

MEBA, 18 OCB2d 3 (BCB 2025)

(IP) (Docket No. BCB-4500-23)

Summary of Decision: The Union alleged that DOT violated NYCCBL § 12-306(a)(1), (4), and (5) by utilizing a private ferryboat operator to conduct passenger service on December 31, 2022, and thereby unilaterally transferring the exclusive bargaining unit duties of various Union-represented ferryboat officer titles. The City argued that it had no duty to bargain over its decision because the work of ferryboat officers was not performed exclusively by the Union's bargaining unit. The City further argued that its decision was a proper exercise of its managerial right to determine the methods, means, and personnel by which government operations are to be conducted. The Board found that the work was exclusive to the Union's bargaining unit and that DOT violated the duty to bargain in good faith by unilaterally assigning it outside the unit. Accordingly, the petition was granted. ***(Official decision follows).***

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

In the Matter of the Improper Practice Proceeding

-between-

**MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
AFL-CIO,**

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,**

Respondents.

DECISION AND ORDER

On January 17, 2023, the Marine Engineers' Beneficial Association, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Transportation ("DOT"). The Union alleges that DOT violated NYCCBL § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City

Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by utilizing a private ferryboat operator to conduct passenger service on December 31, 2022, and thereby unilaterally transferring the exclusive bargaining unit duties of various Union-represented ferryboat officer titles. The City argues that it had no duty to bargain over its decision because the work of ferryboat officers was not performed exclusively by the Union’s bargaining unit. The City further argues that its decision was a proper exercise of its managerial right to determine the methods, means, and personnel by which government operations are to be conducted. The Board finds that the work was exclusive to the Union’s bargaining unit and that DOT violated the duty to bargain in good faith by unilaterally assigning it outside the unit. Accordingly, the petition is granted.

BACKGROUND

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

The Staten Island Ferry (“SIF”) is a division of DOT. SIF provides free passenger ferry service year-round between the City’s publicly owned and operated ferry terminals in Staten Island (“St. George”) and Manhattan (“Whitehall”). SIF has provided such service between its St. George and Whitehall ferry terminals, on SIF ferryboats, since 1905.

The Union represents U.S. Coast Guard-licensed officers in the titles of Captain (Ferry) (“Captain”), Assistant Captain (Ferry) (“Assistant Captain”), Mate (Ferry) (“Mate”), Chief Marine Engineer (“Chief Engineer”), and Marine Engineer (“Engineer”) (collectively, “Licensed Officers”) employed by DOT and working at SIF. The Licensed Officers collectively perform the licensed work on SIF ferryboats, as required by U.S. Coast Guard regulations. At all relevant

times, the Union and the City were parties to the Licensed Ferryboat Titles Agreement (“Agreement”) that remained in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d).¹ The non-licensed work on SIF ferryboats is performed by DOT employees in the Deckhand and Marine Oiler (“Oiler”) titles, who are represented by the Atlantic Maritime Group, International Organization of Masters, Mates, & Pilots, ILA, AFL-CIO (“MMP”).²

Captains, Assistant Captains, Mates, and Deckhands work above deck on the vessel. Captains command the operation of the ferryboat while in service on the water and at the ferry terminals, including with respect to piloting and docking the vessel. Assistant Captains act as second-in-command to the Captain and, among other duties, pilot and dock the vessel under the Captain’s direction. Mates also work under the direction of the Captain and are responsible for supervising a crew of Deckhands, serving as members of the vessel’s navigational watch along with the Captain and Assistant Captain, and overseeing the safe embarking and disembarking of passengers.

Chief Engineers, Engineers, and Oilers work below deck on the vessel. Chief Engineers direct and supervise the ferryboat’s engine room staff, including the Engineers and Oilers, with respect to the operation, maintenance, and repair of the ferryboat’s main propulsion equipment. Engineers, under direction from the Chief Engineer, operate, maintain, and repair the ferryboat’s main propulsion equipment.

It is undisputed that prior to December 31, 2022, the City had never utilized a privately-owned ferryboat to provide passenger service between its St. George and Whitehall ferry terminals.

¹ On August 25, 2023, the parties negotiated a memorandum of agreement, covering the period from November 7, 2010, to January 4, 2027, which continued the terms of the Agreement except as modified.

² We collectively refer to the Licensed Officers and non-licensed titles together as “crewmen.”

