, at 31.

We find that the evidence does not establish that the decrease in NYPD joint operations had a *per se* or practical impact on TLC Officers' safety. It is clear from the record that many aspects of TLC Officers' duties in conducting Dollar Van and other enforcement activities carry inherent safety risks. The size of the Dollar Van and the difficulty in seeing who and what is inside the vehicle due to the window height and tint; the large numbers of irate passengers that TLC Officers may encounter upon stopping a vehicle; and the possibility of discovering drugs or weapons during a vehicle inspection, all contribute to the unpredictability and safety concerns that are intrinsic to the inspection job. Recognizing these inherent safety risks, the TLC has adopted measures to address them. The evidence shows TLC Officers are trained upon hire and throughout their tenure in, among other things, defensive tactics; they are provided protective equipment, including a pepper spray and bulletproof vest; and they have access to the TLC's central radio system as well as the NYPD, which can assist them if necessary. The TLC also mandates certain protocols to protect its employees. For example, TLC Officers are directed to abandon their operation and contact the NYPD if they encounter a weapon during a vehicle stop.

Here, the record does not reflect that the decrease in the frequency in which TLC Officers now engage in NYPD joint operations for Dollar Van enforcement has increased their safety risks. Rather, the risks that TLC Officers described in conducting this type of enforcement, including exposure to a money man and large numbers of angry passengers, are all hazards or risks

encountered in the general performance of their job duties. Further, the Union has not demonstrated that the absence of NYPD Officers subjects the TLC Officers to greater safety risks. It is undisputed that when the Dollar Van is pulled over, the money man tends to leave the scene regardless of whether a Police Officer is present. Further, while there was testimony that bystanders tend to be more vocal in their harassment of the TLC Officer when an NYPD Officer is not present, there was also testimony that such harassment is not unique to Dollar Van stops. Indeed, one witness testified that there is little difference in how passengers react when the NYPD is present. Further to the extent that Dollar Vans drivers are generally less compliant when stopped by a TLC Officer, as opposed to an NYPD patrol car, the evidence again reflects that the safety risks of non-compliant drivers exists notwithstanding the presence of Police Officers, nor are such risks unique to Dollar Van enforcement. Based on these factors, we cannot conclude that the decrease in Police Officer accompaniment made enforcement any less safe for the TLC Officers.¹³

Finally, we find that *SBA*, 23 OCB 6, which the Union analogizes to this case, is factually distinguishable. In that case, the Board found that a practical safety impact resulted from the NYPD's implementation of a policy removing the second officer from the patrol car, thus requiring Sergeants and Lieutenants to engage in "solo supervisory patrols." *Id.* at 21. In reaching this conclusion, the Board relied upon the fact that the NYPD had previously implemented a similar solo patrol policy for Police Officers that permitted two-man patrol cars in certain precincts that the NYPD deemed to be less safe, while the policy at issue in *SBA*, 23 OCB 6, did not include such

¹³ Similarly, we are unpersuaded that the size of Dollar Vans and their windows' height and tint increase the practical impact on TLC Officers' ability to safely perform enforcement without NYPD accompaniment. The evidence reflects that many other vehicles that TLC Officers inspect are comparable to Dollar Vans, featuring a similar size and height, and some have high, tinted windows. Accordingly, this evidence does not establish a safety impact.

a mechanism. In contrast here, we find that the risks involved in conducting enforcement of Dollar Vans is comparable to enforcement on other types of vehicles. Therefore, in the absence of some other safety impact, we cannot conclude based on the mere fact that TLC Officers have been assigned to conduct Dollar Van enforcement with NYPD accompaniment less frequently than previously, that the safety of TLC officers has been impacted.

For the reasons stated above, we dismiss the Union's claim that the decrease in the frequency in which TLC Officers are directed to conduct Dollar Van enforcement in a joint operation with the NYPD resulted in a practical safety impact on unit members.

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 filed by City Employees Union, Local 237, International Brotherhood of Teamsters, docketed as BCB-4250-17, is hereby dismissed.

Dated: June 14, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROL O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER