ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 15, 2004

No. 03-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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ORAL ARGUMENT SCHEDULED FOR OCTOBER 12, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Treasury Employees Union (NTEU) and United States Customs Service, Washington, D.C. (Customs). NTEU is the petitioner in this court proceeding; the Authority is the respondent.

2. Ruling Under Review

The ruling under review in this case is the Authority=s Decision in *National Treasury Employees Union and United States Customs Service, Washington, D.C.*, Case No. 0-NG-2637, decision issued on September 25, 2003, reported at 59 F.L.R.A. (No. 35) 217.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

AFGE	***AFGE v. FLRA*, 712 F.2d 640 (1983)**
AFGE, Local 32	***American Federation of Government Employees, Local 32 v. FLRA*, 853 F.2d 986 (D.C. Cir. 1988)**
Authority	**Federal Labor Relations Authority**
Bartlett-Collins	***NLRB v. Bartlett-Collins Co.*, 639 F.2d 652 (10th Cir. 1981), *cert. denied*, 452 U.S. 961 (1981)**
Chevron	***Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)**
Commerce	***United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993)**
Customs or agency	**United States Customs Service**
Interior	***NFFE & FLRA v. Dep=t of the Interior*, 526 U.S. 86 (1999)**
IRS	***Internal Revenue Serv.*, 29 F.L.R.A. 162 (1987)**
JA	**Joint Appendix**
NLRA or Act	**National Labor Relations Act**
NLRB	**National Labor Relations Board**
NTEU or union	**National Treasury Employees Union**
POPA	***Patent Office Prof=l Ass=n v. FLRA*, 47 F.3d 1217 (D.C. Cir. 1995)**

GLOSSARY (Continued)

***SSA* I**	***Social Security Administration,* 47 F.L.R.A. 1004 (1993)**
***SSA* I I**	***Social Security Administration,* 55 F.L.R.A. 374 (1999)**
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. '' 7101-7135 (2000)
Weingarten	*NLRB v. Weingarten*, 420 U.S. 251 (1975)

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on September 25, 2003. The Authority's decision is published at 59 F.L.R.A. 217. A copy of the decision is included in the Joint Appendix (JA) at JA 5-19. The Authority exercised jurisdiction over the case pursuant to ' 7105(a)(2)(e) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. '' 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to ' 7123(a) of the Statute.

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[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

STATEMENT OF THE ISSUE

Whether the Authority reasonably determined that proposals that would waive an agency=s statutory right not to bargain over matters inseparably bound up with subjects expressly covered in an existing collective bargaining agreement are negotiable only at the election of the agency.

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under section 7117(c) of the Statute. During negotiations for a term agreement, the National Treasury Employees Union (ANTEU@ or Aunion@), the exclusive representative of a nationwide unit of employees of the United States Customs Service[2] (ACustoms@ or Aagency@), submitted collective bargaining proposals that would establish the agency=s obligation to bargain during the term of the agreement. The agency declared the proposals to be outside its obligation to bargain under the Statute and NTEU appealed the agency's allegations of nonnegotiability to the Authority under section 7117(c) of the Statute. The Authority held the proposals to be negotiable only at the election of the agency. NTEU now seeks review in this Court under ' 7123(a) of the Statute.

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[2] At the time this case was initiated Customs was a Bureau within the Department of the Treasury. Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296; 6 U.S.C. '' 101 *et. seq.*), the United States Customs Service transferred to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. ' 203(a)(1).

STATEMENT OF THE FACTS

A. Background

NTEU is the exclusive representative of a nationwide unit of Customs employees. During the course of negotiations over a new collective bargaining agreement, NTEU submitted two related proposals concerning the agency=s obligation to bargain during the term of the agreement. The proposals stated:

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.

JA 6.

Customs declared the proposals to be negotiable only at its election because the proposals would require the waiver of a statutory right. Pursuant to ' 7117 of the Statute, the union appealed the agency=s determination to the Authority.

