Queens Borough Public Library, 17 OCB 13 (BCB 1976) [Decision No. B-13-76 (Arb)], aff'd, Queens Borough Public Library v. Board of Collective Bargaining, No. 40591/77 (Sup. Ct. N.Y. Co., May 20, 1977).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

QUEENS BOROUGH PUBLIC LIBRARY,

Petitioner,

-and- DECISION NO. B-13-76

LOCAL 1321 and D.C. 37, AFSCME, AFL-CIO,

DOCKET NO. BCB-244-75

Respondent.
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DECISION AND ORDER

This decision is the third in a series of decisions rendered by this Board in an effort to resolve the dispute herein. In Decision No. B-26-75, issued on November 5, 1975, the Board of Collective Bargaining approved the request of the Queens Borough Public Library to withdraw its request for arbitration under the Library Contract. It granted permission, however, to Local 1321 (under the Library Contract) and D.C. 37 and the City (under the City-Wide Contract) to request arbitration of their respective rights and duties under the contracts in regard to supper allowance benefits.

On November 27, 1975, Respondent[1] filed with the Board a Request for Arbitration which alleged that "the Library and/or City violated Article XIV of the contract between District Council 37 and its affiliated Local 1321, for the period February 1, 1971 to the present, by unilaterally terminating supper allowance benefits." Local 1321 seeks as a remedy retroactive payment of supper allowance benefits from April 29, 1974 or compensatory time.

On December 5, 1975, the Queens Borough Public Library (Petitioner) by the Office of Labor Relations, filed a petition challenging arbitrability.

Summary of Facts

On July 10, 1973, the Library, D.C. 37, and its affiliated Local 1321 entered into-a contract, effective February 1, 1971 to August 31, 1973. On April 22, 1974,

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[1] The Petitioner and Respondent herein disagree on who, in fact, are the parties to this proceeding. Petitioner contends that the Petitioner is the Queens Borough Public Library and that the Respondent is Local 1321 D.C. 37. Respondent argues that both the Library and (on behalf of the City) are petitioners and that the instant request for arbitration is made on behalf of both D.C. 37 and Local 1321. In light of this dispute, the parties are simply referred to as Petitioner and Respondent in this memorandum.

during the status quo period of the Library Contract, the Library unilaterally rescinded the supper time allowance benefit as provided in Procedure No. 3963 of the Library Rules and Procedure Manual.[2] On May 6, 1974, the City and D.C. 37 entered into a City-Wide Contract effective 7/1/73 to 6/30/76. The contract specifically covers the Library's employees and provides for the length of the employees' work week and for a shift differential. The Library rescinded the supper allowance benefits at issue herein because it concluded that there was a duplication of benefits resulting from the Library Contract and City-wide Contract. In response to this action, Local 1321 filed a grievance alleging that the rescission constituted a violation of the parties' contract. The remedy sought by Local 1321 was restoration of the supper time allowance. Respondent did not pursue this grievance, however, and on July 19, 1974, Respondent filed an improper practice charge with the New York State Public Employment Relations Board, alleging that the Library violated Civil Service Law Section 209-a 1(d) by unilaterally rescinding supper time allowance. In support of its charge, Respondent further alleged that supper time allowance was incorporated by reference into the collective bargaining agreement between the Library and Local 1321, effective 2/1/71 - 8/31/73.

[2] Article XIV of the Library Contract stated that the Library Manual of Procedure was incorporated by reference into the contract.

On May 22, 1975, DC-37 and Local 1321 moved for reconsideration of Decision No. B-12-75 in which the Board, upon the petition of the Library, had determined that supper allowance benefits are a mandatory subject of bargaining at the City-wide level rather than the title unit level. The Board in its decision had also ordered arbitration of "the rights and duties of the parties, if any, under the Library Contract and the current City-Wide Contract, as well as any conflict which may exist with regard to any such several rights and duties." The Board held that "any issue as to the alleged violation of the status quo under the Taylor Act or under Section 1173-7.0d of the NYCCBL, shall not be submitted to, considered by, or disposed of by the arbitrator."