NYC Ferry, a privately-owned ferry operator, is the only non-SIF passenger ferry that regularly provides passenger service between Staten Island and Manhattan in New York Harbor. NYC Ferry charges fares and operates its own vessels from three privately operated terminals.

Minimum SIF service schedules are set forth in the New York City Administrative Code, Title 19, Chapter 3, “Staten Island Ferry Service” (“Admin. Code”). On Saturdays, the Admin. Code provides that both service to and from St. George and Whitehall “shall be every thirty minutes except between the hours of 2:00 a.m. and 6:00 a.m., in which case service shall be every hour.” Admin. Code § 19-305(a)(iii). Trips between St. George and Whitehall take approximately 22 minutes. Therefore, to satisfy a half-hour service schedule, SIF runs two vessels back-and-forth between St. George and Whitehall, with departures from each terminal twice per hour. An hourly service schedule requires one vessel, with departures from each terminal once per hour. SIF Director of Ferry Operations Barry Torrey testified that in December 2022, SIF did not have enough personnel to provide reliable ferry service that complied with the Admin. Code’s service mandates. Indeed, Torrey testified that throughout 2022, there was a staffing shortage among crewmen.

The SIF Assignments Office is responsible for filling vacant shifts among crewmen daily. Some shifts are vacant because they were never bid on and filled, whereas others open when crewmen take leave, are sick, or are otherwise unable to work their scheduled shifts. When openings arise, the Assignments Office works from a rotating overtime list and calls unscheduled crewmen by title, in order of seniority. Torrey and Union Secretary-Treasurer Roland Rexha both testified that SIF management has previously asked union officials for assistance with getting crewmen to return overtime calls from the Assignments Office when faced with acute staffing shortages. Further, to ensure that there are sufficient crewmen available to work on days where

there is an anticipated high demand for service, SIF offers “rest mode pay” as an additional financial incentive to work an unscheduled shift.³ (Tr. 183)

On Friday, December 30, 2022, Torrey testified that the Assignments Office called him and explained that it was having problems filling below-deck shift assignments throughout the day on New Year’s Eve, Saturday, December 31. Later that day, Torrey called DOT Deputy Commissioner for Ferries John Garvey, who expressed similar concerns, while noting that New Year’s Eve offered the potential for elevated passenger counts during the late-evening and overnight hours.⁴ Garvey explained to Torrey that he did not want to be in the position of being unable to provide “any service,” and raised the possibility of bringing in a private ferryboat operator to supplement service, if necessary. (Tr. 168) Torrey testified that they discussed alternatives to enlisting a private ferryboat operator, but there were not many “viable” options. (*Id.* at 418) According to Torrey, offering rest mode pay to unscheduled below-deck crewmen was not an option because allegedly employees were not answering the Assignments Office’s calls. It is undisputed that neither Torrey nor SIF management sought assistance from Union officials or shop stewards to obtain volunteers.

Ultimately, following their call, on Friday, December 30, Garvey emailed Torrey, directing him to reach out to Alan Warren, Vice President of NY Waterways (“Waterways”), a private ferryboat operator, about SIF hiring one of its passenger boats and crews to work the December

³ Rest mode pay refers to hours paid at overtime rates for time in which crewmen do not have to be physically present at work. Rest mode pay is earned in conjunction with traditional overtime pay for work on unscheduled shifts. Torrey explained that rest mode pay is offered to compensate crewmen for inconveniences associated with working on high-demand days, such as bridge or road closures and parking issues.

⁴ Torrey testified that New Year’s Eve is generally a “highly traveled night,” with people traveling to and from Manhattan to watch the ball drop. (Tr. 123) Accordingly, he explained that SIF “had an expectation to have more passengers than a regular Saturday.” (*Id.*)

31 overnight shift.⁵ Specifically, Garvey wrote that, “[Waterways] can either augment [SIF’s] service or provide sole service should [SIF’s] crews not be available for coverage.” (Union Ex. 4) Torrey proceeded to call Warren and tentatively arranged to have a Waterways vessel and crew available for 12 hours starting at 10:00 p.m. on New Year’s Eve.

