District Council 37, 15 OCB 21 (BCB 1975) [Decision No. B-21-75], aff'd, City of New York v. Board of Collective Bargaining, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner

and

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

DECISION NO. B-21-75

DOCKET NO. BCB-228-75

DECISION AND ORDER

On June 9, 1975, District Council 37, AFSCME (hereinafter the Union) served upon the City a demand to bargain "on a City-Wide basis, on the impact of layoffs and terminations on employees of the City of New York who have received such [layoff] notices." on June 30, 1975, the City filed a petition with the Board requesting that the Union's demand to bargain on the impact of layoffs be declared outside the scope of collective bargaining.

The City alleges in its petition that the matter of impact of layoffs is a proper subject of bargaining only on a City-wide basis, and that the current (1973-76) City-wide contract .is silent on the matter of impact of layoffs, although the issue had been raised during the negotiations which gave rise to the current City-wide contract. In the City's view:

> "Section 1173-7.0a(3) of the New York City Collective Bargaining Law precludes collective bargaining during the term of a contract except in cases where the matter was not specifically raised as an issue during the

> negotiations out of which the contract arose, _and_ there have [sic] arisen a significant change in circumstances with respect to such matter which could not have been anticipated by both parties a t the time of execution of the agreement, _and_ where both parties agree to reopen the contract.

The City contends that by virtue of Section 1173-7.0a(3)*, the matter of layoff impact is outside the scope of bargaining because the subject was raised during the negotiations out of which the 1973-76 City-wide contract arose and because the City does not agree to bargain over this subject during the term of the current City-wide contract.

In response to the City's refusal to commence negotiations the matter of layoff impact, the Union, on July 3, 1975, filed an improper practice charge against the City with the New York State Public Employment Relations Board. The Union alleges that the City has violated Section 209-a.1(d) of Article 14 of the Civil Service Law (commonly known as the Taylor Law) by refusing to negotiate in good faith with the City-wide representative over the impact of layoffs and terminations on City employees who have received notice of layoff.

On July 7, 1975, the Union filed with the Board its Answer to the City's petition. The Union reiterates its contention that impact of layoffs is a proper subject of bargaining on a Citywide basis and states that except for the subjects of severance pay

*Section 1173-7.0a(3) provides:
"Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreements arose and (b) there shall have arisen a ~~significant change in circumstances with respect to such~~ matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement."

and unemployment insurance, matters of layoff impact were not raised in the negotiations out of which the current Citywide contract arose.

The Union argues that the Board's Decision B-18-75 disposed of the issues raised herein by the City because in that case it was determined:

> "(a) that there is a statutory duty on the part of the public employer to bargain during a contract on the impact of layoffs ... ;
>
> (b) that the NYCCBL does not limit practical impact bargaining to the period of contract negotiations;
>
> (c) that section 1173-7.0a(3) of the NYCCBL... was not intended to nor does it preclude mid-contract bargaining on the impact of managerial prerogatives;
>
> (d) that whenever management exercises its management prerogative to lay off employees a *per se* practical impact occurs and the Union immediately has a right to claim such impact and demand negotiations with respect thereto;

> (e) that an exception to the permissibility of mid-contract bargaining exists where pre-contract negotiations involved the raising of a particular subject matter of impact which was fully discussed or consciously explored or negotiated and which specific impact subject is sought to be re-negotiated mid-contract;
>
> (f) that negotiations out of which the 1973-76 City-wide contract arose never treated with layoff impact issues such as notice of layoffs, order of layoffs, recall lists and other impact matters...."

For the above reasons, the Union request the Board to dismiss the City's petition.

The City, in its Reply, alleges that the Board committed error in its Decision B-18-75 wherein it indicated that Section 1173-7.0a(3) does not preclude bargaining during a contract, even where one party objects to such negotiation. In the City's view, Section 1173-7.0a(3)

> "... represents a statutory 'zipper clause' which codifies as public policy the position that parties involved in collective bargaining negotiations shall be deemed to have been afforded full and complete opportunity to negotiate over all foreseeable areas properly within the scope of bargaining. Thus, the law represents a public policy to bar either party without the other's consent from raising a matter during mid-contract which could have been raised during the open contract period."

