DC 37, L. 983, 15 OCB2d 42 (BCB 2022)

(IP) (Docket No. BCB-4415-21)

Summary of Decision*:** The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) and (4) and § 12-307(b) by refusing to bargain over the assignment of certain vehicle tows from crime and emergency scenes previously performed by MVOs to TEA Level IIIs and assigning disabled NYPD vehicle tows to private contractors. The Union also claimed that a safety impact arose as a result of the NYPD's removal of NYPD decals on trucks utilized by MVOs. The City argued that the claims regarding the transfer of disabled NYPD vehicle tows and the practical impact of the removal of NYPD decals were untimely. It further argued that assignments are not a mandatory subject of bargaining and that the Union failed to establish that the tows in question were the exclusive work of MVOs. The Board found that that the Union's claims regarding disabled vehicle tows were untimely, that the tows from crime and emergency scenes in question were exclusive MVO work, that the Union did not establish a safety impact resulting from the removal of NYPD decals from trucks, and that the Union's claim of a safety impact on TEA Level IIIs was not properly before the Board because it was raised for the first time in the Union's post-hearing brief. Accordingly, the petition was granted in part and dismissed in part. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 983,

Petitioner,

-and-

CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On February 12, 2021, District Council 37, Local 983 ("Union") filed an improper practice petition against the City of New York ("City") and the New York City Police Department

("NYPD") pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union filed an amended petition on July 12, 2021. The Union alleges that the NYPD violated NYCCBL § 12-306(a)(1) and (4) and § 12-307(b) by refusing to bargain over the assignment of certain vehicle tows from crime and emergency scenes previously performed by Motor Vehicle Operators ("MVOs") to Traffic Enforcement Agents Level III ("TEA IIIs") and the assignment of disabled NYPD vehicle tows, also performed by MVOs, to private contractors. The Union also claims that a safety impact arose as a result of the NYPD's removal of NYPD decals on trucks utilized by MVOs. The City argues that the claims regarding the transfer of disabled NYPD vehicle tows and the practical impact of the removal of NYPD decals are untimely. It further argues that assignments are not a mandatory subject of bargaining and that the Union failed to establish that the tows in question were the exclusive work of MVOs. The Board finds that the Union's claims regarding disabled vehicle tows are untimely, that the tows from crime and emergency scenes in question were exclusive MVO work before being assigned to TEA IIIs, that the Union did not establish a safety impact resulting from the removal of NYPD decals from trucks, and that the Union's claim of a safety impact on TEA IIIs was not properly before the Board because it was raised for the first time in the Union's post-hearing brief. Accordingly, the petition is granted in part and dismissed in part.

BACKGROUND

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

Evidence Vehicle Tows

On July 24, 2020, the NYPD notified its Fleet Services Division that MVOs would no longer be assigned to respond to requests to conduct tows of vehicles from crime and emergency scenes to police facilities ("evidence tows") between the hours of 11:30 PM and 6:30 AM or on weekends. Union Shop Steward Donald Chapman, who has served as an MVO since 2014, testified that in his experience, only MVOs were assigned to overnight and weekend evidence tow shifts prior to August 2020. Chapman testified that the change resulted in a loss of overtime work and a loss of differential for four to five MVOs who were working night shifts prior to August 2020. Union Vice President Marvin Robbins and Chapman both testified that they understood the change was made to save money due to a recent NYPD budget cut.

Chapman testified that for the first two weeks after the July 24 announcement, evidence tows were not conducted during the night and weekend shifts and that he then "found out after the first two weeks that they started giving [those night and weekend shifts] to [TEA IIIs]." (Tr. 114) The NYPD asked TEA IIIs to volunteer for those shifts, and where there were insufficient volunteers, the shifts were assigned to the least senior TEA IIIs with the necessary credentials to carry them out. Inspector Richard Avignon, the Commanding Officer of the NYPD Traffic Enforcement District and supervisor for TEA IIIs, testified that he was involved in meetings to plan this transfer of duties. He testified that he told NYPD management that there was no issue assigning TEA IIIs to conduct evidence tows because they are no different from other tows that TEA IIIs routinely perform to relocate vehicles.

The Union learned from TEA IIIs that a supervisor instructed them during roll call that going forward, they would be responsible for conducting evidence tows when called upon to do so. Traffic Manager Lamar King testified that at the time of his testimony in January 2022, four

TEA IIIs under his command at the Brooklyn Pound were assigned to conduct evidence tows.

It is undisputed that on nights and weekends beginning in or around August 2020, officers at crime or emergency scenes still contacted NYPD Operations for tows but TEA IIIs were dispatched instead of MVOs.[1] The TEA IIIs assigned to cover these shifts on nights and weekends continued to perform their usual duties at those times but would periodically be called off patrol and told to report to a crime or emergency scene to conduct an evidence tow.