On May 27, 1975, the PERB Hearing Officer dismissed the Union's improper practice charge. Two days later, the City filed an answer to the Union motion for reconsideration and modification of Decision No. B-12-75. On June 2, 1975, the Library withdrew its request for arbitration, citing the PERB Hearing Officer's dismissal of the Union's improper practice charge.

On September 26, 1975, PERB issued its decision upholding the Hearing Officer in all regards. As we noted in Decision No. B-26-75:

> "PERB's decision points out that an employer's unilateral action on a non-mandatory subject, although it may involve a possible breach of contract, raises no Taylor Law question of refusal to bargain. The charging party is thus left to its remedies for breach of the collective bargaining agreement. Referring to Decision B-12-75 of the Board of Collective Bargaining, PERB said:
>
> > 'The above-cited decision of New York City's Board of Collective Bargaining directed the parties to arbitration. We assume the parties will comply with the direction of the Board of Collective Bargaining. . . .'"

On or about October 24, 1975, Respondent commenced an action in the Supreme Court of the State of New York against PERB, seeking to annul and set aside PERB's determination in the above-described case.

In Decision B-26-75, the Board denied the motion for reconsideration of Decision B-12-75 made by DC-37 and Local 1321, and gave leave to the City, Library, and the employee organizations which are party to the City-Wide and Library Contracts to file requests for arbitration of their rights and duties under their respective contracts. The City now alleges that the Respondent's request for arbitration does not raise an arbitrable issue.

Positions of the Parties

Petitioner contends that Respondent's request for arbitration is barred by laches. Petitioner argues that the grievance arose over one and a half years ago, and the union in fact brought a Step I grievance but abandoned it and proceeded instead to institute an improper practice charge at PERB. Petitioner claims that the Respondent has returned to the arbitration route only after litigation at PERB resulting in unfavorable decisions. In Petitioner's view, the Respondent's original abandonment and rejection of the grievance route and its continuing appeal of the PERB decision in court bar it from going to arbitration.

Petitioner also argues that the improper practice proceeding before PERB and the Article 76 proceeding brought to overturn PERB's decision bar this arbitration because of the provisions of the NYCCBL and Rules that condition the right of a union to invoke arbitration upon its waiver of the right to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. Petitioner claims that the issue raised and the relief sought in the Respondent's original Step One grievance, the issue raised and the relief sought in the improper practice proceeding, and

the issue raised and relief sought in the instant arbitration request are identical. The Respondent has attempted to and still seeks "to adjudicate the following indistinguishable underlying dispute: Whether the Library wrongfully rescinded supper allowance benefits, and if so, should the Library be required to restore those benefits?"

The Respondent filed its Answer to the Library's petition on December 18, 1975. Initially, Respondent denies that Petitioner is the Library alone and states that the arbitration request is directed to both the Library and the OLR (on behalf of the City). Respondent also states affirmatively that the request for arbitration is made on behalf of DC-37 and Local 1321 and, therefore, both unions are the respondents.

With respect to the City's laches argument, the Respondent claims:

> "This is not a situation where the unions sat on their rights for one and a half years and all of a sudden decided to bring the matter directly to arbitration.... On the contrary, this is a situation in which the unions have been attempting... to have some tribunal deal with the merits of the controversy."

Respondent argues that PERB never ruled on the merits of the instant dispute and additionally, that the OLR has resisted getting to the merits by opposing arbitration.

Respondent quotes extensively from Board Decision Nos. B-12-75 and B-26-75. In particular, it notes that in the first footnote of B-26-75, the Board stated:

> "In order that the City, the Library, and the employee representatives under both the City-Wide and the Library contracts shall not be deprived of such right to proceed to arbitration on the issue of supper allowance benefits, if they desire to, we explicitly rule out the availability of the defense of laches to any party if a request for arbitration is timely made after service of this decision. . . .”