DISCUSSION

Our Decision B-18-75, issued on June 16, 1975, squarely controls the scope of bargaining question raised herein. In that case, we held that the City-wide level is the appropriate level for bargaining on the impact of layoffs. Although we dismissed the Union's petition therein because it inappropriately sought to bargain layoff impact matters at the title level, our decision was "without prejudice to the right of the City-wide representative, District Council 37, AFSCME, to initiate bargaining with respect to layoff impact issues." Our Decision B-18-75 specifically dealt with the questions raised by the City in the instant case, and we believe, fully disposed of the issues presented here. Rather than involve the parties and this Board in time consuming procedural controversy, however, we will deal with the issues on the merits, in large part by simply reiterating the language of our Decision B-18-75.

Impact Bargaining - The Private Sector

Although, as we have previously noted, private sector precedents are not binding upon this Board, the bargaining requirements under the NLRA and cases inter-

preting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the NYCCBL.

There is a long line of cases in the private sector holding that although an employer may unilaterally decide to lay off employees for economic reasons, the effect of its decision on employees is a mandatory subject of bargaining. in NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (CA 9, 1967), the Ninth Circuit held that the decision of a ship terminal operator to relocate and lay off employees was not a mandatory subject of bargaining. The court emphasized, however:

> "...the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision .... Such bargaining over the 'effects' of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority, and pensions, among others, which are necessarily of particular importance and relevance to the employees."

The Second Circuit decided similarly in NLRB v. Rapid Bindery, Inc., 293 F. 2d 170 (CA 2, 1961). It affirmed an employer's right to decide unilaterally to move its plant and terminate employees. But once that decision is made, Section 8 (a) 5 requires that notice

> "be given to the union so that the negotiators could then consider the treatment due to those employees who conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

In summary, at least seven circuit court decisions have held that here is no duty to bargain about managerial decisions involving layoffs for economic reasons such as plant closings, partial plant shut-downs, plant relocations, changes in production procedures, and certain subcontracting arrangements when the decision was made free of animus toward the union. (See NLRB v. Rapid Bindery, Inc., 293 F. 2d 170, 48 LRRM 2658 (CA 2, 1961); NLRB v. Adams Dairy, 350 F. 2d 108, 60 LRRM 2084 (CA 8, 1965), cert. denied, 382 U.S. 1011 (1966); NLRB v. Royal Plating and Polishing Co., 350 F. 2d 191, 60 LRRM 2033 (CA 3, 1965); NLRB v. Transmarine Navigation Corp., 380 F. 2d 933, 65 LRRM 2861 (CA 9, 1967); NLRB v. Dixie Ohio Express Co., 409 F. 2d 10, 70 LRRM 3336 (CA 6, 1969); NLRB v. Thompson Transport Co., Inc., 406 F. 2d 698, 70 LRRM 2418 (CA 10, 1969); NLRB v. United Nuclear Corp., 381 F.2d 972, 66 LRRM 2101 (CA 10, 1967).

But it is also well settled under these decisions that the effects, or impact, of management decisions upon employees are mandatory subjects of bargaining.

Bargaining During the Term of an Existing Agreement - The Private Sector

In the private sector, the NLRB and courts have held that collective bargaining is not limited to negotiation of an agreement.

A landmark decision on this subject is NLRB v. Jacobs Mfg. Co., 196 F. 2d 680 (CA 2, 1952). In this case, the Second Circuit, interpreting the bargaining exception contained in Section 8(d) of the NLRA, elaborated on the issues open to negotiation during the life of a contract. Section 8(d) provides, in relevant part, that the duty to bargain collectively "... shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

The Second Circuit held that although the Section 8(d) exception was intended to give stability to agreements,

> "... we do not think it relieves an employer of the duty to bargain as to subjects which were neither discussed nor embodied in any of the terms and conditions of the contract."[1]

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[1] See also Allied Mills, Inc., 82 NLRB 854, 23 LRRM 1632 (1949). With respect to mid-contract bargaining, the Board held:

The NLRB has also held that the duty to bargain during the life of the agreement may even exist with respect to items that were discussed during negotiations and subsequently abandoned. In Beacon Piece Dyeing and Finishing Co., 121 NLRB 953 (1958), the employer was found to have violated §8(a)(5) by unilaterally increasing employees' workloads, a mandatory subject, even though the employer contended that the Union waived its right to bargain on that subject because in collective negotiations, it had dropped a demand for freezing a workload ceiling into the contract in return for employer concessions elsewhere. The Board observed that it

> "...has consistently held that an employer's action in changing the wage rates or other working conditions of its employees without notice to, or consultation with, the labor organization which they have chosen to represent them is in derogation of its duty to bargain and is violative of Section 8(a)(5). Moreover, although the Board has also held repeatedly that statutory rights may be 'waived' by collective bargaining, it has also said that such a waiver 'will not readily b e inferred' and there must be 'a clear and unmistakable showing' that the waiver occurred."

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1 continued

> "As to the written terms of the contract either party may refuse to bargain further about them ... without committing an unfair labor practice. With respect to unwritten terms dealing with 'wages, hours, and other terms and conditions of employment,' the obligation remains on both parties to bargain continuously"

The Board concluded that the There abandonment of a bargaining demand in return for other concessions did not meet the established waiver test. Nor did it represent a union acquiescence "in any management prerogative position on workload so as to 'hand over' to the Respondent the Union's statutory bargaining rights on workload."

In general, the NLRB is reluctant to find a waiver of bargaining rights "unless it can be said from an evaluation of the prior negotiations that the matter was 'fully discussion or 'consciously explored' and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter." (Press Co., Inc., 121 NLRB 976, 42 LRRM 1493 (1958).

Thus, the private sector case law holds: 1) effects of managerial decisions resulting in layoffs are mandatory subjects of bargaining; and 2) even during an existing agreement, an employer may not act unilaterally on a mandatory subject (i.e., term and condition of employment) that is not embodied in the agreement. Unless the union has expressly waived its bargaining rights, it must he I afforded the opportunity to bargain on management's announced action regarding such mandatory subject.

Bargaining on Layoffs - The Public Sector

Decisions in other jurisdictions on the subject of the negotiability of layoff procedures, while not controlling here, are instructive.

The Wisconsin Employment Relations Commission, in City of Beloit and Beloit Education Association, Case V, No.16732 DR(M)-43, Decision No. 11831-C, (1974), 578 GERR B-11 (10/28/74), determined the negotiability of a teacher proposal on layoffs. The Commission held:

> "The matter of teacher layoffs and their right to recall to active teaching status, have a direct and intimate affect (sic) on a teacher's working conditions including employment status, and as such, the Commission concludes that the proposals relating to teacher layoffs and recall are mandatory subjects of bargaining, as are concomitants thereof, not limited to, but including such matters as the basis for layoffs, order of recall, qualifications for recall, and non-loss of previous service credits."

In Fire Fighters Union, Local 1166, IAFF v. City of Vallejo, 12 Cal 3d 608, 116 Cal Rptr 507, 87 LRRM 2453 (1974) the California Supreme Court, interpreting the Vallejo City Charter provisions governing public employee labor relations, held that a union proposal on personnel reduction was arbitrable to the extent it affected employees' working conditions and safety.

The Court concluded that a management decision to lay off was a "matter of policy of fire prevention" which was not a mandatory subject of bargaining and, therefore, not arbitrable. But with respect to the other elements of the union's proposal, the Court found:

> "... because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their work-load and endangering their safety.... To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration..."

Additionally, the Court ruled that "matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable."

The concept of impact bargaining is familiar under both the NYCCBL and Taylor Law. Section 1173-4.3b of the NYCCPL specifically grants employee representatives the right to bargain on "questions concerning the practical impact" on employees of managerial decisions. The Board of Collective Bargaining first defined "practical impact" in Decision B-9-68. Since that time, it has rendered several decisions dealing with practical impact, and recently, as evidenced in the MEBA decision, has been reconsidering its policies and procedures regarding practical impact.