B. The Authority=s Decision

The Authority held (Member Pope dissenting) that the union=s proposals concerned a permissive subject of bargaining, negotiable only at the election of the agency. JA 15. In reaching this conclusion, the Authority first reviewed the relevant precedent concerning an agency=s obligation to bargain during the term of a collective bargaining agreement, specifically the Acovered by@ doctrine. Under well-established precedent, a party is not obligated to bargain over matters that are Acontained in@ or Acovered by@ an existing collective bargaining agreement. The Authority further noted that the Acovered by@ doctrine was based on private sector precedent developed by the National Labor Relations Board (NLRB) and that the purpose behind the Acovered by@ doctrine was to provide the parties to a collective bargaining agreement with stability and repose with respect to matters covered by the agreement. JA 6-7.

Summarizing the relevant precedent (principally *Social Security Administration*, 47 F.L.R.A. 1004, 1017-18 (1993) (*SSA* I)), the Authority stated that the "covered by" doctrine operates as a defense to an alleged unlawful refusal to bargain by an agency under ' 7116(a)(5) or by a union under ' 7116(b)(5) of the Statute. According to the Authority, the Acovered by@ doctrine has two prongs. Under the first prong, if a party seeks to bargain over a matter that is expressly addressed by the terms of the parties' collective bargaining agreement, the other party may properly refuse to bargain over the matter. Under the second prong, if a matter is not expressly addressed by the terms of the parties' collective bargaining agreement but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, the party may also properly refuse to bargain over the

matter. JA 8-9. Examining the union=s proposals in the instant case, the Authority stated that their effect would be to preclude the Agency from using the second prong of the Acovered by@ doctrine as a defense to a charge that it refused to bargain over matters proposed during the term of an agreement. JA 10-11.

The Authority held that the proposals would require the agency to waive a statutory right and, accordingly, the proposal was not a mandatory subject of negotiation. In the Authority=s view, in addition to mandatory subjects of bargaining under the Statute, there are also Apermissive@ matters over which a party *may* bargain, but is not required to do so (citing *United States Food and Drug Administration, Northeast and Mid-Atlantic Regions,* 53 F.L.R.A. 1269, 1273-74 (1998)). Included in these permissive subjects are proposals that seek to limit a right granted to a party by the Statute. JA12. In that regard, the Authority noted that in *Social Security Administration*, 55 F.L.R.A. 374, 377 (1999) (*SSA* II), it had previously held that the Acovered by@ defense constitutes a right granted by the Statute and that the doctrine is intended solely to serve the Statute=s purposes of stability and repose. JA 11-14. The Authority rejected the union=s contention that the Acovered by@defense is a right granted by contract not statute, stating that the union=s reliance on *Social Security Administration, Headquarters, Baltimore, Maryland*, 57 F.L.R.A. 459, (2001) was misplaced. According to the Authority, that case did not address the statutory basis of the Acovered by@ defense. Similarly, the Authority discounted the union=s argument that substantially similar proposals, such as those for in-term reopener clauses, have been found to be within an agency=s obligation to

bargain. The Authority noted that in the cases cited by the union, the agencies had not contended that the proposals concerned permissive subjects of bargaining and, therefore, the Authority had not addressed the issue. JA 14-15.

STANDARD OF REVIEW

The standard of review of Authority decisions is Anarrow.@ *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if Aarbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.@ 5 U.S.C. ' 7123(c), incorporating 5 U.S.C. ' 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*). A court should defer to the Authority=s construction as long as it is reasonable. *See id.* at 845.

As the Supreme Court has stated, the Authority is entitled to Aconsiderable deference@ when it exercises its A>special function of applying the general provisions of the [Statute] to the complexities= of federal labor relations.@ ***NFFE & FLRA v. Dep=t of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted) (*Interior*).** In that regard, the negotiability of the proposal at issue here is determined by consideration of the appropriate scope of collective bargaining under the Statute. ACongress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of

public sector labor relations.@ *Patent Office Prof=l Ass=n v. FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995) (*POPA*) (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)).

More specifically, this case involves the extent of a party=s obligation to bargain during the term of a collective bargaining agreement. Noting the Statute=s ambiguity on the matter, the Supreme Court has stated that Congress has delegated to the Authority the power to determine Awhether, when, where, and what sort of midterm bargaining is required.@ *Interior*, 526 U.S. at 98-99.