The Respondent also challenges Petitioner's argument that the NYCCBL's waiver provisions (and election of remedies and collateral estoppel) bar arbitration because the improper practice proceeding and request for arbitration involve the same underlying dispute. Respondent maintains that two entirely different issues are involved:

> "(a) The improper practice proceeding involved the issue of whether the Library breached its statutory duty by unilaterally revoking a term and condition of an existing contract.
>
> (b) The Article 78 proceeding essentially involves the issue of whether an employer can evade responsibility (improper practice-wise) for its action by claiming that it has no duty to bargain on an existing term and condition of a contract.
>
> (c) This arbitration involves the issue of whether the Library and/or the City violated the contract by unilaterally terminating the supper allowance benefits."

Respondent argues that the Board, in Decision No. B-26-75, recognized the distinct issues before it and PERB. Moreover, Respondent urges that in this case, public policy warrants a distinction between an alleged statutory violation and an alleged breach of contract, even though the two distinct issues may have arisen from a particular action of the employer. This is so, according to the Respondent, because it would be improper for an arbitrator to determine that the Library and/or City had a duty to bargain with the Unions on the supper allowance benefits since it is not within the authority of an arbitrator to decide levels of bargaining, mandatory subjects of bargaining, or improper practice charges. On the other hand, an arbitrator could find a contract violation and order retroactive payment of the supper allowances - which PERB is not empowered to do.

In its reply, filed December 30, 1975, Petitioner contends that Respondent's insistence upon interposing the City as a party to this proceeding is without legal justification.

Attached to Petitioner's Reply was Memorandum of Law addressed to the issue of whether a party waives its right to arbitration of a contract dispute after it has previously litigated the "identical" dispute in another forum. Petitioner cites several judicial decisions holding that a dispute previously submitted for judicial disposition may not be resubmitted for arbitral disposition.

Finally, Petitioner cites several Board decisions (B-8-71, B-10-74, B-11-75, and B-15-75), applying the NYCCBL's waiver provisions where litigation preceded or accompanied the filing of a request for arbitration. In particular, Petitioner quotes the following language from Decision B-10-74:

> ". . . the arbitrability case before us and the improper practice case before PERB both stem from and challenge the involuntary transfers made pursuant to Department Order No. 3. The Union alleges before this Board that the transfers violated department policy, which is grievable under the contract, while it alleges before PERB that the transfers violated the Civil Service Law. The basis of the charges in both forums, however, is that the involuntary transfers constituted reprisals for that November strike. We find, therefore, that the Union has submitted to PERB the same underlying dispute which is the subject of

> the instant case before us. In so doing, the Union has violated the waiver provision of the New York City Collective Bargaining Law and may not avail itself of arbitration while simultaneously pressing an improper practice charge with PERB."

In summary, Petitioner challenges arbitrability on the basis of the Board's waiver doctrine because the issue of revocation of supper allowance benefits has been exhaustively litigated in prior proceedings.

On January 9, 1976, D.C.37 submitted a letter to Chairman Anderson in response to Petitioner's Reply and Memorandum of Law. In this letter, D.C. 37 reiterates that it is a separate party to the Library contract. In support of this contention, D.C. 37 has submitted a copy of the Library Contract, which indicates that both Local 1321 and D.C. 37 were signatories to the agreement. As to the City's role in the instant proceedings, the Union states:

> "The City was brought in as a party to the arbitration request because it is the City that has absolute control over these proceedings and all of the decisions that have been made pertaining thereto including the initial decision to terminate the supper allowance. . ."

The Union also restates that the waiver it executed in conjunction with the instant arbitration request was in good faith because the underlying dispute herein is not the

same as that involved in the PERB case even though both proceedings may have arisen out of the same set of circumstances.