The next morning, on December 31, Torrey testified that based on his assessment of the staffing outlook, he believed that SIF would be running on a one-vessel, hourly service schedule starting in the afternoon and that led him to finalize plans with Waterways to provide a vessel for the last few trips of the evening. At approximately 2:00 p.m., Torrey emailed Warren and indicated that SIF was planning to utilize Waterways for three departures between 10:00 and 11:00 p.m.⁶ Around 1:30 p.m., the SIF schedule was reduced to one boat, with its Spirit of America (“Spirit”) running hourly between St. George and Whitehall. The Spirit continued running on an hourly schedule throughout its afternoon/evening shift, which ran between approximately 4:30 p.m. and 12:00 a.m. Torrey testified that by “sometime late in the afternoon,” he was informed by either the Assignments Office or terminal management that SIF had sufficient staff in place to crew its two scheduled vessels on the overnight shift. (Tr. 140)

By approximately 10:00 p.m., Torrey testified that the Spirit had fallen behind on the hourly schedule because of harbor conditions, such as fog and traffic. He testified that the Spirit had fallen far enough behind schedule such that it was positioned to depart from Whitehall at the same time as Waterways’ first scheduled departure from Whitehall, and therefore it was no longer

⁵ We take administrative notice that Waterways provides private passenger ferry service primarily between Manhattan and New Jersey. It does not provide service to Staten Island.

⁶ In his email, Torrey also provided Warren with SIF’s Private Operational Safety Plan (“Plan”). The “purpose” of the Plan was to “detail the requirements for safe vessel operations when an approved [p]rivate [f]erry is conducting passenger operations in any [SIF] slip.” (Union Ex. 1G) Torrey testified that he drafted the Plan with a SIF safety manager on the morning of December 31 and that no procedure governing private ferry operations existed previously.

necessary for Waterways to make that first departure. Thereafter, Waterways was utilized for only one-round trip service between St. George and Whitehall, starting with the 10:30 p.m. scheduled departure from St. George. According to the SIF terminal logbooks, Waterways departed St. George at approximately 10:38 p.m., arrived at Whitehall at 11:02 p.m., and made its final departure to St. George at 11:21 p.m.⁷

Torrey testified that, in light of the anticipated high passenger demand due to the holiday and the many openings on the crew schedules, the use of Waterways on December 31 was expected to be necessary in order to maintain hourly service. Initially, it was his recollection that the Spirit's afternoon/evening crew had just finished their shift prior to the Waterways' departure from St. George and that the Spirit's overnight crew was not yet ready to leave St. George at the time of Waterways' departure. Also, Torrey recalled initially that the Spirit missed an additional round-trip immediately following the Waterways' round-trip.⁸ However, after he was shown the St. George terminal logbook, Torrey acknowledged that the logbook reflected that the Spirit arrived

⁷ SIF Assistant Captain Kevin Buselmeier, who previously worked as a Captain for Waterways, described certain operational differences between SIF and Waterways. Specifically, he explained that Captains and Assistant Captains at SIF make decisions regarding the direction and speed of the vessel, whereas at Waterways, only the Captain makes those same decisions; Mates at SIF oversee the Deckhands in loading and off-loading passengers, whereas Waterways utilizes a single Captain and Deckhands who load and off-load passengers; and Licensed Officers at SIF contact the terminals to get arrival slip assignments, whereas Waterways' vessels generally have assigned slips for each run and crewmen do not need to call for assignments. He also testified that SIF vessels have ramps and aprons, whereas Waterways' vessels do not, and that SIF vessels have two decks from which they load and off-load passengers, whereas Waterways' vessels have one. Additionally, Torrey testified that SIF ferryboats, as larger passenger vessels, load and off-load passengers after connecting to dock hooks and using a transfer bridge to connect to the terminals, whereas the smaller Waterways' passenger vessels use a bow loading procedure by which the ferryboat remains pressed up against the dock without connecting to hooks.

⁸ Various documents produced and maintained by SIF throughout 2022 and 2023, such as daily performance sheets and terminal logbooks, show that SIF service was regularly reduced to hourly service. In addition, it was not unusual for trips to be missed or delayed from either terminal during hourly service schedules.

at St. George at approximately 10:32 p.m. and departed from St. George at approximately 11:01 p.m. Further, the Spirit deck logbook shows that the Spirit's afternoon/evening crew had not just finished their shift prior to Waterways' departure at approximately 10:38 p.m.; it was the Spirit's afternoon/evening crew that made the 11:01 p.m. departure.

