64 FLRA No. 22

NATIONAL TREASURY EMPLOYEES UNION
(Union)

and

UNITED STATES CUSTOMS SERVICE
(Agency)

0-NG-2637
(59 FLRA 217 (2003))

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on a remand from the United States Court of Appeals for the District of Columbia Circuit (the court) in *NTEU v. FLRA*, 399 F.3d 334 (D.C. Cir. 2005) (*NTEU II*) (reviewing *NTEU*, 59 FLRA 217 (2003) (*NTEU I*) (then-Member Pope dissenting)).

The court remanded the case to the Authority to determine whether the two disputed proposals constitute permissive subjects of bargaining under the Federal Service Labor-Management Relations Statute (the Statute). For the following reasons, we find that the proposals are within the duty to bargain.

II. Proposals

Proposal 1

Article 37, Section 1.A

Unless it is clear that a matter at issue was specifically addressed by the parties in this Agreement or an existing Memorandum of Understanding, the subject is appropriate for mid-term bargaining.

Proposal 2

Article 37, Section 1.C.

The Employer recognizes that the Union in accordance with law and the terms of this Agreement has the right to . . . (2) initiate bargaining on its own and engage in mid-term bargaining over matters not specifically addressed in this Agreement or an existing Memorandum of Understanding.

III. Meaning of the Proposals

As set forth in *NTEU I*, 59 FLRA at 219, both proposals would require the Agency to engage in mid-term bargaining, either over Agency-initiated changes (Proposal 1) or over Union requests for mid-term bargaining (Proposal 2), unless the subject matter of bargaining is specifically addressed in the parties' National Agreement or an existing Memorandum of Understanding. *Id.* The effect of both proposals would be to preclude the Agency from using the second prong of the "covered by" doctrine to excuse its failure to bargain in these circumstances. [2] *Id.*

IV. The Authority's Decision in *NTEU I* and the Court's Decision in *NTEU II*

In *NTEU I*, the Authority found that, because the proposals would limit the Agency's ability to raise a "covered by" defense to an alleged failure to bargain, the proposals would require the Agency to limit its "right" under the Statute to raise such a defense. 59 FLRA at 220 (citing *Soc. Sec. Admin.*, 55 FLRA 374, 377 (1999)). Stating that "proposals that a party negotiate to limit a right granted to it by the Statute[]" are permissive subjects of bargaining, 59 FLRA at 219 (citation omitted), the Authority found the proposals to be negotiable only at the Agency's election. In reaching this conclusion, the Authority rejected the Union's reliance on Authority precedent finding "reopener" proposals to be negotiable because, according to the Authority, in those cases, and unlike this case, there were no claims that the proposals concerned permissive subjects of bar-

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. The "covered by" doctrine is set forth in *United States Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1017-1018 (1993) (*SSA*). Under the first prong of that doctrine, the Authority examines whether a matter is expressly contained in the collective bargaining agreement. *Id.* at 1018. If it is not, then under the second prong, the Authority will consider whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by the agreement. *Id.*

gaining. [3] *See id.* at 221 (citing *Patent Office Prof'l Ass'n*, 56 FLRA 69, 72-73 (2000) (POPA); *AFGE, Local 1995*, 47 FLRA 470, 472-73 (1993)).

When the Union sought judicial review, the court in *NTEU* II remanded the case. The court remanded the case for two reasons. First, the court held that the Authority's decision had failed to address relevant Authority precedent concerning "unilateral rights." *See NTEU II*, 399 F.3d at 340-41. The court pointed out that both Authority precedent and judicial precedent that the Authority had adopted "limits permissive subjects of bargaining to 'unilateral rights specifically vested in one party.'" *Id.* at 340 (quoting *United States Food & Drug Admin.*, 53 FLRA 1269, 1275 (1998) (*FDA*) (quoting in turn *AFGE v. FLRA*, 712 F.2d 640, 646 (D.C. Cir. 1983) (*AFGE*)). Thus, in the court's opinion, the issue before the Authority, which the Authority had failed to address, was "whether the 'covered by' defense is a unilateral right explicitly or by unambiguous implication conferred by the Statute." *NTEU II,* 399 F.3d at 341 (citation omitted).

Second, the court remanded the case because the Authority's decision "fails to explain (or even to discuss) the relationship between the Union proposals . . . and both FLRA and private sector precedent regarding zipper and reopener clauses." *Id.* The court was particularly concerned that the Authority had failed to distinguish the Union's proposals from reopener clauses. *Id.* at 342. As the court observed, the Authority has often ordered agencies to bargain over reopener proposals, treating them as mandatory bargaining subjects. *Id.* (citations omitted).

V. Positions of the Parties [4]

The Agency argues that the proposals are outside the duty to bargain because they would preclude the Agency from raising the second prong of the "covered by" doctrine as a defense to a refusal to bargain. In this connection, according to the Agency, the proposals are similar to proposals that seek to limit a party's statutory rights, which the Authority has found to be permissive subjects of bargaining.