The Union is the certified bargaining representative of both MVOs and TEA IIIs, but the two titles are in different bargaining units.[2] MVOs operate motor vehicles at a variety of different City agencies. The MVO job specification describes their duties as follows:

> Under supervision, operates motor vehicles such as passenger cars, ambulettes, vans, hearses, trucks, wreckers, forklifts, tractor-trailer trucks and sign-erecting trucks; in a small garage, may dispatch personnel, motor vehicles and equipment; performs related work. Employees in this title may be required to work rotating shifts, including nights, Saturdays, Sundays, and holidays.

(City Ex. P) MVOs employed by the NYPD's Fleet Services Division, Department Tow and Roadside Repair ("Fleet Services") are tow truck drivers who are responsible for conducting evidence tows on vehicles from crime and emergency scenes. In addition to evidence tows, these MVOs are assigned to tow disabled NYPD vehicles to the NYPD auto shop.

Chapman testified that MVOs are provided with lockout equipment for breaking into vehicles they need to tow, a radio for communication, and cargo straps and chains for attaching and securing the vehicle to be towed. They are also provided with a rain jacket and leather work

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[1] TEA IIIs who do not perform evidence tows are dispatched from the Traffic Enforcement Division.

[2] Within the Union, TEA IIIs are part of a division with other represented traffic enforcement titles, separate from MVOs.

gloves. Chapman further testified that the vehicles towed from crime and emergency scenes ("evidence vehicles") are sometimes damaged and are often contaminated with blood, other bodily fluids, and potential evidence of crimes. MVOs receive personal protective equipment ("PPE") for use in contaminated vehicles consisting of latex surgical gloves and disposable full body plastic jumpsuits called Tyvek suits.[3]

Chapman testified that all MVOs complete a multi-week training program during which they are instructed on how to conduct tows and complete the related paperwork. He testified that the training program includes both classroom work and field instruction, where a trainee accompanies and assists an experienced MVO in performing tows. Trainee MVOs may deal with contaminated vehicles and use their PPE while accompanying an experienced MVO during their training, but otherwise no special training is provided to MVOs regarding contaminated vehicles.

Traffic Manager King oversees all operations out of the Brooklyn Tow Pound and previously served in the same role in the Manhattan Tow Pound. He testified that when a vehicle has been in an accident or utilized in a crime, Police Officers at the scene call the NYPD Operations Unit. The Operations Unit then contacts Fleet Services to request the services of a tow truck. MVO Supervisors at Fleet Services then dispatch the MVOs. Chapman testified that usually the MVO enters the vehicle, puts it in neutral, secures the steering wheel, attaches the vehicle to the tow truck, and tows it away. Chapman testified that the Police Officer on the scene gives the MVO instructions regarding whether they can enter the vehicle and if there is evidence they need to avoid. For example, he testified that MVOs are sometimes instructed to wear their latex surgical

[3] Chapman testified that the Tyvek suits were available at the MVO office and that MVOs could bring them in the trucks when needed. He stated that usually dispatchers will ask the officers on the scene about the condition of the evidence vehicles and inform the MVOs before they are dispatched. Traffic Manager King and TEA III Platoon Commander Andrea Sewell testified that Tyvek suits were also available to TEA IIIs upon request.

gloves while inside an evidence vehicle when fingerprints need to be preserved. It is undisputed that MVOs do not collect or process evidence from the vehicles they tow. MVOs who enter contaminated evidence vehicles sometimes wear Tyvek suits to avoid contamination.

Motor Vehicle Supervisor and former MVO Alexander Shnicer testified that he conducted hundreds of evidence tows and approximately 40-50 evidence vehicles had blood in them. He further testified that he had never used or requested to use a Tyvek suit. Chapman testified that at times in order to tow damaged vehicles or avoid disturbing evidence, evidence tows are conducted with alternate equipment that allows vehicles to be towed without their wheels needing to turn and without the tow truck driver having to enter the vehicle.[4]

TEA IIIs are employed at tow pounds across the City that are part of the NYPD's Traffic Enforcement Division ("TED"). The NYPD's job specification for TEA IIIs describes their duties as:

> Under general supervision, removes or immobilizes illegally parked vehicles; performs tasks such as the following:
>
> Operates a tow truck; removes illegally parked vehicles which are impeding traffic flow.
>
> Affixes restraining or immobilizing devices to prevent operation of scofflaw-owned vehicles; -removes such devices.