After reviewing the St. George terminal logbook, Torrey testified further concerning the reason it was necessary to use Waterways. He testified that the Spirit could not have made the 10:30 p.m. trip out of St. George, which was ultimately made by Waterways at 10:38 p.m., because it would not have been ready to depart until approximately 10:40 p.m. He testified that a vessel is considered "late" if it is to depart more than five minutes past the scheduled departure time. (Tr. 348) Therefore, Torrey explained that a 10:40 p.m. departure would have been "too late."⁹ (*Id.* at 347) He further stated that SIF took "an opportunity to reset the schedule" for the Spirit to depart from St. George at the normally scheduled 11:00 p.m. trip time. (*Id.*)

Following the completion of the Spirit's afternoon/evening shift at approximately 12:00 a.m., the afternoon/evening crew retired, and the overnight crew resumed service on the overnight shift into the early morning hours on New Year's Day, January 1, 2023. Throughout the overnight shift, SIF had two crewed vessels conducting half-hour service, with the Noble accompanying the Spirit. The Noble began service on its overnight shift with a departure from St. George at 11:30 p.m., whereas the Spirit began with a departure from St. George at 12:17 a.m.¹⁰

⁹ SIF terminal logbooks from 2022 and 2023 show that vessels are frequently able to arrive, off-load passengers, load new passengers, and depart from St. George and Whitehall in 5 or 6 minutes. Indeed, SIF Captain Joseph Ajar, who served on the Spirit during the afternoon/evening shift on New Year's Eve, testified that it is possible that his crew could have been ready to depart St. George by 10:38 p.m., if instructed to do so.

¹⁰ SIF Captain Patrick Walsh, who served on the Spirit during the overnight shift, testified that SIF crews generally report for work approximately two hours prior to their first departure time to attend

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DOT violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally outsourcing SIF passenger ferry service to Waterways on December 31, 2022.¹¹ It asserts that any alleged lack of exclusivity over such work is an affirmative defense, which DOT failed to prove. To the contrary, the Union contends that City employees working for SIF have exclusively transported passengers between St. George and Whitehall for over 100 years and that the Union did not consent to DOT's outsourcing of the Licensed Officers' bargaining unit work. Indeed, the

to startup procedures and other matters, and therefore the Noble's overnight crew likely arrived for work at around 9:30-10:00 p.m., ahead of its first departure at 11:30 p.m. Moreover, he testified that although it is not preferred, crews can and have been asked to startup in a half-hour. Accordingly, he testified that he believes that the Noble could have made the 10:30 p.m. departure out of St. George that was ultimately made by Waterways, if instructed to do so by management.

¹¹ 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;

(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;

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in [NYCCBL § 12-311(d)].

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

Union avers that prior to December 31, 2022, no privately-owned ferryboat or any other non-SIF ferryboat had ever provided passenger service between SIF's St. George and Whitehall terminals. Moreover, the Union argues that DOT has conceded that on December 31, 2022, Waterways' employees performed the same duties as those regularly performed by the Union's bargaining unit members.

The Union asserts that DOT's reliance on any general management rights defense pursuant to NYCCBL § 12-307(b) must be rejected.¹² Indeed, citing Public Employment Relations Board ("PERB") caselaw, it contends that "there is no such thing" as a management rights defense to an improper practice charge alleging the unilateral outsourcing of bargaining unit work. (Union Br. at 10 n.7)

Moreover, to the extent the City relies on language in NYCCBL § 12-307(b) with respect to the City's discretion to "take all necessary actions to carry out its mission in emergencies" or otherwise avers that the outsourcing was a lawful response to "exigent circumstances," the Union

¹² NYCCBL § 12-307(b) provides, in pertinent part:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and technology of performing its work

argues that this too must be rejected.¹³ (Union Br. at 17) Specifically, the Union asserts that the City's purported rationale for its decision to outsource ferry service to Waterways fails to articulate an emergency or exigent circumstances. It contends that the City's shifting explanation for the utilization of Waterways as described by Torrey was first an alleged fear that staffing levels would be too low to provide overnight service on New Year's Eve leading into the early hours of New Year's Day, and then second a purported concern was that the Spirit was having trouble keeping to an hourly service schedule during the afternoon and evening on New Year's Eve, due to fog and traffic. However, the Union avers that alleged issues related to routine scheduling problems, staffing shortages, and predictable weather and traffic conditions are, by definition, not emergencies. Even if the shifting explanation for utilizing Waterways did constitute an emergency or exigent circumstances, the Union, citing PERB caselaw, argues that such unilateral outsourcing would only be permitted as a last resort, after all other options were exhausted. In this case, the Union asserts that DOT did not exhaust all its options for ensuring its desired staffing level prior to utilizing Waterways.¹⁴