The Union maintains that PERB did not make a decision on the merits. It did not determine whether or not the recission of supper allowance benefits was proper. In fact, PERB contemplated that the issue would be arbitrated. Additionally, argues D.C. 37, since it was not a party to the PERB proceedings, "there can be no question of the PERB proceeding barring the Council's right to go to arbitration." The Union continues:

> "Although we believe that the underlying issues and remedies are not the same, assuming arguendo that Local 1321 is precluded from going to arbitration because of the improper practice proceeding before PERB, this cannot bar the District Council which was not a party to that proceeding: Irrespective of any other argument which we have made on the waiver, this argument is conclusive."

Finally, the Unions contend that they have not opposed arbitration at every turn. They allege that the reasons for the improper practice charge were because the Unions thought it important to vindicate a statutory right that had been violated and because of the City's policy of consistently contesting arbitrability of grievances.

In response to the request of the Unions, the Board held oral argument on the issues involved in this case on April 7, 1976. During that proceeding, the counsel for D.C. 37 alleged, and the City did not rebut

the fact that the shift differentials contained in the prior City-Wide Contract were also adopted in the Queens Borough Library Contract. Moreover, the City Budget Director granted the Library permission to make such payments, retroactive to January 1, 1971. According to the Union, the Library was aware as early as 1971, that it was providing both supper allowances and shift differentials to employees and was duplicating a shift differential benefit provided in the City-Wide Contract (Tr. 11-15).

The City, through the OLR's general counsel, focused its oral argument on the allegation that the issue before the Board is identical to that already litigated before PERB and that the Union's grievance is non-arbitrable on the basis of election of remedies, improper execution of waiver, res judicata and collateral estoppel.

In June 1976, it came to the attention of the Board that a new agreement was reached between the Queens Borough Library and D.C. 37 and its affiliated Local 1321 some time in the fall of 1975. Neither of the parties had heretofore raised this matter. On June 17, 1976, the Board wrote to the City and District Council 37 seeking their views as to the meaning and impact, if any, of the new Library Contract with respect to the issues involved in the instant arbitrability dispute.

The parties' written responses indicate that a library agreement was reached on or about September 1975. The agreement was not signed until June 1976, although some of its provisions were implemented in January 1976. Article I of the new agreement provides that "Collective bargaining under this Agreement shall not include matters which are covered by the City-Wide Contract." Article XVI specifically provides that the City-Wide Contract applies to employees covered by the Library agreement.

The City, in a letter dated June 28, 1976, maintains that the City-Wide Contract is governing with respect to supper hours and that the grievance is not arbitrable because the unit contract does not contain any clause providing for supper hours. This position is supported by Article I of the new Library Contract, argues the City, because this article was changed to state ". . . the continued intent of the parties, that City-wide clauses prevail unless specifically superseded by a unit contract clause."

Ms. Kiok makes several points in her letter of June 25, 1976:

1. The provisions of the new unit contract relating to adoption of City-Wide provisions were not effective until at least January 1976. They were not retroactive under the NYCCBL's status quo provisions, the old contract remained in effect until the new one was implemented.

2. The question of whether the shift differentials in the City-Wide Contract supersede supper allowance benefits is a question of contract interpretation, which is a matter for an arbitrator.

3. The Board should not decide that a subsequent City-Wide Contract automatically obliterates a specific provision of a unit contract where:

   (a) the Board did not decide until after both the unit and City-Wide Contracts were reached that the question of supper allowances was a matter for City-Wide bargaining,

   (b) the unit contract which was in existence did not provide for adoption of City-Wide economic terms, and

   (c) the application of the City-Wide Contract to the Library was limited to the terms of its election to come under the NYCCBL,

   (d) there is no provision in the City-Wide Contract or in such election which states that all economic terms in the current Library Contract are superseded by subsequent City-Wide contracts.

4. The new Library Contract has no effect on supper allowance benefits since the Rules of Procedure are still incorporated in the contract.