SUMMARY OF ARGUMENT

The Authority properly held that the union=s proposals, having the effect of requiring the agency to waive its statutory right to refuse to bargain over matters Ainseparably bound up with@ matters expressly covered by an existing collective bargaining agreement, were permissive subjects of bargaining. The Authority=s decision is well grounded in the language and policies of the Statute. Further, the union=s arguments to the contrary are without merit.

1. Agencies have a statutory right to be free of the obligation to bargain over matters resolved in existing collective bargaining agreements. The Statute expressly provides for a mutual obligation of federal agencies and the unions that represent their employees to bargain in good faith over conditions of employment. With respect to the obligation of parties to bargain during the term of an agreement, the Supreme Court has held that Awhether, when, where, and what sort of midterm bargaining is required@ was a matter Congress left to the Authority=s expertise. *Interior*, 526 U.S. at 98-99. Exercising that

delegation, the Authority has held that agencies are obligated to bargain over union-initiated proposals midterm only to the extent such matters are not Acontained in or covered by@ the term agreement. Expanding on this doctrine, the Authority has reasonably determined that the statutory purpose behind this rule of providing parties with stability and repose requires that matters are considered Acovered by@ an existing collective bargaining agreementif the matter is: 1) expressly contained in the agreement; or 2) Ainseparably bound up with . . . a subject expressly covered by the contract.@ *United States Customs Serv., Customs Mgmt. Ctr. , Miami, Fla.*, 56 F.L.R.A. 809, 813-14 (2000).

The union=s proposals at issue here would be preclude the agency from relying on the second prong of the statutory Acovered by@ test. As this Court has noted, a statutory right Ais a logical candidate@ for a permissive subject of bargaining. *AFGE v. FLRA*, 712 F.2d 640, 646 n.27 (1983) (*AFGE*). Consistent with its own precedent holding that a party cannot be forced to waive a statutory right and that a proposal to require such a waiver constitutes a permissive subject of bargaining, the Authority found the union=s proposals at issue here to be only permissibly negotiable.

2. The union erroneously argues that the second prong of the Acovered by@ test is not part of a statutory right itself, but rather an administratively developed Atool@ to be used in applying the right to individual cases. However, Congress left it to the Authority to determine the precise contours of the right to be free of an obligation to bargain midterm over matters previously resolved by the term agreement. In that regard, the Authority has clearly held that *under the Statute* matters both expressly set forth in an agreement as well as those inseparably bound up with matters expressly set forth in the agreement are not subject to renewed bargaining during the life of the agreement. The Authority=s considered judgment should not be displaced.

3. Contrary to the union=s contention, the Authority=s decision is not inconsistent with this Court=s decision in *AFGE*. In the first place, the union did not raise this argument before the Authority and, therefore, may not raise it before this Court. 5 U.S.C. ' 7123(c).

Moreover, even if the Court were to consider the union=s argument, it should be rejected. In *AFGE*, the Court suggested that the Arights@ that would

be candidates for permissive bargaining subjects were those that could be exercised unilaterally. The right to refuse to bargain over matters resolved in extant agreements is just such a right. Under the Statute, an agency may, without qualification, simply refuse to bargain over proposals concerning matters that are Acovered by@ an agreement, *including matters not expressly covered but inseparably bound up with matters expressly covered*. This unilateral ability to terminate bargaining clearly is a right vested in the agency.

4. Finally, the union mistakenly argues that federal and private sector precedent finding Areopener@ and Azipper@ clauses to be mandatory subjects of bargaining requires that the instant proposals also be declared mandatory subjects. With regard to federal sector precedent, the Authority acknowledged that it had previously found reopener clauses to be mandatory subjects of bargaining, but noted in the decision below that the dispositive argument here, namely, whether a reopener proposal required the waiver of a statutory right, was not presented or considered in previous cases. Accordingly, those cases are not controlling in the instant case. Regarding zipper clauses, the union concedes that the Authority has never considered the negotiability of such proposals. Accordingly, whether either reopener or zipper clauses are permissive subjects because they would entail the waiver of a statutory right has never been decided by the Authority.