(Union Ex. A)

Robbins, who formerly served as a TEA III, testified that the primary duties of TEA IIIs are to issue parking violation summonses and conduct tows of illegally parked vehicles ("violation tows"). TEA IIIs are assigned to an area of the City that they patrol in a tow truck looking for such vehicles. Upon encountering an illegally parked vehicle, the TEA III attaches it to the truck and

[4] This equipment includes use of a flatbed truck or alternate wheels called a "dolly" placed around the vehicle's wheels so that the vehicle can be towed without its own wheels rotating. (Tr. 27)

tows it to the local pound. Traffic Manager King testified that TEA IIIs also remove vehicles blocking a parade route ("relocation tows") (Tr. 305), for which revenue is not collected. Finally, King and Robbins testified that TEA IIIs are sometimes assigned to remove or immobilize vehicles that are impeding the flow of traffic or blocking access to an emergency scene ("specialty tows") (Tr. 80). Specific examples of a specialty tows include removal of a bus from a road in Queens and a Coca-Cola truck from a Brooklyn expressway in 2015 after accidents, as well as towing abandoned vehicles in the aftermath of a hurricane and towing damaged vehicles away from the scene of a gas explosion. TEA III platoon commander Sewell testified that some vehicles towed during these specialty tow requests, including the Coca Cola truck, were used in the commission of a crime, and served as evidence in later legal proceedings. Similarly, King testified that specialty tow vehicles are sometimes damaged or contaminated and that TEA IIIs are expected to tow vehicles in any condition. King further testified that TEA IIIs were dispatched to specialty tows by the Traffic Enforcement Division. Robbins testified that in his experience as a TEA III, he was assigned to conduct these specialty tows an average of once or twice per month.

TEA IIIs Tamara Francis and Nelson Basura testified that upon hire TEA IIIs complete a multi-week training program during which they are instructed on how to conduct tows and report them in the computer system. The training program includes both classroom work and field instruction. TEA III Marquis Quinn testified that the TEA III field training entailed practicing the violation tows regularly performed by TEA IIIs, not evidence tows. Sewell testified that the tow training that TEA IIIs receive is focused on the problem-solving element of the job and is generally applicable to all tows, not only violation tows. However, she conceded that TEA IIIs are not trained to tow vehicles from crime or emergency scenes.

The standard truck used for both evidence tows and violation tows is the eight-ton tow

truck. These trucks require only a "W" tow truck endorsement on a standard driver's license. Sometimes larger tow trucks are needed for particular tows, such as a flatbed truck or heavy-duty truck, which require a Commercial Driver's License ("CDL") to operate. MVOs are required to have at least a permit to operate commercial vehicles upon hire and to obtain a full CDL as soon as possible thereafter. Some MVOs already have a CDL when they are hired. TEA IIIs are not required to have a CDL, but some possess one to conduct tows with larger trucks. King testified that six TEA IIIs under his command have CDLs.

Robbins testified that he received multiple complaints from TEA IIIs regarding their assignment to cover the night and weekend evidence tow shifts. He stated that TEA IIIs did not receive any additional training when assigned to evidence tows. TEA IIIs Francis and Basura both testified regarding their experience conducting evidence tows. Francis testified that she filed a written objection when she was first assigned the new duties because it would disrupt her previously stable Monday through Friday day shift schedule. She further testified that she was assigned to tow a vehicle that was filled with blood and bullet holes. She did not have latex gloves with her when she arrived on the scene and borrowed a pair from the police officer at the scene to complete the tow. After conducting that tow, Francis said she experienced mental health issues including anxiety, panic attacks, and loss of sleep. TEA III Quinn described an evidence tow during which he was concerned for his safety after a crowd of 12-15 people who did not want him to tow the evidence vehicle followed him some distance as he towed it away. Francis and Basura testified that they did not receive any additional PPE, such as latex gloves and Tyvek suits, when assigned to conduct evidence tows. However, TEA III Quinn testified that he received a Tyvek suit when first assigned to evidence tows.

Disabled Vehicle Tows

The Union claims that, in addition to assigning TEA IIIs to evidence tows on nights and weekends, the NYPD began assigning disabled vehicle tows performed by MVOs to private contractors starting in or prior to February 2021. When an NYPD vehicle is disabled on the road, an MVO is assigned to tow it to an NYPD auto shop. Chapman testified that in 2021 he observed an NYPD Ford Explorer being towed by a flatbed truck labeled "Breen Bros," a private contractor.[5] The City received a photo of the Breen Bros truck in question from Chapman in February 2021. Chapman testified that other MVOs reported occasionally seeing private towing companies towing NYPD vehicles in 2021.

District Supervisor Nick Markatos testified that the NYPD purchases vehicles from manufacturers with five to six-year warranties, during which time the manufacturer is obligated to perform repairs on those vehicles. In that circumstance, the manufacturer is responsible for towing NYPD vehicles from the NYPD shop to a repair shop. Manufacturers either send their own tow trucks to retrieve the vehicles, or hire contractors, including Breen Bros, to do it for them. Markatos testified that the Breen Bros trucks observed towing NYPD vehicles were not transporting disabled NYPD vehicles to the NYPD auto shop, but instead were towing vehicles from the NYPD shop to private auto shops.