The scope of bargaining, as set forth in the Taylor Law does not expressly include the "practical impact" of exercises of managerial prerogatives. PERB and the Courts, however, have developed the concept of impact bargaining in a series of cases dealing with the scope of bargaining.

First, the breadth of the statutory phrase "terms and conditions of employment" was defined by the Court of

Appeals in Board of Education, Huntington v. Teachers, 30 NY 2d 122 (1972). The court held:

> "Under the Taylor Law, the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment."

Particularly relevant to the instant case are PERB's decisions in City School District of the City of New Rochelle and New Rochelle Federation of Teachers, 4 PERB 3704 (1971); City of White Plains and Professional Fire Fighters Association, 5 PERB 3031 (1972); and City of Albany and Albany Police Officers Union, 7 PERB 3078, at 3132 (1974).

In New Rochelle, PERB determined that a managerial decision to approve budgetary cuts resulting in reduction of the work force is a non-mandatory subject. "The employer is obligated, however, to negotiate on the impact of such decision on the terms and conditions of employment of the employees affected." In White Plains, PERB held that a union demand that the employer not reduce the work force is a non-mandatory subject. PERB reiterated, however, that there is a duty to bargain on the impact of a decision to curtail services or abolish positions. "Examples of such negotiable matters are order of lay-off,

severance pay, and workload for the remaining employees. These and other matters of impact are mandatory subjects of negotiations."

PERB most recently considered the negotiability of layoffs in its Albany Police decision. In that case, the union had presented several demands relating to job security, re-employment rights, and layoff procedures. Those demands that were covered by Civil Service Law or that abridged management's right to curtail services and eliminate positions were held to be non-mandatory. With respect, however, to union demands relating to layoff procedures and requiring reasonable notice prior to implementation of a managerial decision to lay off, PERB held that there was neither conflict with the Civil Service Law nor undue interference with a public employer's right to eliminate a service.[2] According to PERB, "a provision for reasonable notice of the implementation of such decision is not unreasonably related to the requirement that a public employer negotiate over the impact of such decisions."

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[2] The specific layoff demands determined by PERB,,to be mandatory subjects included the following:

Section 5. Lay-Off

(a) in the event the Employer plans to lay off employees for any reason, the employer shall meet with the Union to review such anticipated layoff at least thirty (30) days prior to the date such action is to be taken.

Our own MEBA decision, B-3-75, supports the theory that the impact of is a managerial decision to lay off employees is a mandatory subject of bargaining. We held in that decision that practical impact on those laid off or to be laid off is implicit in any exercise by management of its prerogative to lay off,

> "... and wherever the employer exercises this particular power, a practical impact will be deemed to have occurred and to have been established.

[2] continued

(c) The Employer shall forward a list of those employees being laid off to the local union secretary on the same date that the notices are issued to the employees.

(d) Employees to be laid off will have at least thirty (30) calendar days notice of layoff.

(e) All employees who have been laid off shall be placed on a recall list.

(f) The Employer will be liable for any error on a layoff from the date of the error.

Section 7. Consolidation or Elimination of Jobs

(a) It is understood and agreed that the employer will notify the Union immediately, in writing, of any decisions involving a change in its facilities or operations, whether such decision involves expansion, partial or total closure, or termination of any facilities or operations, a consolidation, or a partial or total relocation or removal of any facilities or operations.

> With respect to those issues over which the employer has discretion to act, and which relate to the practical impact of a managerial decision to lay off employees, the City is obligated to bargain immediately."

Bargaining During the Term of an Existing Agreement - The Public Sector

Admittedly, the scope of bargaining questions in the MEBA case arose during negotiations for a successor agreement to one that had expired. The difficult problem in the instant case is to determine whether the impact of a managerial decision to lay off employees is a mandatory subject of bargaining during the life of a contract which is silent on the issue of job security.

PERB confronted a similar problem in North Babylon Union Free School District and North Babylon Teachers Organization, 7 PERB 3040 (1974). In that case, the Teachers Organization charged that the employer abolished a number of teaching positions during the term of the contract and refused to negotiate on the impact of such action on terms and conditions of employment.