In sum, the Union avers that the City's arguments amount to nothing more than speculation that crewmen scheduled to work the overnight shift on New Year's Eve into New Year's Day might call in sick and an unfounded assertion that, without Waterways, SIF would been unable to keep an hourly departure schedule due to the presence of fog, harbor traffic, and a chronic and

¹³ The Union maintains that the City waived the right to proceed with an emergency action defense pursuant to NYCCBL § 12-307(b) because it disavowed any claim of an "actual emergency" prior to and during the hearing in this matter. (Union Br. at 9)

¹⁴ For the sake of responding to the City's argument, the Union assumes that there was a staffing shortage on December 31, 2022. However, the Union maintains that there was no staffing shortage, as evidenced by Torrey's testimony conceding that he knew by the afternoon on New Year's Eve that SIF had sufficient staff on hand to operate its two scheduled ferryboats on the overnight shift.

longstanding staffing shortage. However, the Union argues that even if SIF genuinely believed that it was critical to enlist a second ferryboat to make the 10:30 p.m. departure out of St. George, Waterways was not needed because management could just as easily have directed the Noble's crew to make the trip.

As a remedy, the Union seeks an order directing that DOT cease and desist from unilaterally assigning or transferring the work of employees in the Union's bargaining unit, consisting of operating passenger ferryboats at or between St. George and Whitehall; post notices of the improper practice; and any such other further relief as may be just and proper.

City's Position

The City argues that the Union has failed to establish a violation of NYCCBL § 12-306(a)(1), (4), and (5) because the decision to provide supplemental passenger ferry service with Waterways on December 31, 2022, was a proper exercise of its managerial right under NYCCBL § 12-307(b) to determine the methods, means, and personnel by which government operations are to be conducted. Specifically, the City asserts that it was not obliged to bargain over the decision to utilize Waterways because SIF's Licensed Officers do not maintain exclusivity over the piloting of passenger ferry vessels in New York Harbor. Indeed, the City contends that NYC Ferry, a private ferry operator, has also provided private passenger ferry service in New York Harbor between Staten Island and Manhattan for years. Therefore, it avers that the Union's claim to exclusive unit work is "demonstrably untrue." (City Br. at 21)

Further, the City maintains that the work performed by the Waterways crew on December 31, 2022, was not substantially similar to that regularly performed by the Licensed Officers on SIF ferryboats. The City argues that SIF vessels differ significantly from those utilized by Waterways and therefore the duties performed by their respective crews are similarly varied. For instance, the

City alleges that Captains and Assistant Captains at SIF make decisions regarding the direction and speed of the vessel, whereas at Waterways, only the Captain makes those same decisions; that Mates at SIF oversee the Deckhands in loading and off-loading passengers, whereas Waterways has a single Captain and Deckhands who load and off-load passengers; and that Licensed Officers at SIF contact the terminals to get arrival slip assignments, whereas Waterways' vessels generally have assigned slips for each run and crewmen do not need to call for assignments.¹⁵

Additionally, the City asserts that it was well within its managerial rights under NYCCBL § 12-307(b) to utilize Waterways to maintain the continuity of service needed on December 31, 2022. While the City cited NYCCBL § 12-307(b)'s "mission in emergencies" language in its answer to the improper practice petition, the City concedes in its brief that it "did not present evidence or argument seeking to establish the existence of an emergency." (City Br. at 18 n.7) Nevertheless, the City maintains that in the face of a "unique confluence of circumstances," its use of Waterways fell within its managerial rights. (*Id.* at 17-18) Specifically, it contends that SIF was presented with a predictably high-demand for ferry service on New Year's Eve, combined with an "extreme and unexpected shortage" of Licensed Officers. (*Id.*) Accordingly, the City avers that it properly utilized Waterways to "address the real possibility there would be insufficient licensed crew to run any boats at all for some period of time." (*Id.* at 19) Moreover, it asserts that when it became apparent later in the afternoon on New Year's Eve that the "late night runs" would be covered, SIF ended the use of Waterways after only one round-trip. (*Id.*)

Accordingly, the City asks that the improper practice petition be dismissed.