Removal of NYPD decals

At approximately the same time as the transfer of night and weekend evidence tows, in or around July 2020, the NYPD removed the "NYPD" decals from Fleet Services tow trucks.

[5] In support of its claim, the Union submitted into evidence a photograph of that tow job, as well as a photograph of a different Breen Bros truck at an NYPD auto shop.

Markatos testified that the NYPD removed the decals based on a concern that street protesters active during the Black Lives Matter demonstrations might target NYPD vehicles. After removal of the NYPD decal on the side of the truck, only the words "New York City Police Department Fleet Services Division" remained to indicate that the truck was an NYPD vehicle. (Tr. 129) Chapman testified that subsequently, the words "New York City Police Department" were removed as well, leaving only "Fleet Services Division" on the body of the truck. *Id.*

Chapman testified that nearly all MVOs for whom he serves as shop steward have registered complaints regarding this change. He reported that the change made it more difficult to recognize MVO-driven trucks as NYPD vehicles, which resulted in it taking longer to be admitted into crime scenes and other drivers "not giving the respect on the road that they would have if the decals were still on." (Tr. 133) Chapman also described an incident on September 11, 2021, when he was assigned to a presidential motorcade, but then not allowed to participate by the police lieutenant on the scene because his truck did not have the NYPD decal.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the NYPD violated NYCCBL § 12-306(a)(1) and (4) by transferring exclusive bargaining unit work from MVOs to non-bargaining unit employees.[6] It

[6] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> ***

claims that the NYPD has transferred the evidence tow work conducted during night and weekend shifts to TEA IIIs. The Union claims that it established that evidence tows were the exclusive work of MVOs prior to August 2020 by demonstrating that they are a distinct category of work that has consistently been assigned to MVOs and not TEA IIIs. The Union claims that crime and emergency scenes are significantly different from scenes where violation tows would take place due to the potential criminal evidence, the condition of the vehicles, and other issues that are not present for standard tows. As evidence of this assertion, the Union points to the fact that MVOs practice towing evidence vehicles during their training while TEA IIIs do not and claims that MVOs are provided with PPE such as Tyvek suits and latex gloves while such equipment is not provided to TEA IIIs. The Union claims that these factors create a discernible boundary around the work of towing evidence vehicles from crime and emergency scenes such that it must be considered work exclusive to the bargaining unit. The Union maintains that the fact that TEA IIIs, as part of their specialty tows, occasionally tow damaged or contaminated vehicles after catastrophic events such as hurricanes or gas pipe explosions does not negate that discernible boundary.

Regarding disabled NYPD vehicle tows, the Union claims that the NYPD has unilaterally subcontracted this bargaining unit work to private contractors. It also argues that this assignment

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> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees; . . . .

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities . . . .

creates a practical impact on safety because MVOs must pass a rigorous background check before being cleared to tow NYPD vehicles, while there is no evidence that drivers for any private tow companies with which the NYPD may have contracted undergo a similar check.

In addition to the asserted unilateral transfer of bargaining unit work, the Union argues that removal of decals from MVO tow trucks in the summer of 2020 created a practical impact on its members' safety. It claims that the decal removal puts the lives of MVO tow truck operators in danger because members of the public and officers at crime scenes do not know their identity. The Union contends that this could lead to a disruption of operations if MVOs cannot be identified and allowed to perform their jobs.

Finally, the Union raised two additional claims for the first time in its post-hearing brief: that the NYPD violated NYCCBL § 12-306(a) (1) and (4), by unilaterally altering MVO schedules, and that assigning TEA IIIs to perform evidence tows has both a *per se* and a practical impact on their safety and therefore is a violation of NYCCBL § 12-307(b).

City's Position

As a preliminary matter, the City argues that two of the Union's claims are untimely and must be dismissed. It asserts that the claim regarding the NYPD's alleged assignment of contracts to private auto companies to tow disabled NYPD vehicles under warranty was added upon submission of the amended improper practice petition on July 12, 2021 but is based on observations made on or before February 22, 2021. Since there were more than four months between the Union's admitted observation of the practice and the filing of the amended improper practice petition, the City argues that the claim is untimely.

The City also argues that the Union's claim regarding the practical impact of the removal of the NYPD decal is untimely because it was first introduced in its amended petition on July 12,

2021. The City reasons that, pursuant to gubernatorial Executive Orders issued in response to the COVID-19 pandemic, the four-month statute of limitations began running on this claim on November 4, 2020, and expired on March 4, 2021. Therefore, it asserts that the Union's practical impact claim regarding the removal of the NYPD decals was first raised several months after the statute of limitations had expired.