In response to the employer's contention that the job eliminations did not create an impact, PERB held that an employer may not avoid a duty to bargain by making a unilateral decision that there is no impact flowing from its action. Upon request, the employer must meet and

discuss the issue of impact; the act of discussing does not constitute a concession on the employer's part that there is an impact on terms and conditions.

PERB also found unpersuasive the employer's argument that since effectuation of layoffs did not violate any provision of the existing contract, there was no duty to bargain on impact. PERB concluded:

> The duty to negotiate does not terminate upon the execution of a collectively negotiated agreement. It continues during the term of the agreement. For example, an employer has a duty to negotiate grievances which arise during the term of the agreement. Further, absent an explicit waiver, an employer may not alter a term and condition of employment which is not covered by the agreement. Finally, an employer does have a duty to negotiate upon request as to terms and conditions which are not provided for in the contract if the employee organization, as here, has not waived its right to do so.

The waiver issue and the Practical Impact of Layoffs

Private and public sector precedents clearly indicate that the duty to bargain on matters of impact stemming from management's exercise of its prerogative to lay off can arise during the life of an agreement. In New Rochelle, PERB held that the employer was required to bargain over the impact of its decision to make budgetary cuts resulting in personnel reductions. And, as discussed above, in

North Babylon, PERB adopted a very broad rule with respect to mid-contract impact bargaining: "an employer does have a duty to negotiate upon request as to terms and conditions which are not provided for in the contract if the employee organization, as here, has not waived its right to do so."

In the instant case, the City alleges that the Union has waived its right to bargain on layoff-related impact issues as a result of the history of City-wide negotiations, specifically, the Union's unsuccessful attempt to gain contract provisions on severance pay and unemployment insurance. We agree with the City that if a Union bargains on layoff impact demands at contract renegotiation time, as is its right under the MEBA decision, it should not be permitted, during the life of the agreement and in response to a management decision to lay off employees, to bargain on those identical demands in an effort to improve upon current contract language or to gain new provisions which it failed to achieve in the prior negotiations. The test to be applied is that which the NLRB enunciated in the Press case, cited above:

> "it is well-established Board precedent that, although a subject has been discussed in pre-contract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act, if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject unless it can be said from an evaluation of

> the prior negotiations that the matter was ‘fully discussed’ or ‘consciously explored’ and the union ‘consciously yielded’ or clearly and unmistakably waived its interest in the matter. (42 LRRM 1493)

In the instant case, the subjects of severance pay and unemployment insurance were raised, negotiated, and submitted to an impasse panel in the City-wide negotiations. Those specific matters, therefore, were carefully explored, and the City is not required to renegotiate them mid-contract. The City-wide bargaining did not, however, exhaust the entire area of layoff impact. Other subjects directed to the effect of layoffs were not even raised in the City-wide negotiations. With respect to those items, there was no “full discussion” or “conscious exploration” as to constitute a waiver of interest on the part of the Union. Therefore, the Union should not be barred from negotiating mid-contract, in response to the City’s impact creating decision to lay off, on impact matters not previously bargained.

Although the City contends that the Union has waived its right to bargain mid-contract because it had the opportunity in City-wide bargaining to negotiate on impact issues related to layoff, the Union’s City-wide bargaining demands did not arise out of an actual managerial decision to lay off employees but rather as a search for an alternative

benefit to unimplemented pension benefit.[3] Whereas there may be no general duty on the part of the employer to bargain during a contract, there is a duty to bargain if the employer takes action which creates a practical impact on the employees. In other words, in the instant case, while the Union may be barred from taking the initiative to demand bargaining over the subject of job security during the term of the agreement, and while it may not demand bargaining on the two layoff related issues it previously negotiated, it still has the right to demand bargaining on other layoff items in response to the City's impact-creating decision to terminate employees. The NYCCBL does not limit practical impact bargaining to the period of contract negotiations, and our past decisions have held that if the City exercises a managerial prerogative during the term of an agreement, the Union immediately has the right to claim that a practical impact has resulted. Inasmuch as in MEBA, we held that the exercise of the managerial prerogative to lay off creates a per se practical impact, it logically follows that such impact issues as notice of future intended layoffs, order of layoff, and recall list of terminated employees are mandatorily bargainable immediately upon the Union's demand for negotiations.