The Union argues that the proposals do not limit either party's statutory rights and, thus, are not permissive subjects of bargaining. The Union asserts that the "covered by" doctrine is a contractual, not statutory, defense, and that its proposals are similar to reopener and zipper proposals.

VI. Analysis and Conclusions

Consistent with the court's remand instructions, we have reexamined the Authority's *NTEU I* decision, and have determined to reverse it. Mindful of the issues identified by the court in *NTEU II,* we begin our analysis with the presumption that all matters relating to conditions of employment are mandatory subjects of bargaining unless the Statute explicitly or by unambiguous implication vests in a party an unqualified, or "unilateral," right. *See NTEU II,* 399 F.3d at 340; *AFGE,* 712 F.2d at 646 & n.27, 649.

This presumption is applicable in the instant case. Matters relating to the parties' mid-term bargaining relationship plainly relate to conditions of employment. There is no dispute that, under the Statute, agencies are obligated to engage in mid-term bargaining over negotiable union proposals concerning matters that are not "covered by" the collective bargaining agreement, unless the union has waived its right to bargain about the subject matter involved. *E.g., United States Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50 (2000).

In like manner, proposals, such as those at issue in this case, that seek to define the parties' mid-term bargaining rights and obligations by limiting the availability of the "covered by" defense, also relate to conditions of employment. The Union's proposals are therefore mandatory subjects of bargaining unless the "covered by" defense to an alleged failure to bargain is a "unilateral right" explicitly or by unambiguous implication vested in a party by the Statute. For the reasons discussed below, we hold that the "covered by" defense is not such a right.

First, there is no explicit, vested right in the Statute to raise a "covered by" defense. Unlike provisions of the Statute that explicitly grant parties various rights, [5] nothing in the Statute explicitly sets forth a right to raise a "covered by" defense, or to decline to bargain mid-term over a proposal that would limit a party's ability to raise such a defense. *Cf. FDA*, 53 FLRA at 1276 (proposal for more than one collective bargaining agreement

3. A reopener clause specifies the conditions under which a party may seek to negotiate over a term that is "covered by" a collective bargaining agreement. *See NTEU II*, 399 F.3d at 341 (citing e.g., *NLRB v. Lion Oil Co.*, 352 U.S. 282, 286 (1957)).

4. The parties' positions are fully set forth in *NTEU I*, 59 FLRA at 218-19, and relevant portions of those arguments are merely summarized here.

5. *See, e.g.,* §§ 7102 ("Employees' rights"), 7106 ("Management rights"), & 7114 ("Representation rights and duties").

was permissive subject of bargaining because union had a unilateral right to negotiate with "an agency" under § 7103(a)(12) of the Statute). In this regard, as the court stated, "Congress knew how to write a provision defining permissive subjects of bargaining unambiguously." *NTEU II,* 399 F.3d at 340 (quoting *AFGE*, 712 F.2d at 646). Congress did not include in the Statute a provision listing the "covered by" defense as a permissive subject of bargaining, or addressing the "covered by" defense in any manner whatsoever. Rather, the "covered by" defense is a legal doctrine developed to elucidate the mutual obligation to bargain mid-term. [6]

Moreover, we conclude that the Statute does not vest such a right in parties by "unambiguous implication[.]" *NTEU II,* 399 F.3d at 341. We note in this regard, that in *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992) (*Marine Corps Logistics Base*), on which the Authority relied in *SSA*, the court stated that "[a] primary purpose of the Statute is to promote collective bargaining and the negotiation of collective bargaining agreements." *Id.* at 59 (citing §§ 7102(2) & 7114(a)(4) of the Statute). [7] The court also stated that "[i]mplicit in this statutory purpose is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement." *Id.*

As noted, the Authority relied on these principles in *SSA*, 47 FLRA at 1017. In this connection, the Authority stated that, "upon execution of an agreement, *an agency* should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, *a union* should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining." *Id.* at 1017-18 (emphasis added). Put simply, the ability to raise a "covered by" defense is rooted in the policies of: (1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them. These policies involve the parties' mutual obligation to bargain, not unilateral rights. [8]

Finding a duty to bargain over whether and how the "covered by" doctrine will apply during the terms of parties' collective bargaining agreements is consistent with both of these policies. In addition, finding such a duty to bargain is likely to encourage parties to reach agreements that are more comprehensive, of greater duration, and clearer. In this connection, it is reasonable to conclude that parties will be more willing to reach more comprehensive agreements if they have no need to be concerned that raising a matter at the negotiating table may later result in the successful use of a "covered by" defense to future failures to bargain over those subjects. It also is reasonable to conclude that they will enter into longer-duration agreements if they are not concerned that they will be foreclosed from bargaining a wide range of subjects mid-term. Finally, it appears likely that parties will be more clear in their agreements as to exactly how those agreements should be interpreted.