On July 1, 1976, the city submitted a letter which responded, in particular, to the Union's argument that the terms of the new unit contract relating to the adoption of the City-wide provisions were not effective until at least January 1976; nor were they retroactive. The City contends that under the conditions of the Library's October 1971 election, the Library was a party to the City-Wide Contract and was bound by its terms of that date.

In a letter dated July 6, 1976, the Union reiterated several points made in its earlier submissions. Ms. Kiok states:

> "1. When I said that the provisions of the latest unit contract were not retroactive I meant in the following sense: Suppose the Library contract provided for a 10-cent shift differential and the City-Wide for a 5-cent shift differential. 'Under the status quo provisions of the NYCCBL the employees would continue to get the 10-cent shift differential until agreement was reached on a lesser amount. It is absurd to suggest that a decrease in a fringe benefit can be retroactive."
>
> "2. There was no election to come under the City-Wide Contract in October, 1971. That event took place in June 1976 when the latest City-Wide Contract was signed or no earlier than the fall of 1975 when it was agreed to. What happened in October 1971, was the election of the Library to come under the NYCCBL,

> an election . . . which was limited to matters having a substantial fiscal impact on the Library. Whether a ½ hour supper time allowance has a substantial fiscal impact and whether an election to be bound by City-Wide bargaining excludes other and different provisions in the Library contracts, are again, questions for the arbitrator.

Discussion

It seems that the Petitioner's laches argument is squarely controlled by the above-noted footnote #1 of Decision B-26-75, wherein the Board anticipatorily "rule[d] out the availability of the defense of laches to any party if a request for arbitration is timely made after service of this decision. . . .” The Board in that decision approved the Library's withdrawal of its request for arbitration under the Library Contract, but specifically provided that the City, the Library, or employee organizations which are parties to both the City-Wide and Library Contracts would be permitted to file requests for arbitration of their respective rights and duties under the contracts with respect to supper allowance benefits. In view of the Board's direction of arbitration in Decision B-12-75; PERB's citation, with approval, of the BCB's direction of arbitration; the Board's reservation (in Decision B-26-75) of the parties' right to seek arbitration and its explicit ruling out of the defense of laches; Petitioner's argument in regard to procedural arbitrability is dismissed.

Respondent and Petitioner disagree as to the identity of the parties in this proceeding. The request for arbitration was filed by both Local 1321 and D.C. 37 and the grievance alleges that the "Library and/or the City violated Article XIV of the contract between District Council 37 and its affiliated Local 1321." This contract, however, was entered into solely by the Library, D.C. 37, and its affiliated Local 1321, and it was the Library which allegedly breached its contract by rescinding the supper allowance benefits. The Board, therefore, believes that the proper parties to the instant case are the Library, Local 1321, and D.C. 37. In Decision B-26-75, the Board gave D.C. 37 leave to request arbitration of its rights and responsibilities under the City-Wide Contract, but the request for arbitration herein is based solely on the Library Contract. The City argues that because the only parties to this proceeding are the Library and Local 1321, there somehow has been a violation of the NYCCBL's waiver provision. For the reasons discussed below, however, the Board concludes that neither D.C. 37 nor its affiliated Local has waived any right to arbitration as a result of conduct in pursuing actions before both PERB and the State Supreme Court.

The issues involved in the PERB and court proceedings are distinguishable from the matter raised in the instant arbitration request. The PERB holding, which Respondent now seeks to overturn in an Article 78 proceeding, was that the Library's suspension of supper allowance benefits during the status quo period of the Library Contract, but during the term of the City-Wide agreement, did not constitute a violation of Civil Service Law. PERB's decision did not, however, resolve the question of whether the unilateral rescission of the benefits was a breach of the express terms of the Library Contract, which was in force during the status quo period. As we stated in Decision B-2.6-75:

> "The issues ordered by BCB to be submitted to arbitration relate not to the bargainability of suppertime allowance benefits by the title unit representative, Local 1321, but to the extent to which the terms of both the Library contract and the City-Wide contracts obligate the Library to provide such benefits, and how, if at all, those terms may have been violated by the Library."