The practical impact concept in bargaining under the NYCCBL has to do with considerations both of bargainability

[3] See Decision B-1-74.

of particular subjects and of timeliness of demands for bargaining. it is apparent that the-legislative purpose of Section 1173-4.3b of the NYCCBL is to reserve to management the right and freedom to act unilaterally in matters over which it must have discretionary powers in order to accomplish its mission of maintaining effective government. In light of this legislative purpose, we reiterate that a decision to lay off is not mandatorily bargainable, and that any statutory duty to bargain on matters of impact arising from layoffs shall in no way defeat or frustrate the City's right to lay off employees.

The purpose of the practical impact language of Section 1173-4.3b is to provide means of cushioning, or reducing, to the extent possible, the adverse effects upon employees arising from exercises of management prerogatives. It thus may be said that the right to bargain pursuant to Section 1173-4.3b arises only where an exercise of a management prerogative has resulted in a practical impact; the only exception to this rule is in the case of per se practical impacts, which may be anticipated. Thus, in the MEBA case, it was held that a union may demand to bargain as to matters relating to a subject of management prerogative the exercise of which would, per se, constitute a practical impact. In that case, the particular job security demand would have required no

action by the employer in advance of the creation of an impact, and the decision did not determine the bargainability of an impact demand which would have required such anticipatory action by management. Aside from the special conditions relating to <u>per se</u> practical impacts, however, management and not the union, has the initiative and the union's right to bargain comes into existence only after management has acted unilaterally pursuant to Section 1173-4.3b in such a way as to create a practical impact. The corollary to this rule is, of course, that whenever management takes such action, and regardless of when it occurs with relation to contract periods, the union has the right to allege practical impact and to demand remedial bargaining. The only exception to this rule is where during pre-contract bargaining, a particular subject is negotiated, the union may not demand mid-contract bargaining on the identical subject under a claim of practical impact.

With respect to the instant case, layoffs, clearly, are a subject of management prerogative; related to that management prerogative are a host of subjects of bargaining some of which may be mandatorily bargainable and others bargainable only on mutual consent of the parties. Two such subjects -- unemployment insurance and severance pay --

were bargained during the last City-wide contract negotiations, and may not be raised now on a practical impact basis. The subjects of notice of layoffs, order of layoff recall lists of terminated employees, and other impact matters not dealt with in the City-wide negotiations are now bargainable in connection with the practical impact of layoffs.

We emphasize, as we have in other scope of bargaining decisions, that our determination herein does not require the City to agree on any Union demand determined to be negotiable, but merely to negotiate, subject, of course, to the possibility of resorting to an impasse panel.

The Application of Section 1173,7.0a(3)

The City contends that Section 1173-7.0a(3) of the NYCCBL precludes bargaining during the term of a contract except in cases where the matter was not raised during negotiations, and there has arisen a significant change in circumstances which could not have been anticipated at the time the agreement was executed, and both parties agree to reopen the contract. The City's argument accords Section 1173-7.0a(3) a statutory priority while it ignores Section 1173-4.3b. Under rules of statutory construction, however, different provisions of the same statute are to be harmonized if a harmonious reading will not clearly misconstrue or

render meaningless any of the provisions in question. In our view, if Section 1173-7.0a(3) is read in conjunction with, and in light of, Section 1173-4.3b, the legislative intent with respect to the parties' mid-contract bargaining rights and obligations clearly emerges.

Section 1173-4.3b contemplates impact bargaining, the right to which arises only after the employer exercises a management prerogative that results in a practical impact. Section 1173-7.0a(3) is not a bar to impact bargaining. It does constitute a bar to mid-contract bargaining on non impact matters and on any matters that have already been fully negotiated, regardless of whether or not they are included in the contract.

In the instant case, mid-contract bargaining on severance pay and unemployment insurance is thus precluded inasmuch as the parties fully negotiated those subjects during bargaining for the current contract. But as to all other subjects relating to the impact of management's decision to lay off, inasmuch as the occasion for bargaining arises only now, there can be no preclusion.