Regarding evidence tows, the City asserts that the Union has failed to state a claim of a violation of NYCCBL § 12-306(a)(1) and (4) because the decision to assign TEA IIIs to evidence tows was an exercise of express management rights under NYCCBL § 12-307(b). The City argues that towing vehicles has never been a function exclusively performed by MVOs and that the Union has failed to distinguish evidence tows from other tows that TEA IIIs are routinely assigned to perform. It points to instances prior to the transfer of duties when TEA IIIs towed vehicles that were damaged, contaminated, or later used as evidence. It asserts that MVOs do not receive specialized training related to the particulars of evidence tows and that the practice of towing vehicles is the same for evidence and violation tows. Thus, it argues that the distinction between evidence and violation tows is not relevant to the issue presented, only that the work of both titles is towing vehicles. As TEA IIIs regularly tow vehicles, towing vehicles cannot be an exclusive function of MVOs. The City therefore claims that the assignment of "in-title" duties to TEA IIIs is a clear managerial right that does not require collective bargaining under the NYCBBL. (City Br. at 22)

To the extent the Board does not dismiss the Union's claim regarding a transfer of disabled NYPD vehicle tows to private contractors as untimely, the City argues that the Board should dismiss it on the merits, because for decades such tows have been performed by private contractors when the vehicle in question is still under warranty and have never been exclusively performed by

MVOs. To the extent the Union's claims regarding the practical impact of the removal of the NYPD decal from MVO vehicles is deemed timely, the City argues that the "Petitioner has not alleged any practical impact on employee safety, other than vague and unactionable claims that a certain sense of prestige and distinctiveness has been stripped from MVOs." (Am. Ans. ¶ 99)

DISCUSSION

Timeliness

Pursuant to the NYCCBL, a party must file an improper practice petition no later than four months from the date the party knew or should have known that the disputed action occurred.[7] *See* NYCCBL § 12-306(e); § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). The City contends that the Union's claim regarding the unilateral transfer of disabled NYPD vehicle tows from MVOs to private contractors and the practical impact claim arising from the removal of the NYPD decals are both untimely since they were first raised in the amended petition, which was filed more than four months after the dates the disputed actions occurred.

To determine whether the statute of limitations for a claim added in an amended petition relates back to the submission of the original petition, we consider whether the newly added claim falls "within the scope of the original causes of action." *McAllen,* 31 OCB 2, at 16 (BCB 1983). *See Local 333, UMD*, 6 OCB2d 25, at 13 (BCB 2013) (finding that a claim added in the amended

[7] Pursuant to monthly Executive Orders issued by the Governor of the State of New York, the statute of limitations was tolled from March 20, 2020, to November 3, 2020, in response to the COVID-19 pandemic. For claims that accrued during that time, the four-month statute of limitations began to run on November 4, 2020. The petition was filed less than four months later, on February 12, 2021. Accordingly, claims regarding events that Petitioner knew or should have known occurred in July 2020 are timely.

petition was timely because it related to a broader issue raised in the original petition). For the statute of limitations to relate back to the filing date of the original petition, the claim newly added in an amended petition must arise "out of the cause of action set forth in the original pleadings" and not be "new and independent claims of improper practices[.]" *McAllen,* 31 OCB 2, at 16.

Here the claim regarding the transfer of disabled vehicle tow work to private contractors was newly added in the amended petition and do not fall within the scope of the original causes of action. Although the original petition raises a claim concerning the unilateral reassignment of exclusive bargaining unit work, the facts pled are specific to evidence tows on nights and weekends. There is no mention of towing disabled vehicles in the original petition. Therefore, the statute of limitations for the disabled vehicle tow claim is measured in relation to July 12, 2021, the date the amended petition was filed. At the latest, the statute of limitations for that claim began to run when the Union communicated its knowledge of the claim to the City on February 22, 2021. Therefore, since it was not raised until the amended petition was filed, we must conclude that the Union's claim regarding the transfer of disabled vehicle tow work to private contractors is untimely. *See* Am. Ans., Ex. A. . Since the claim was not raised until July 12, 2021, we find that the Union's claim regarding the transfer of disabled vehicle tow work to private contractors is untimely.[8]

Regarding the Union's allegation of a practical impact arising from the removal of NYPD decals, this Board has "recognized that when an employer exercises a management right in a

[8] Additionally, we note that there is insufficient evidence in the record to establish that this action occurred as alleged. The only record evidence of private towing companies conducting disabled vehicle tows are the photos of NYPD vehicles being towed by Breen Bros trucks. City witnesses have credibly testified, without rebuttal, that those pictures were of NYPD vehicles under warranty being transported from the NYPD shop to private repair shops to perform covered repairs by a private company hired by the vehicle's manufacturer. The Union does not claim to perform the work of transporting vehicles from the NYPD shop to private repair shops.

manner that has an adverse effect on terms and conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact." *UFOA*, 3 OCB2d 50, at 16 (BCB 2010) (citing *UFA*, 73 OCB 2, at 6 (BCB 2004)) (additional citations omitted). We consider claims of practical impact to raise scope of bargaining issues, not issues of improper practice. *See NYSNA*, 71 OCB 23, at 12-13 (BCB 2003); *SBA*, 41 OCB 56, at 15-16 (BCB 1988). Therefore, pursuant to NYCCBL § 12-306(e), the four-month statute of limitations applicable to improper practice petitions does not preclude consideration of the Union's practical impact claim. *See EMS Superior Officers Assn*., 75 BCB 15, at 15 (BCB 2005). Accordingly, the City's timeliness claim regarding the practical impact of the removal of the NYPD decals is dismissed.