With respect to private sector precedent, it is well established that law developed under the National Labor Relations Act does not bind the Authority. Both this Court and the Supreme Court have noted the special needs of federal sector labor relations. Authority decisions should be upheld if they are

reasonably grounded in the Statute, even if they are at variance with private sector precedent. As discussed above, the Authority=s determination in this case is supported by the language and policies of the Statute.

ARGUMENT

THE AUTHORITY REASONABLY DETERMINED THAT PROPOSALS THAT WOULD WAIVE AN AGENCY=S STATUTORY RIGHT NOT TO BARGAIN OVER MATTERS INSEPARABLY BOUND UP WITH SUBJECTS EXPRESSLY COVERED IN AN EXISTING COLLECTIVE BARGAINING AGREEMENT ARE NEGOTIABLE ONLY AT THE ELECTION OF THE AGENCY

A. The Union=s Proposal Would Require the Agency to Waive a Statutory Right

1. The ACovered By@ Doctrine Is a Statutory Right

The mutual obligation of federal agencies and the unions that represent their employees to bargain in good faith over conditions of employment is unquestionably a product of statute. *See* 5 U.S.C. ' 7114(a)(4). Because the precise contours of the obligation to bargain and its concomitant rights are not expressly provided in the Statute, it is evident that Congress left it to the Authority to resolve those matters. *See Interior*, 526 U.S. at 98-99 (citing *Chevron*, 467 U.S. at 865-66). Amongst those matters left to the Authority to determine were the contours and limits of the right to bargain midterm. *Interior*, 526 U.S. at 98-99.

Adopting the reasoning of this Court, the Authority held that an agency is obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals, but only on matters not Acontained in or covered

by@ the term agreement. *Internal Revenue Serv.*, 29 F.L.R.A. 162, 166 (1987) (*IRS*) (citing *NTEU v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987). Put another way, under *IRS* agencies retain the right to refuse to bargain midterm over matters contained in or covered by an existing agreement. After the Fourth Circuit disagreed with the Authority by holding that agencies have no obligation at all to bargain midterm (*SSA v. FLRA*, 956 F.2d 1280 (4th Cir. 1992), the Supreme Court held that the Statute was ambiguous on the matter of midterm bargaining and stated that the scope of the obligation to bargain midterm was a matter Congress had left to the Authority=s expertise. *Interior*, 526 U.S. at 98-99. On remand from the Supreme Court, the Authority reaffirmed the holding of *IRS*. *United States Dep=t of the Interior, Washington, D.C.*, 56 F.L.R.A. 45 (2000).

Although the Authority has consistently held since the *IRS* decision that the obligation to bargain midterm does not extend to matters contained in or covered by an existing agreement, the precise definition of Acontained in or covered by@ has evolved over the course of time. *See* JA 6-8 and cases cited therein. As recently clarified, the Acovered by@ doctrine has two Aprongs.@ A matter is Acontained in or covered by@ an agreement, and thus exempt from an agency=s obligation to bargain if the matter is: 1) expressly contained in the agreement; or 2) Ainseparably bound up with . . . a subject expressly covered by the contract.@ *United States Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 F.L.R.A. 809, 813-14 (2000).

It is, therefore, well-settled that *under the Statute* an agency=s obligation to bargain midterm does not extend to matters that are *either* expressly contained in existing agreements *or* inseparably bound up with such matters.

See SSA II., 55 F.L.R.A. at 377 (Athe Statute frees an agency from a requirement to continue negotiations over terms and conditions of employment already resolved by previous bargaining@). An agency acts within its statutory rights when it refuses to bargain over union-initiated midterm proposals that fall within either prong of the Acontained in or covered by@ doctrine.

2. The Union=s Proposal Would Require the Agency to Waive its Right to Refuse to Bargain over Matters Contained in or Covered by an Existing Agreement

The union concedes (Brief (Br.) at 3-4) that the effect of the union=s proposal would be to preclude the agency from relying on the second prong of the Acovered by@ definition to justify a refusal to engage in midterm bargaining. *See also* JA 10-11. Thus, although under the Statute an agency has the right to refuse to bargain over a matter not *expressly* contained in an existing agreement, but nonetheless inseparably bound up with matters so contained, under the union=s proposal an agency would be required to bargain over such a matter. Accordingly, the union=s proposal entails the relinquishment of a statutory right.