The distinction between the statutory issue involved in the PERB case and the contractual dispute involved herein becomes even sharper when one considers the type of relief available through each process. As the Respondent points out, an arbitrator may not law-

fully decide either levels of bargaining or the scope of bargaining; nor may an arbitrator find an employer guilty of refusing to bargain in good faith and order it to bargain or post notices. Those functions fall respectively within OCB and PERB's exclusive authority. On the other hand, an arbitrator could find a contract violation and order retroactive payment of supper allowance benefits - a remedy which PERB could not order in light of the Court of Appeals' decision in Jefferson County Board of Supervisors v. PERB, 36 N.Y. 2d 534 (1975).

The Board in its Decisions B-12-75 and B-26-75 has recognized a distinction between contractual and statutory issues in this case and has directed the parties to arbitration. As the Board noted in B-26-75, PERB decided that the Library was not obligated to bargain with Local 1321 on supper allowances. Thus, the issue in the Respondent's Article 78 proceeding is whether under the Taylor Law an employer is "relieved of a responsibility for its actions in unilaterally revoking a contract provision because it has since been determined that bargaining on that subject exists on another level." PERB did not rule on the propriety of the Library's suspension of the benefits, which allegedly were terms of a contract in force and effect by virtue of the NYCCBL's status quo provision. This latter issue is the subject-of Respondent's arbitration request which, in the Board's view, is an arbitrable question.

In two recent cases, the Supreme Court of the State of New York has held that the filing of an improper practice proceeding with PERB does not bar a union from seeking contractual relief in another forum. In Professional Staff Congress CUNY v. Board of Higher Education, 373 NYS 2d 453 (1975), the Court held that the filing of an improper practice charge before PERB not Lar a proceeding based on express contract language, to enjoin the employer from the commission of the same wrongful acts as were alleged in the improper practice charge.

Further, in a case to which the Board of Collective Bargaining was a party, the Supreme Court held that the filing of an improper practice charge does not constitute a waiver of the right to seek arbitration pursuant to a collective bargaining agreement. City of New York v. Anderson, et al, (UFA) NYLJ Jan. 29, 1976, pp. 8-9. The Court, among other reasons, held that:

> ". . . the PERB in any event lacked authority to render an enforceable determination (see Jefferson County v. PERB, 36 N.Y. 2d 534 (1975) Professional Staff Congress/CUNY v. Board of Higher Education. - Misc. 2d - 373 N.Y.S. 2d 453 [Sup. Ct., N.Y. Co., 1975]."

The same rationale can be applied to the instant case although the facts differ somewhat from those in the cited cases. The rationale of the Supreme Court in both cases noted above was based on PERB's lack of authority to render an enforceable determination requiring adherence to a contract term allegedly violated by the employer. In there circumstances, the Court refused to apply principles of waiver or appeal.

The effort to discourage unnecessary litigation and to prevent repetitive litigation has a long history in our judicial system. The common law doctrines of stare decisis, res judicata, collateral estoppel and the election of remedies are some of the products of this effort. Closely related in purpose and highly appropriate to a law regulating labor relations and intended to provide the means of achieving speedy resolution of labor management disputes is the "waiver provision" - §1173-8.0d of the NYCCBL. The intention to prevent unnecessary or repetitive litigation should not be so implemented as to impede thorough and effective litigation, however. That point is the common factor in the CUNY and UFA decisions, supra. In CUNY, the Court entertained the Union's proceeding for injunctive relief despite the pendency of an improper practice proceeding before PERB relating to the