Unilateral Change Claims

Turning to the merits of the remaining claims, we address whether the NYPD violated NYCCBL § 12-306(a)(1) and (4) when it failed to bargain with the Union over the transfer of evidence tows on night and weekend shifts from MVOs to TEA IIIs. NYCCBL § 12-306 (a)(4) provides that "[i[t shall be an improper practice for a public employer or its agents 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." The Board has long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *UFADBA*, 13 OCB2d 15, at 7 (BCB 2020) (quoting *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012)) (internal quotation marks omitted). In order to establish that a unilateral change constitutes an improper practice, the "party asserting that such a unilateral change has occurred must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing

policy." *SSEU*, 14 OCB2d 20, at 11 (BCB 2021) (citations and internal quotation marks omitted); *see also Local 237, IBT*, 13 OCB2d 17 (BCB 2020) (considering the parties' past practice in determining whether there had been a unilateral change to a mandatory subject of bargaining); *Local 621, SEIU*, 2 OCB2d 27 (BCB 2009) (holding that the City violated NYCCBL § 12-306(a)(1) and (4) when it unilaterally altered a past practice without first negotiating with the union).

Generally, management has the right to determine the "methods, means and personnel by which government operations are to be conducted." NYCCBL § 12-307(b); *see Local 831, IBT*, 39 OCB 6, at 10 (BCB 1987); *see also State of New York (State University of New York at Stony Brook)*, 33 PERB ¶ 3045 (2000). In the context of transfer of bargaining unit work, "[t]his Board has stated that management is limited from exercising this right if it has so agreed in a contract provision, if a statutory provision prevents such unilateral exercise, or if a party makes a showing that the work belongs exclusively to the bargaining unit." *IUOE, L. 15 & 14*, 77 OCB 2, at 12 (BCB 2006) (citing *PBA*, 25 OCB 5, at 8 (BCB 1980)) (internal quotation marks omitted).

This Board has not had occasion to consider many claims involving the transfer of exclusive bargaining unit work. *See CWA, L. 1180*, 1 OCB2d 2, at 12 (BCB 2008) (explaining that the Board has rarely dealt with the issue of transferring unit work out of a bargaining unit). In matters where the parties dispute whether the work at issue is exclusive to a bargaining unit, the Board's cases have relied on Public Employment Relations Board ("PERB") jurisprudence. We have adopted PERB's standard of looking to evidence of past practice: whether the work at issue "was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *Local 621, SEIU*, 2 OCB2d 27, at 12 (citing *County*

of Nassau, 38 PERB ¶ 3005 (2005)).[9]

For example, in *DC 37 L. 983 & 1062*, 45 OCB 6 (BCB 1990), the union claimed that MVOs employed at the Human Resources Administration had exclusively performed the duties of transporting children in protective services or foster care prior to the City's decision to use a private contractor. The Board found that the work at issue had in the past been performed by private contractors for several years. Thus, the Board ruled that the union could not seek to preserve the work for the unit because it could not demonstrate that the work had been performed exclusively by MVOs.[10]

Here, we find that there was a clear, consistent, and longstanding past practice of assigning MVOs to perform evidence tows, including during the night and weekend shifts at issue here. The record shows that continuously for at least six years prior to the July 2020 change, all parties were aware that only MVOs were assigned to perform evidence tows. Thus, the practice was both unequivocal and lasted long enough for employees to reasonably expect that it would continue unchanged.

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[9] A review of PERB cases shows some variance over time in the standards it applied to this issue. Regardless of any perceived variance, in *Manhasset Union Free School Dist.*, 41 PERB ¶ 3005 (2008), PERB clarified its standard, ruling that "[w]hen determining the scope of unit work and whether that work has been performed exclusively by the bargaining unit, we will examine whether an enforceable past practice exists[.]" *Manhasset Union Free School Dist.*, 41 PERB ¶ 3005, at 3024; *see also Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083 (1985) (in order to establish an improper transfer of work, a party must prove: (1) that the work in question had been performed by unit employees exclusively, and (2) that the reassigned tasks are substantially similar to those previously performed by unit employees). We find that the standard laid out by PERB in *Manhasset Union Free School Dist.* comports with longstanding Board policy of conducting a past practice analysis to determine whether there has been an improper transfer of work.