3. An Agency May, but Cannot Be Required to, Bargain over a Proposal Requiring the Waiver of a Statutory Right

The Authority has consistently held that a party cannot be forced to waive a statutory right and that a proposal to require such a waiver constitutes a permissive subject of bargaining. *See, e.g., United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 F.L.R.A. 1269, 1273-74 (1998)*; Merit Sys. Prot. Bd. Prof=l Ass=n*, 30 F.L.R.A. 852, 861-62 (1988); *Fed. Deposit Ins. Corp.*, 18 F.L.R.A. 768, 774 (1985). As this Court stated, A[a] >right= is a logical candidate for a permissive subject of bargaining.@ *AFGE v. FLRA*, 712 F.2d 640, 646 n.27 (1983) (*AFGE*).

As demonstrated above, the union=s proposals would require the agency to relinquish a substantial part of its statutory right to refuse to bargain over matters contained in or covered by an existing collective bargaining agreement. Accordingly, the Authority properly found that the proposals were negotiable only at the election of the agency.

B. NTEU=s Arguments Are Without Merit

1. The Union=s Proposal Involves a Statutory Right

NTEU erroneously contends (Br. at 25-28) that the Acovered by@ doctrine is not a statutory right, but rather an administratively developed Atool@ to evaluate evidence of the parties= intent.[3] In this regard, the union does not

[3] We do not interpret the union=s position to be that the Acovered by@ doctrine cannot be a statutory right because it was a product of administrative interpretation of the Statute, rather than a right expressly granted by the Statute=s terms. Rights found by appropriate authorities to be implicit in statutes are no less rights than those found in the express terms of the statute. *See NLRB v. Weingarten*, 420 U.S. 251, 256 (1975) (*Weingarten*)

dispute that parties have a statutory right to Abe free from bargaining during the term of an agreement over matters that have been resolved by that agreement.@ Br. at 25. The union further contends (Br. at 28), however, that its proposal does not seek a waiver of that right, but only seeks to define what counts as Aresolved@ by the term agreement.

Essentially, the dispute concerns the precise contours of the right to be free of an obligation to bargain midterm over matters previously resolved by the term agreement. The Authority held that the right itself includes the right to refuse to bargain over not only matters expressly addressed in the term agreement, but also matters inseparably bound up with those express provisions. JA 8-9. The union contends that the Aright@ itself is more limited, *i.e.*, to be free from bargaining over matters that have been Aresolved@ by the term agreement. According to the union, what counts as being Aresolved@ is a matter of the application that right to individual cases.

The question of the precise Acontours and limits@ of a statutory right is within the province of the agency charged with administering the statute. *See United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1070 (D.C. Cir. 1992) (citing *Weingarten*, 420 U.S. at 256, 266-67). In discussing bargaining obligations Aunder the Statute,@ the Authority plainly stated that:

(NLRB=s Aconstruction [of] ' 7 [of the National Labor Relations Act] creates a statutory right@); *see also United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1070 (D.C. Cir. 1992).

> certain matters -- both those expressly set forth in an agreement *as well as those inseparably bound up with matters expressly set forth in the agreement* -- are not subject to renewed bargaining during the life of the agreement.

JA 11 (emphasis added). That is, both prongs of the Acovered by@ doctrine are part and parcel of the statutory right. As the Authority explained, the covered by doctrine was developed to implement the statutory purpose of providing parties to an agreement with stability and repose. JA 7-8 (citing *SSA I*, 47 F.L.R.A. at 1017). The union=s argument to the contrary, seeking to redefine then statutory right here involved should, therefore, be rejected.