same allegedly wrongful changes in work rules by management. In the UFA case, the Court refused to stay an arbitration despite the fact that the same allegedly wrongful transfer order had been the subject of a prior arbitration and an improper practice proceeding before PERB. The pivotal fact in each of these cases is that the issues presented in each could not have been submitted, fully litigated and effectively disposed of in any of the respective prior proceedings. one of the chief factors in these findings of the Court in both UFA and CUNY was the inability of PERB under the rule stated by the Court of Appeals in Jefferson County, supra, to issue an effective remedy. The Court's reasoning is directly applicable to the instant matter for in this case we deal with the City petition opposing a request for arbitration of rights under a unit contract in which the City maintains that a related prior improper practice proceeding before PERB acts as a bar under the provisions of §1173-8.0d of the NYCCBL. The issue presented to, and adjudicated by, PERB, however, was whether the suspension of a benefit during a period of negotiation and refusal to bargain thereon with the unit representative constituted an improper practice. The issue sought to be arbitrated now by the Union concerns alleged violations of contractual rights.

That issue was neither presented to nor adjudicated by PERB; in fact, PERB's decision in the improper practice case refers to this Board's decision No. B-26-75 directing arbitration of alleged contract violations, and, further, assumes that such arbitrations will occur. Moreover, if the Union's contract violation allegation had been submitted to PERB and upheld, PERB would have been powerless to issue an appropriate remedial order. Accordingly, the Board finds that the issues in the proceeding before PERB and in the instant matter - allegedly improper unilateral changes in working conditions in violation of status quo and alleged violation of contract, respectively - are not identical although related to the same line of management conduct and that the waiver provisions of §1173-8.0d therefore do not apply. Furthermore, the Board finds that the instant request for arbitration is not barred by application of principles of collateral estoppel since the proceeding before PERB to which that argument is addressed could not have been the vehicle for effective litigation and resolution of the issue presented here.

In reviewing the history of this case, the Board has also considered the fact that the City had urged the Union to go to arbitration after Local 1321 had filed

its improper practice charges at PERB. In light of the fact that the City had indicated a willingness to resort to arbitration even after the PERB proceeding had been instituted, it should not now contend that the Union's improper practice bars the Union from seeking arbitration on account of the NYCCBL's waiver provision.

This case hinges on the Library's alleged breach of a contract provision, which the Union contends was operative at the time by virtue of the NYCCBL's status quo provision. The meaning and purpose of the status quo provision is to preserve the respective positions and relationship of the parties during the statutorily defined period of negotiations for a successor contract. This preservation is obtained, in part, by prohibiting the unilateral change of any conditions created hy the prior contract during the status quo period. (See Decisions Nos. B-1-72 and B-13-74.) Moreover, we have expressly held that even permissive subjects of bargaining, if they were included in the prior contract, are continued in full force and effect during the status quo period. (See Decision No. B-7-72.)

In dealing with controversies involving alleged violations of the Law's status quo provision, the Board has decided, on a case-by-case basis, whether it would

retain jurisdiction and treat the matter as a statutory question or whether it would refer the dispute to an arbitrator following the arbitration provisions of the parties' prior contract. In light of our prior decisions B-12-75 and B-26-75, which ordered arbitration of the instant dispute; PERB's determination, which also contemplated arbitration; and additional factors discussed below, we are persuaded to adhere to the conclusion we reached in Decision No. B-1-72, wherein we held:

> ". . . in a case such as this, where the underlying controversy derives solely from the statutory extension of the provisions of a prior contract, the arbitration provisions - either contractual or statutory - which applied during the term of the contract provide the most appropriate means of dealing with such a controversy arising during the period covered by the status quo provisions of the New York city Collective Bargaining Law."

In the instant case, supper allowances were provided for in the expired Library Contract which was extended by virtue of the status quo period. The fact that a year after the Library's rescission of the supper allowances this Board held that subject to be a matter for City-Wide bargaining does not relieve the parties of their duty to arbitrate their dispute which concerned an alleged breach of contract during the status quo period.

The City argues that the implementation of the City-Wide agreement of May 6, 1974, stopped the running of the status quo period with respect to supper allowances contained in the unit contract. However, the question of whether the shift differentials in the City-Wide agreement duplicate or supplant the supper allowance benefits in the unit contract involves the interpretation and intent of contractual provisions which are matters for an arbitrator.