[10] Similarly, in *IUOE, L. 15 & 14*, 77 OCB 2, we found no violation because the evidence did not show that the operation of front-end loaders for waste removal had been exclusive to the bargaining unit. While the Board cites to PERB's analysis of a "discernable boundary" in reaching this conclusion, the Board relies upon the past practice standard set forth by PERB in *Niagara Frontier Transportation Authority*, 18 PERB ¶ 3083. *Id.* at 13-14.

Moreover, we do not find sufficient evidence in the record to conclude that evidence tows were not exclusively assigned to MVOs prior to July 2020. The City points to undisputed incidents prior to the alleged transfer of work when TEA IIIs were assigned specialty tows on vehicles that were damaged, contaminated, or later used as evidence. Examples of these specialty tows include removing vehicles blocking traffic, clearing vehicles from the scene of a gas explosion, or cleaning up vehicles abandoned after a hurricane. However, these types of assignments are not the evidence tows that are at issue here. Even to the extent the specialty tows performed by TEA IIIs could be described as evidence tows because the vehicles involved were involved in crimes or accidents, occasional assistance with these tows from non-unit members would not be sufficient to defeat exclusivity. *See Village of Johnson City*, 46 PERB ¶ 4561 (ALJ 2013) (occasional assistance from detectives based in neighboring jurisdictions did not destroy exclusivity of police detective work, but a policy change that resulted in outside personnel partnering with local detectives on a daily basis did destroy exclusivity); *see also County of Seneca*, 47 PERB ¶ 3005 (2014) (PERB ruled that the exclusivity of the bargaining unit work of security functions at a county building was not defeated when non-unit workers were occasionally used to cover shifts generally performed by bargaining unit workers). The Board therefore concludes that as of July 2020, the NYPD maintained an enforceable past practice of assigning MVOs to tow evidence vehicles.[11]

We do not find, as the City argues that the work in issued is simply the operation of a tow truck and it is improper to distinguish between evidence tows and other types of towing assignments, such as specialty tows. In this regard, the City contends that since both TEA IIIs and

[11] To the extent that the Union claims that the City transferred evidence tows to private contractors as well as to TEA IIIs, we find no evidence in the record that private contractors have conducted evidence tows and such claim is dismissed.

MVOs operate tow trucks, the work of towing vehicles is not exclusive to MVOs. We are not persuaded that the mere fact that both titles perform towing duties defeats the Union's claim that evidence tows are exclusive to MVOs. In *Manhasset Union Free School Dist.*, 41 PERB ¶ 3005, PERB found that the exclusivity of school bus drivers transporting public school students to their schools was not broken by non-unit drivers transporting parochial, private, and special education students in the district. Similarly, in *County of Monroe*, 45 PERB ¶ 3048 (2012), non-unit members performance of security screening in one facility did not impact PERB's finding that security screenings were exclusively performed by bargaining unit members in another facility. Thus, we find that the Board's conclusion that evidence tows were exclusively assigned to MVOs is consistent with PERB's conclusions regarding exclusive bargaining unit work.[12]

Accordingly, we find that the City breached its duty to bargain in violation of NYCCBL § 12-306(a)(1) and (4) by transferring evidence tow work to TEA IIIs during night and evening shifts.[13]

Practical Impact Claims

The Union alleges that the City's removal of NYPD decals from tow trucks driven by MVOs created a practical impact on their safety. For the Board to find a safety impact, the Union

[12] For the first time in its post-hearing brief, the Union also alleged violations of NYCCBL § 12-306(a(1) and 4) regarding the unilateral cancellation of night and weekend MVO shifts and alteration of TEA III schedules. To the extent that this schedule change claim is separate from the unilateral transfer of evidence tows claim, we need not consider this argument because it is merely an effect of the assignment of night and weekend evidence tows to TEA IIIs and the Union has already prevailed on that claim. *See UFA,* 3 OCB2d 16 at 28 (BCB 2010) (finding that the Board need not consider an additional argument by a party on an issue where that party has already prevailed).

[13] When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See Local 621, SEIU*, 2 OCB2d 27, at 14; *USCA*, 67 OCB 32, at 8 (BCB 2001).