Finally, from a policy perspective, permitting unions to compel bargaining on matters already covered by an existing agreement would be contrary to the admonition that the Statute be interpreted in a manner consistent with an effective and efficient government. 5 U.S.C. ' 7101(b). Moreover, the inclusion of such a provision in a collective bargaining agreement would effectively trump established Authority precedent designed to thwart bargaining over matters falling within second prong of the Acovered-by@ doctrine. *See Soc. Sec. Admin., Douglas Branch Office, Douglas, Ariz.*, 48 F.L.R.A. 383, 386 (1993) (agency not required to bargain over safety and health related proposal where, although particular matter not addressed, the term agreement provided for specific procedures for resolving safety and health concerns); *see also United States Dep=t of Justice, Immigration and Naturalization Serv., Washington, D.C.*, 51 F.L.R.A. 1274, 1277-79 (1996) (agency not required to bargain over reduced holiday and Sunday staffing necessitated by budget cuts where term agreement provision comprehensively covered Atours of duty@).

Under the union=s proposal here, the agency would be required to bargain anew over matters already covered in an extant collective bargaining agreement unless the exact matter at issue had been expressly and specifically addressed and resolved in the existing agreement.

2. The Instant Case Is Not Controlled by this Court=s Decision in *AFGE*

NTEU contends (Br. at 30-32) that, even assuming that its proposal requires the waver of a statutory right, the proposal is nonetheless within the agency=s obligation to bargain. In support of this position, NTEU cites this Court=s decision in *AFGE*. NTEU=s contention is meritless. First, the argument was not raised before the Authority and cannot, therefore, be considered by this Court. Second, the instant case is distinguishable for *AFGE v. FLRA*.

a. The Union=s Argument Is Not Properly Before the Court

Section 7123 provides that A[n]o objection that has not been urged before the Authority . . . shall be considered by the court.@ 5 U.S.C. ' 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure Athat the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues.@ *Equal Employment Opportunity Comm=n v. FLRA*, 476 U.S. 19, 23 (1986). Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority=s decision, are not within the Court=s jurisdiction to consider. *See, e.g., United States Dep=t of Commerce v. FLRA*, 7 F.3d 243, 244-45 (D.C. Cir. 1993) (*Commerce*).

NTEU=s extensive argument made here that *AFGE* stands for the proposition that waivers of statutory rights may be a mandatory subject of negotiations was never made to the Authority.[4] *See* JA 6, *see also* Union Response to Agency Statement of Position (attached as Addendum B to this Brief). Although Member Pope=s dissent makes specific reference to *AFGE*, ' 7123(c)=s requirements are no less applicable where the petitioner=s arguments appear in a dissenting opinion. *Nat=l Assoc. of Gov=t Employees, Local R5-136 v. FLRA*, 363 F.3d 468, 479-80 (D.C. Cir. 2004).

b. In Any Event, the Instant Case Is Consistent With *AFGE*

At issue in *AFGE* was whether the scope of the negotiated grievance procedure was a mandatory or permissive subject of bargaining. As relevant there, the Statute requires that parties have a negotiated grievance procedure, 5

[4] The union notes (Br. at 31) that it cited *Vermont Air National Guard,* 9 F.L.R.A. 737 (1982) before the Authority. *Vermont National Guard* is where the Authority first announced the holding at issue in *AFGE*, namely that the scope of the grievance procedure is a mandatory subject of bargaining. *See AFGE*, 712 F.2d at 642. However, the union=s offhand citation to *Vermont National Guard* is insufficient to have raised its arguments concerning *AFGE* to the Authority. The union=s submission to the Authority (Addendum B) never mentions *AFGE*. *See NFFE v. FLRA*, 681 F2d 886, 891 (D.C. Cir. 1982) (parties must provide specific references to legal authorities before the Authority in the first instance).

U.S.C. ' 7121(a)(1), and defines Agrievance@ broadly as any complaint by an employee , labor organization, or agency concerning employment, the interpretation of a collective bargaining agreement or the application of laws or regulations affecting conditions of employment. 5 U.S.C. ' 7103(a)(9); s*ee also AFGE*, 712 F.2d at 641. However, ' 7121 (a)(2) of the Statute provides that a collective bargaining agreement can exclude matters from the scope of the grievance procedures. AFGE, a union representing units of federal employees, had contended before the Authority that the Statute creates a right to the broadest scope grievance procedure possible and that agency proposals narrowing the scope of the grievance procedure would require the union to waive that right. Accordingly, AFGE argued that the scope of the grievance procedure was a permissive subject of bargaining. The Authority held that the scope of the grievance procedure was a mandatory subject of bargaining. *AFGE*, 712 F.2d at 642-43.