¹⁵ The City cites to additional differences between the SIF and Waterways vessels and operating procedures as described *supra*, at n.7.

DISCUSSION

NYCCBL § 12-306(a)(4) provides that it is 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) (internal quotation marks omitted) (quoting *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012)). In order to establish that a unilateral change constitutes an improper practice, “the petitioner must demonstrate the existence of such a change from the existing policy or practice and establish that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining.” *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2, at 10 (BCB 2016) (internal quotation and editing marks omitted) (quoting *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014)).

Generally, management has the right to determine the “methods, means and personnel by which government operations are to be conducted.” NYCCBL § 12-307(b). However, in the context of the 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.” *DC 37, L. 983*, 15 OCB2d 42, at 17 (BCB 2022) (internal quotation marks and additional citations omitted) (quoting *IUOE, L. 15 & 14*, 77 OCB 2, at 12 (BCB 2006)).

In order to establish that a transfer of unit work requires bargaining, the Union “must prove . . . that the work in question had been performed by unit employees exclusively, and . . . that the reassigned tasks are substantially similar to those previously performed by unit employees.” *IUOE, L. 15 & 14*, 77 OCB 2, at 14 (citing *Niagara Frontier Transp. Auth.*, 18 PERB ¶ 3083

(1985)). In so doing, the Board looks to evidence of past practice and considers 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.” *DC 37, L. 983*, 15 OCB2d 42, at 17-18 (internal quotation marks and additional citation omitted) (quoting *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2009)); *see also Manhasset Union Free School Dist.*, 41 PERB ¶ 3005, at 3024 (2008) (explaining 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[.]”).

In this case, we find that there was a clear past practice of DOT assigning the Union’s bargaining unit members to operate passenger ferryboats between SIF’s St. George and Whitehall terminals. Indeed, the record shows that the Licensed Officers have regularly performed such work for decades, and there is no evidence that non-unit employees have ever performed that work. Moreover, it is undisputed that prior to using Waterways on December 31, 2022, the City had never utilized a privately-owned ferryboat to perform such work.

We note that the City argues that the work is not exclusive to the Union’s bargaining unit merely because NYC Ferry, a private operator, provides private passenger ferry service from privately operated terminals in New York Harbor. However, we find that the at-issue work is the operation of SIF passenger ferryboats between its St. George and Whitehall terminals. Therefore, the operation of non-City owned ferry service in New York Harbor is not relevant to our analysis. *See, e.g., IUOE, L. 15 & 14*, 77 OCB 2, at 12 (considering whether work “under the auspices of the DSNY” was exclusive to the union’s bargaining unit); *DC 37 L. 983 & 1062*, 45 OCB 6, at 25 (BCB 1990) (finding that the work at issue was not exclusive to the union’s bargaining unit where the City had utilized private contractors to perform the work on its behalf for several years and

“[t]he custom had been to utilize private contractors and the exception was to involve City employees”). Accordingly, we reject this defense.

Further, we reject the City’s argument that it had no duty to bargain over its decision to utilize Waterways on December 31 because the work performed by the Waterways crew was not substantially similar to the work regularly performed by the Union’s bargaining unit members on SIF ferryboats. The City argues that Waterways and SIF’s respective crews carry out the duties associated with providing passenger ferry service in different ways because there are differences in operational procedures followed and the size of their respective vessels. However, we do not find that any such differences undermine the conclusion that the work Waterways performed when it operated between St. George and Whitehall terminals was substantially similar to the Licensed Officers’ regular work at SIF. *See Town of Southampton*, 30 PERB ¶ 3069, at 3172 (1997) (explaining that where the work of the bargaining unit was receiving, handling, and disposing of trash and refuse, “[t]he nature of the trash and the method used to ascertain the charge for its disposal [did] not provide a sufficient basis by which to define unit work”). Therefore, we find that as of December 31, 2022, DOT maintained an unequivocal past practice of exclusively assigning the work of operating passenger ferryboats between SIF’s St. George and Whitehall terminals to the Union’s bargaining unit members. *See DC 37, L. 983*, 15 OCB2d 42, at 17-18.