Further, although the "covered by" doctrine set forth in *SSA* is the standard — default — arrangement that applies in assessing duty to bargain issues, this does not mean that parties cannot be required to bargain over the scope of that doctrine. In this connection, as the court has recognized, a broad-scope grievance procedure is "the standard arrangement[]" provided for in the Statute, *AFGE*, 712 F.2d at 644, but parties nonetheless are required to bargain over proposals to narrow the scope of the grievance procedure. *See, e.g., Vermont Air Nat'l Guard, Burlington, Vt.*, 9 FLRA 737, 740-41 (1982), *aff'd AFGE*, 712 F.2d 640. The same reasoning applies with respect to negotiating to narrow the scope of the "covered by" doctrine.

Finally, we find that the proposals at issue here are similar to reopener proposals, which both the Authority and the National Labor Relations Board have found to be mandatory subjects of bargaining. *See, e.g., POPA*, 56 FLRA at 72-73 (Chairman Wasserman and Member Cabaniss dissenting in part on other grounds); *AFGE,*

6. The ability to raise this defense arises only after the parties have entered into a collective bargaining agreement. As such, it appears to be particularly appropriate for parties, during negotiations, to determine whether and how the "covered by" doctrine will apply once they reach such an agreement.

7. As noted previously, §§ 7102 & 7114 concern, respectively, employees' rights and representation rights and duties.

8. We do not use the term "unilateral" to refer only to rights that are held by one party and withheld from the other party. Rather, it also applies to rights that are held by more than one party, but which one party may unilaterally raise as a basis for refusing to bargain. *See, e.g., FDA*, 53 FLRA at 1276 ("*both* the agency and the exclusive representative have a *unilateral* right to demand that they negotiate with each other as one entity[,]" and, thus, the union had the right to refuse to negotiate over a proposal to negotiate two separate collective bargaining agreements for employees who were members of a single bargaining unit) (emphasis added). In any event, the ability to raise a "covered by" defense does not fall within either category of unilateral rights.

Local 1995, 47 FLRA 470, 471-73 (1993); *AFGE, AFL-CIO, Local 3804*, 21 FLRA 870, 889-91 (1986); [9] *McAllister Bros.*, 312 NLRB 1121, 1129 (1993). Like the instant proposals, reopener proposals seek bargaining over matters that are "covered by" a collective bargaining agreement. In fact, the instant proposals appear more likely to further the statutory purpose of contractual repose – which, as discussed above, is one of the policies behind the "covered by" doctrine — than are many reopener proposals. In this connection, while many reopener proposals seek to open a contract as to entire subjects, the instant proposals would permit reopening as to only those aspects of subjects that are not expressly addressed in the contract. [10]

For the foregoing reasons, we find that the ability to raise a "covered by" defense is not a unilateral, statutory right that is explicitly or by unambiguous implication vested in any party. [11] Accordingly, the instant proposals do not seek the waiver of such a statutory right and are mandatory, not permissive, subjects of bargaining. [12]

VII. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over the proposals.

9. We note, as the Authority did in *NTEU I*, 59 FLRA at 221, that the above-cited Authority decisions did not present the precise legal arguments that are raised here. Nevertheless, we find that our holding in the instant case is consistent with the holdings in those decisions.

10. We note the court's finding that, "[i]n some respects, the Union's proposals are arguably more analogous to zipper clauses than they are to reopeners[]" because, "[w]hile a reopener clause is ordinarily limited to particular contractual provisions and by certain triggering circumstances, a zipper clause, like the Union's proposals, alters the scope of the duty to bargain mid-term with respect to virtually all contract terms (or, in the case of Union's proposals, all terms not resolved by the agreement)." 399 F.3d at 343.

We agree that the instant proposals are in some ways akin to zipper clauses in that both the instant proposals and zipper clauses alter the scope of the duty to bargain mid-term. However, we need not rely on this similarity in reaching our negotiability determination. In this connection, as the court noted, "[t]he precedent regarding the negotiability of a zipper clause is not as well established as that for the reopener clause[,]" and the Authority has not squarely addressed whether zipper clauses are mandatory subjects of bargaining. *Id.* at 342. Given our findings above, we need not reach that issue here.

11. We agree with the court that the statement in *Soc. Sec. Admin.*, 55 FLRA at 377, was unexplained and, in any event, was *dictum*. Accordingly, we overrule *Soc. Sec. Admin.* only to the extent that it implies that the ability to raise a "covered by" argument is a "statutory right[]" that is a permissive subject of bargaining. *Id.*

12. Given these findings, it is unnecessary to address the Union's claim that the "covered by" doctrine is solely a contractual defense.