On review, the Court held that although Arights@ are a Alogical candidate@ for permissive subjects, the Authority=s holding that the scope of the grievance procedure was not such a right was reasonable.[5] *AFGE*, 712 F.2d at 646-47 and n.27. According to the Court, rights that fall within the permissive bargaining category are those that vest Ain a party@ a right. *Id.* at 646 n.27.

[5] The Court stated that both the Authority=s and the union=s interpretation of the Statute were plausible. The Court granted the Authority=s interpretation deference. *AFGE*, 712 F.2d at 644.

NTEU argues here that the agency=s Aright@ to refuse to bargain midterm over matters inseparably bound up in express provisions of a term agreement is not a right vested in a party. The union is mistaken.

As discussed above, the Authority and this Court have recognized that, under the Statute, an agency=s obligation to bargain midterm does not extend to matters covered by collective bargaining agreements, either expressly or implicitly. Put another way, when presented with bargaining proposals concerning matters that are Acovered by@ an agreement, including matters not expressly covered but inseparably bound up with matters expressly covered, the agency may, without qualification, simply refuse to bargain, leaving the union with no recourse. This unilateral ability to shut off bargaining clearly is a right vested in a party, *i.e.*, the agency in this case.

As the Authority has noted, unilateral rights need not be specifically spelled out in the Statute, but may be rooted in general statutory and policy considerations. *See FDA* 53 F.L.R.A. at 1275-76 (citing *NLRB v. Bartlett-Collins Co.*, 639 F.2d 652, 656-67 (10th Cir. 1981), *cert. denied*, 452 U.S. 961 (1981) (*Bartlett-Collins*)). There is no requirement that such rights be labeled Aagency rights@ or Aunion rights.@[6]

[6] A unilateral right may vest in both parties. Indeed, the Acovered by@ right involved in this case unilaterally vests in both the agency and the union. What makes something a Aunilateral right@ is that it may be exercised without agreement or approval of the other party. For example, in both the federal and private sector, neither party may insist to impasse on the recording of bargaining sessions. Either party has the Aunilateral@ right to say no to recording devices. *See Sport Air Traffic Controllers Org.*, 52 F.L.R.A. 339, 345-46 (1996); *Bartlett-Collins*, 639 F.2d at 656-57.

Accordingly, contrary to the union=s suggestions, this Court=s decision in *AFGE* provides no support for overturning the Authority=s decision.

C. The Union=s Reliance on Precedent Concerning Reopener and Zipper Clauses Is Unavailing

The union contends that the instant proposals are analogous to proposals for Areopener@ and Azipper@ clauses that have been held to be mandatory subjects of bargaining in both the private and federal sectors. According to the union, these types of proposals seek waivers of statutory rights but are consistently found to be negotiable matters. Reopener clauses permit parties to raise matters covered by the agreement and thus waive a party=s right to be free of the obligation to bargain concerning matters resolved by the agreement. Zipper clauses, conversely, bar negotiations on all matters during the term of the agreement even if they are not covered by the agreement, thus waiving the right to bargain over matters not contained in or covered by the agreement. However, the Authority=s decision here is not inconsistent with its own precedent. Further, to the extent the Authority=s position may be inconsistent with some private sector precedent, such precedent is not binding on the Authority.

1. Authority Precedent

The Authority acknowledged that it had previously found reopener clauses to be mandatory subjects of bargaining. JA 14-15. However, as the Authority noted, the dispositive argument here, namely, whether a reopener proposal required the waiver of a statutory right, was not presented or considered in previous cases. Accordingly, those cases were not controlling in the instant case.

Regarding zipper clauses, the union concedes (Br. at 22) that the Authority has never been faced with the negotiability of such proposals. Instead, NTEU references the opinion of the Authority=s Solicitor in the course of litigation. It is well established that, absent conditions not present here, positions asserted only in litigation do not constitute the Aagency position.@ *See Church of Scientology of Cal. v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986). Further, the Authority, in its adjudications, has specifically declined to speculate on the negotiability of zipper clauses, instead stating that it will consider the issue only when it arises in the context of an actual dispute. *United States Dep=t of the Interior, Washington, D.C.*, 56 F.L.R.A. 45, 54 n.18 (2000).