The Union contends that the status quo period continued at least until January 1976, at which time some of the provisions of the new Library Contract were implemented. The evidence indicates, however, that the parties did in fact reach agreement on a unit contract in September 1975. This Board has held that the meaning of status quo is statutory. The status quo is defined in the statute as "the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed." We interpret the end of the status quo period to be when the parties have reached or concluded an agreement, which, in this case, may fairly be said to have occurred in September 1975; it does not mean the status quo Period extends until a new collective agreement is effectuated or executed. The end of the

status quo period as of September 1975, means that the City's potential liability, if any, in any forthcoming arbitration would extend only from the date of the recission of supper allowances to September 1975. We also note in this regard that the Union seeks an award of compensatory time rather than-a monetary payment should it be sustained in an arbitration proceeding.

Because the parties have presented this case as one whose outcome will rely to some extent on the interrelationship of contractual terms and the status quo provision of the NYCCBL, as a preventive measure, the Board will follow a "Collyer-like" policy of retaining jurisdiction over this matter for the limited purpose of insuring that the arbitrator does not encroach on the Board's exclusive jurisdiction to determine the statutory "status quo" and that the arbitration does not result in a decision repugnant to the NYCCBL.[3]

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[3] Collyer Insulated Wire, NLRB, 1971, 77 LRRM 1931.

DETERMINATION AND ORDER

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

DETERMINED, that the Union's grievance is found arbitrable under the terms and within the limits set forth in this decision and it is, therefore,

ORDERED, that the Library's petition challenging arbitrability be, and the same hereby is, dismissed.

DATED: New York, New York.
November 10, 1976

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD F. GRAY
M e m b e r

JOSEPH SOLAR
M e m b e r

I dissent THOMAS J. HERLIHY
M e m b e r

I dissent EDWARD SILVER
M e m b e r

NOTE: See page 30 for dissent

Dissent of Alternate City Member
Thomas J. Herlihy

In the reasoning on this matter the decision states on page 25, that "this case hinges on the Library's alleged breach of a contract provision, which the Union contends was operative at the time by virtue of the NYCCBL's status quo provision."

To determine when the contract provision terminated, it is first necessary for the Board to interpret the Collective Bargaining Law as to the extent to which the City-Wide Contract entered into on May 6, 1974, affected the status quo period of the unit contract between Local 1321 and the Library.

The status quo provisions of the Bargaining Law were established in recognition of the union surrendering the right to strike, and were designed to prevent chaos by protecting the two parties during the interim period between the end of one contract and the agreement on another. In this particular instance, the old unit contract had terminated on August 31, 1973.

Queensborough Public Library had elected to come under the terms of the City-Wide Contract with D.C. 37 serving as the bargainer for its affiliate, Local 1321,

in that bargaining. Then agreement was reached between the City, acting for the Queensborough Public Library, among others, and D.C. 37, acting for Local 1321, among others, on May 6, 1974, on a contract that covered the period 7/1/73 to 6/30/76, a clear statement of hours of work was included, with no inclusion, exception, or special protective clauses for Local 1321.

It appears to me that once D.C. 37 reached agreement with the City on a firm provision dealing with hours of work which had general application, the interim protection of the status quo period Was no longer required. I believe that the applicability of the status quo protection under these circumstances should have been decided by the Board to give clear guidance to an arbitrator.

While it is true that the Library rescinded the supper time allowance benefit on April 22, rather than on May 6, and may have "jumped the gun" for that period, I attribute it to the usual fuzziness about when the parties having reached agreement, sit down together to initial the final draft.

Because I believe that the Board should have taken jurisdiction in this case solely for the purpose of clarifying the picture on status quo, I must dissent from sending the matter to arbitration at this stage.

Dissent of City Member
Edward Silver

I dissent on the grounds that the issue presented involves basically an interpretation of the "status quo" provisions, a matter of law that must be decided by the Board.