"must demonstrate that the exercise of a management right has created a 'clear and present or future threat to employee safety.'"[14] *UFOA*, 3 OCB2d 50, at 18 (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)). The Union must do more than "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 of changed circumstances." *UFA*, 37 OCB 43, at 17-18 (BCB 1986); *see also UFA*, 43 OCB 4, at 48 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. v. Off. of Collective Bargaining*, Index No. 12338/1989 (Sup. Ct. N.Y. Co. Oct. 30, 1989) (Santaella, J.), *affd.*, 163 A.D.2d 251 (1st Dept. 1990). While the Union "must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain[,]" this Board has never "require[d] a union to show that injuries have actually resulted from management's action in order to demonstrate a practical impact on safety." *EMS Superior Officers Association*, 79 OCB 7, at 30-31 (BCB 2007) (citations omitted); *see also SBA*, 23 OCB 6, at 25 (BCB 1979), *affd.*, *Matter of Sergeants' Benevolent Assn. v. Bd. of Collective Bargaining*, Index No. 11950/1979 (Sup. Ct. N.Y. Co. Aug. 7, 1979) (Riccobono, J.). Thus, a union need not show any actual injury. However, it must show "more than simply a change in the way things are done." *UFA*, 43 OCB 70, at 4 (BCB 1989), *affd.*, *Uniformed Firefighters Assn. v. Off. of Collective Bargaining*, Index No. 1065/1990 (Sup. Ct. N.Y. Co. Nov. 26, 1990) (Weissberg, J.). Further, the Board considers whether the employer has adopted measures that offset any potential threat to safety and whether the employees' adherence to management procedures and guidelines would obviate any safety concerns. *See UFA*, 3 OCB2d

[14] The Union also alleges a practical impact on public safety due to the transfer of disabled NYPD vehicle tows to private contractors. However, our jurisdiction under the NYCCBL to address an alleged practical impact encompasses only the impact on bargaining unit members, not the public at large. *See UFOA*, 3 OCB2d 50 at 18 (BCB 2010). Therefore, the Union's assertion of a practical impact on public safety does not state a claim under the NYCCBL and we do not address it.

16, at 30 (BCB 2010); *EMS Superior Officers Association*, 79 OCB 7, at 30-31.

Here, the Union has provided insufficient evidence to support its safety impact claims. *See EMS Superior Officers Assn.*, 79 OCB 7, at 36 (witnesses' good faith belief that they "felt" a change had increased safety risks was not sufficient to establish a safety impact); *Local 333, UMD*, 5 OCB2d 15, at 14 (BCB 2012). The removal of NYPD decals or any NYPD identifier from the MVO tow trucks may impair or eliminate the ability of members of the public and other NYPD employees to tell that the trucks are NYPD vehicles. However, Union witnesses Robbins and Chapman testified only that this change resulted in MVOs having a more difficult time gaining entrance to crime scenes and getting less "respect" from other drivers. (Tr. 133) While this testimony may suggest the removal of the decals resulted in some inefficiency in the performance of their duties, there was simply no evidence that the change created an unsafe condition for MVOs. Accordingly, we do not find that the Union has established a practical impact on safety.

We do not address the Union's arguments regarding the safety impact of conducting evidence tows on TEA IIIs because these claims were raised by the Union for the first time in its post-hearing brief, and thus are not properly before the Board. A party may not add new claims in a brief to which the opposing party does not have an opportunity to respond. OCB Rule § 1-10(i) provides a party with the ability to move to amend a pleading as late as the hearing.[15] *Cf. PBA*, 63 OCB 12 (BCB 1999) (finding that new safety impact claim added in the reply was permissible because it arose from the same management action, the City had the opportunity to

[15] OCB Rule § 1-10(i) provides:

> A variance between an allegation in a pleading and the proof shall not be deemed material unless it is so substantial as to be misleading. If a variance is not material, the trial examiner may admit such proof and the facts may be found accordingly. A party may move to amend a pleading to conform to the evidence in accordance with § 1-07(c)(7) of these rules.

address the claim at hearing, and the claim could have been filed in a separate petition), *affd.*, *Matter of Savage v. DeCosta*, Index No. 120860/1998 (Sup. Ct. N.Y. Co. Jan. 13, 1999) (Gangel-Jacob, J.). The Board does not allow parties to interject a new cause of action at such a late stage in the proceeding when the opposing party does not have an opportunity to respond. *See Cromwell,* 51 OCB 29 at 8 (BCB 1993). Prior to filing its post-hearing brief, the Union had not raised this safety impact claim, nor even included TEA IIIs as petitioners in this case. Thus, we find that the City was not on notice and did not have an opportunity to respond to that claim and therefore, we decline to address it. *See PBA*, 63 OCB12.

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 Respondents, the City of New York, and the New York City Police Department, cease and desist from unilaterally transferring evidence tow work previously performed by Motor Vehicle Operators to Traffic Enforcement Agents Level III and reinstate the *status quo ante* regarding evidence tow work; and it is further

ORDERED, that Respondents, the City of New York, and the New York City Police Department, make Motor Vehicle Operators whole for any financial loss that may have resulted from its improper unilateral transfer of evidence tow work to Traffic Enforcement Agents Level III from the date the work was transferred until such time as it is restored, or until the parties negotiate over the transfer of work and either reach agreement or impasse; and it is further

DIRECTED, that to the extent issues arise such that the parties are unable to apply the provisions of this Decision and Order, the parties shall submit those issues to OCB's Deputy Chair for Dispute Resolution for final determination.

Dated: November 30, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

CHARLES MOERDLER
MEMBER