The union also relies (Br. at 22) on the statements by Judge Edwards, concurring in a *per curium* denial of initial hearing en banc, noting that zipper clauses are negotiable in the private sector, and suggesting that they would also be so in the federal sector. *See FLRA v. IRS*, 838 F.2d 567, 570 (D.C. Cir. 1988). However, this statement was dictum, the issue of the negotiability of

zipper clauses not being before the Court. As such, the statement is binding on neither the Court nor the Authority.[7]

Based on the foregoing, the union clearly overstates the case (Br. at 22-23) when it says that Areopener and zipper clauses are mandatory subjects of bargaining in the federal sector.@ Rather, whether either reopener or zipper clauses are permissive subjects because they would entail the waiver of a statutory right has never been decided by the Authority. Accordingly, the Authority=s decision here cannot be considered arbitrary or capricious on the grounds that it is inconsistent with existing precedent.

2. Private Sector Precedent

The union further argues (Br. 23-24) that Ato the extent there is any doubt with respect to [federal sector law], there is unbroken precedent in the private sector holding that zipper and reopener clauses are mandatory subjects of bargaining.@ According to the union, such precedent is binding on the Authority, unless the Authority can justify its departure from private sector principles (citing *American Federation of Government Employees, Local 32 v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) (*AFGE, Local 32*)). However, the union misstates the effect of private sector precedent.

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[7] The union also relies (Br. 21, 26-27)on a memorandum from the Authority=s General Counsel. However, the memorandum itself notes that the views therein are only the opinion of the General Counsel and do not constitute a statutory interpretation by the Authority. *See* General Counsel=s Memorandum (attached to the union=s brief) at 1.

It is well established that law developed under the National Labor Relations Act (ANLRA@ or AAct@) does not bind the Authority. Rather, as the Supreme Court has held, the NLRA Adeal[s] with labor-managment relations in [an] entirely different field[] of employment, and the [Statute] contains no indication that it is to be read *in pari materia* with [it].@ *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648 (1990). Also, linguistic comparisons Abetween the NLRA and the [Statute] tell us little, particularly given the fact that the two labor statutes, like collective bargaining itself, are not otherwise identical in the two sectors.@ *Interior*, 526 U.S. at 93-94. This Court has noted that the Authority must draw Aupon its expertise and understanding of the special needs of public sector labor relations@ in making determinations about the proper subjects for collective bargaining. *Patent Office Prof=l Ass=n v. FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995).[8]

[8] One distinction with respect to obligation to bargain questions in the federal sector is that there is no private sector analog to the negotiability proceedings of the Statute. Because of the limited scope of bargaining in the federal sector, Congress provided a special procedure for determinations of negotiability. *See Dep=t of Defense v. FLRA*, 659 F.2d 1140, 1145-47 (D.C. Cir. 1981). Negotiability determinations, *i.e.*, whether a matter is a mandatory subject of bargaining, have particular significance in the federal sector, because matters deemed negotiable may be imposed by the Federal Service

Impasses Panel. *Id.* at 1146-47; *see also United States Dep=t of Energy v. FLRA*, 106 F.3d 1158, 1160 (4th Cir. 1997) (Athe duty to negotiate does more than simply require an agency to negotiate, it subjects the agency to the possibility that the proposal will become binding.@).

Further, there is no special requirement that the Authority must specifically justify a departure from private sector precedent. In *AFGE, Local 32*, the case cited by the union, the Court merely suggested that the Authority Ashould *either* identify practical distinctions between private sector and governmental needs . . . *or offer some evidence in the language, history, or structure of the Statute* . . .@ to support its interpretation of the Statute. 853 F.2d at 992 (emphasis added). This simply requires that the Authority=s position must be reasonably grounded in the Statute, no more, no less. As discussed above, the Authority=s position in this cases is supported by the language and policies of the Statute.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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June 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, Petitioner	)	
v.	)	No. 03-1351
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority have been served this day, by mail, upon the following:

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June 1, 2004