The City maintains that Section 1173-7.0a(3) is a permissive rather than obligatory provision and that midcontract bargaining is prohibited absent the parties' mutual consent. We, do not reach the question as to the significance of the word "may" in that provision with respect to a demand for mid-contract bargaining based on a contention that the subject matter is mandatory and negotiable as a result of

an unforeseen change in circumstances. We do hold, however, that Section 1173-7.0a(3) was not intended to nor does it preclude mid-contract bargaining on the practical impact of a managerial prerogative inasmuch as the timing of the managerial action giving rise to the impact is entirely within the employer's control. Thus even if Section 1173-7.0a(3) were held to constitute the "zipper clause" the City claims it is, it would have no application to matters of practical impact. For if Section 1173-7.0a(3) can be characterized as a zipper clause which forecloses further bargaining, Section 1173-4.3b can be characterized, with equal force, as a re-opener clause having limited application to bargaining instituted by management's creation of a prerequisite practical impact. The City's interpretation of Section 1173-7.0a(3) renders the provisions of Section 1173-4.3b and the employee rights thereby created ephemeral and meaningless; a conjunctive reading of the two provisions results in a sensible statutory construction.

DETERMINATION AND ORDER

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

DETERMINED, that the demand herein on the impact of layoffs on employees laid off is a mandatory subject of bargaining, and it is

ORDERED, that the petition of the City be, and the same hereby is, dismissed.

DATED: New York, N.Y.
July 16, 1975

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBER
MEMBER

ERIC J. SCHMERTZ
MEMBER

JOSEPH J. SOLAR
MEMBER

DANIEL J. PERSONS
MEMBER

Dissenting Opinion of Board Member Thomas Herlihy

I respectfully dissent.

The Board states that §1173-7.0a(3) is not a bar to impact bargaining because to the extent that §1173-4.3b is inconsistent therewith it clearly takes precedence. However, while the Board recognizes that it is necessary to construe apparently conflicting provisions of the same statute harmoniously so as to preclude rendering meaningless one of the provisions, it goes on to effectively render §1173-7.0a(3) meaningless. In the Board's view, §1173-7.0a(3) constitutes a bar only "on non-impact matters and on any matters that have already been fully negotiated." However, the Board states earlier in its decision, without reliance on §1173-7.0a(3), that those subjects "raised, negotiated and submitted to an impasse panel in the City-wide negotiations" may not be raised mid-contract. Furthermore, it is fundamental labor law that a union may not seek to reopen a contract on a non-impact matter that the Employer has not taken action on, or threatened to take action on. Therefore, since general principles of labor law constitute a bar to mid-contract bargaining on non-impact matters and on any matters that already have been fully negotiated, the Board's statutory construction of §1173-7.0a(3) is redundant and meaningless.

It is clear from its absolute language that §1173-7.0a(3) is intended to incorporate as public policy a contractual "zipper clause" to be read as part of every signed collective bargaining agreement. Thus, the provision precludes mid-contract bargaining over <u>all</u> matters which were, and <u>could have been</u> discussed during negotiations, as well as those matters included in the contract.[1] This proscription

[1] The N.L.R.B. has recently approved such a contractual "zipper clause." <u>Radioear Corporation</u>, 7199 NLRB

naturally extends to those impact matters which could have been discussed at the time of negotiations. There can be no doubt but that the entire subject area of impact of layoffs, including order of layoffs, could have been so discussed. Indeed, in the negotiations which culminated in the current City-wide contract, the Union herein sought to bargain over two demands relating to the areas of unemployment insurance and severance pay, but were not success ful in securing these benefits. These two demands most certainly were designed to ease the impact of potential layoffs. Such areas have been of traditional concern to unions in negotiations. Yet, in the Board’s view, §1171-7.0a(3) encourages unions to abandon impact bargaining demands since they are assured of mid-contract bargaining rights in the event the employer contemplates or takes specific managerial prerogatives available to it. I do not believe that the intent of the framers of the N.Y.C.C.B.L. was to draft a statute encouraging collective bargaining generally, but including a provision which in effect urges unions to refrain from negotiations on all impact matters.

For these reasons, I would grant the City’s Petition and determine that the Union’s demand to bargain is outside the scope of collective bargaining.