Finally, the City argues that, irrespective of any exclusivity of the Union’s unit work, it was within its managerial rights under NYCCBL § 12-307(b) to utilize Waterways on December 31, 2022, to maintain the continuity of service in the face of a “unique confluence of circumstances.”¹⁶ (City Br. at 17-18) However, as described above, the Board has consistently

¹⁶ As noted earlier, the City advised, in its post-hearing brief, that it was no longer asserting that it had no bargaining obligation because its actions were within its managerial right to “take all

held that the managerial right to determine the “methods, means and personnel by which government operations are to be conducted” is limited by the fact that the City cannot unilaterally transfer exclusive bargaining unit work. *See, e.g., DC 37, L. 983*, 15 OCB2d 42, at 17 (additional citations omitted); *see also New York City Transit Auth.*, 30 PERB ¶ 3004, at 3009 (1997) (explaining that “[a] general management rights clause does not . . . confer upon an employer the right to unilaterally transfer unit work to non[-]unit personnel”). We note that there is no “unique circumstances” provision in NYCCBL § 12-307(b), and the City has otherwise provided no support for the existence of such a defense. Therefore, we conclude that the purportedly “unique confluence of circumstances” did not confer upon DOT the right to use Waterways, nor eliminate the City’s statutory duty to bargain.

Accordingly, we find that the City violated NYCCBL § 12-306(a)(1) and (4) by utilizing Waterways to conduct passenger service on December 31, 2022, and thereby unilaterally transferring the exclusive bargaining unit work of the Licensed Officers.¹⁷ Moreover, because the City’s unilateral change occurred during the *status quo* period, we further find that the City violated NYCCBL § 12-306(a)(5). *See DSA*, 17 OCB2d 8, at 15 (BCB 2024); *Doctors Council, L. 10MD*, *SEIU*, 9 OCB2d 2, at 13; *MLC*, 7 OCB2d 6, at 20-21 (BCB 2014).

necessary actions to carry out its mission in emergencies.” NYCCBL § 12-307(b). Therefore, we do not address that defense. However, we note that our decision in this matter should not be construed to suggest that we would necessarily reach the same conclusion where an emergency defense was raised and emergency circumstances were established.

¹⁷ When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 983*, 15 OCB2d 42, at 20 n.13 (citing *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001)).

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 improper practice petition, docketed as BCB-4500-23, filed by the Marine Engineers' Beneficial Association, AFL-CIO, against the City of New York and the New York City Department of Transportation, is hereby granted; and it is further

ORDERED, that the City of New York and the New York City Department of Transportation cease and desist from unilaterally transferring the Licensed Officers' exclusive bargaining unit work; and it is further

ORDERED, that the New York City Department of Transportation post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the Notice must remain for a minimum of thirty days.

Dated: March 6, 2025
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

ALAN M. KLINGER
MEMBER

JEFFREY L. KREISBERG
MEMBER

I dissent.

M. DAVID ZURNDORFER
MEMBER

I dissent.

CAROLE O'BLENES
MEMBER



OFFICE OF COLLECTIVE BARGAINING

**NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW**

OFFICE ADDRESS 100
Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS
Peck Slip Station
PO Box 1018
New York, New York

212.306.7160
www.ocb-nyc.org

IMPARTIAL MEMBERS
Susan J. Panepento, Chair
Alan R. Viani

LABOR MEMBERS
Alan M. Klinger
Jeffrey L. Kreisberg

CITY MEMBERS
M. David Zurndorfer
Pamela S. Silverblatt

DEPUTY CHAIRS
Monu Singh
Steven Star

We hereby notify:

That the Board of Collective Bargaining has issued 18 OCB2d 3 (BCB 2025), determining an improper practice petition between the Marine Engineers' Beneficial Association, AFL-CIO, and the City of New York and the New York City Department of Transportation.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, that the improper practice petition, docketed as BCB-4500-23, is hereby granted; and it is further

ORDERED, that the City of New York and the New York City Department of Transportation cease and desist from unilaterally transferring the Licensed Officers' exclusive bargaining unit work; and it is further

ORDERED, that the New York City Department of Transportation post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

The New York City Department of Transportation
(Department)

Dated: _____ (Posted By)
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.