

STATE of DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,	)	
LOCAL 1694-1, AFL-CIO,	)	
	)	
Charging Party,	)	<u>ULP 12-11-880</u>
	)	
v.	)	Decision on the Merits
	)	
DIAMOND STATE PORT CORPORATION,	)	
	)	
Respondent.	)	

Appearances

*Bernard N. Katz, Esq., Meranze, Katz, Gaudioso & Newlin, P.C. for ILA Local 1694-1*  
*Scott A. Holt, Esq, Young, Conaway, Stargatt & Taylor, for Diamond State Port Corporation*

**BACKGROUND**

The State of Delaware is a public employer within the meaning of 19 Del. C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). Diamond State Port Corporation (DSPC) is an agency of the State. DSPC operates the Port of Wilmington which is located in Wilmington, Delaware.

The International Longshoremen’s Association, Local 1694-1, (“ILA”) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1, the ILA is the exclusive bargaining representative of a bargaining unit of DSPC employees within the meaning of 19 Del.C. §1302(j).

ILA Local 1694-1 and DSPC are parties to a current collective bargaining agreement  
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which has a term of October 1, 2010 through September 30, 2013.

On or about November 16, 2012, the ILA filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging conduct by the DSPC in violation of §1307(a)(1), (3), (4), (5), (6) and (7).<sup>1</sup> Specifically, the Charge alleges “sometime in 2010 or early 2011, the employer arranged to have certain bargaining unit work performed by a private contractor on the premises of Diamond State Port Corporation which was bargaining unit work.”

*Charge ¶4.*

On January 18, 2013, DSPC filed its Answer to the Charge, including New Matter. While admitting to most of the factual assertions, it denied it had violated the PERA or committed an unfair labor practice. Under New Matter, DSPC alleged the Charge failed to state a claim under the PERA and that the Charge was barred by the statute of limitations established by 19 Del.C. §1308. DSPC also asserted PERB should adopt a post-arbitral deferral policy and defer the current issue by requiring the ILA to seek judicial enforcement of the arbitration award in the Court of Chancery.

On January 23, 2013, Charging Party filed its Response to New Matter denying the New Matter contained in the State’s Answer.

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<sup>1</sup>§1307(a). It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under this chapter.
- (5) Refuse to bargain collectively in good faith with an employer representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.
- (7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

A probable cause determination was issued on April 17, 2013 which dismissed the allegations that DSPC may have violated §1307(a)(4) and/or(a)(7) of the PERA for lack of probable cause. Probable cause was found to believe a violation of §1307(a)(1), (a)(3), (a)(5) and/or (a)(6), may have occurred. A hearing was directed to receive evidence and argument concerning DSPC's alleged failure to implement a final and binding arbitration award. The probable cause determination also noted the pleadings raised a question as to the scope of DSPC's control of the work in issue.

A hearing was convened before the Executive Director of the Public Employment Relations Board on May 21, 2013, during which the parties were afforded the opportunity to present evidence and argument. This decision results from the record created by the parties.

### **FACTS**

The following facts are undisputed and are derived from the testimony and documentary evidence contained in the record created by the parties.

Diamond State Port Corporation operates the Port of Wilmington. It employs a unionized work force which is represented by ILA Local 1694-1, the Charging Party in this case. DSPC is a public employer and an agency of the State of Delaware. DSPC and ILA 1694-1 are signatories to a current collective bargaining agreement which establishes terms and conditions of employment for bargaining unit members of ILA Local 1694-1.

Murphy Marine Services (MMS) is a private stevedore company which operates at the Port of Wilmington, loading and unloading ships. It employs a work force (some of which is unionized) which includes employees represented by ILA Local 1694 (commonly referred to as the "deep sea local"). MMS is a member of the Philadelphia Maritime Trade Association (PMTA). PMTA is a member of the United States Maritime Alliance, Ltd., which is party to a

master collective bargaining agreement with the International Longshoremen's Association, AFL-CIO. This master agreement covers the work performed by ILA Local 1694 for MMS, including containerization, or "non-vessel container" work. Non-vessel container work is defined in Appendix A of the agreement to include "the loading and discharging of containers on and off of ships; the receipt of cargo; the delivery of cargo; the loading and discharging of cargo into and out of containers; the maintenance and repair of containers; [and] the inspection of containers at waterfront facilities." *ER Exhibit 1, p. 36.*<sup>2</sup>

Pacific Seaways is a shipping company that transports Chilean fruit into the Port of Wilmington. Its ships carry both palletized fruit below decks and containers of fruit on the decks. It contracts with MMS for stevedore services, including discharging and loading its ships. The Chilean fruit season typically runs from the middle of December through the middle to end of April, annually.

DSPC's Director of Operations Frank Vignuli clarified the nature of non-vessel container work in his testimony:

The non-vessel container work is work that occurs after the vessel is finished [*being unloaded*]. When the vessel is discharging, you're discharging containers onto chassis. Those chassis are being moved around and moved to the ship, from the ship. The non-vessel is the stuff that happens after that. There are containers that are on Pacific Seaways chassis that are going to be delivered. They have to be removed from that chassis, loaded onto a trucker's chassis. So non-vessel work would be something like that, that type of move, moving a container from a Pacific Seaways chassis to a trucker's chassis. *TR p. 58.*<sup>3</sup>

During the period of 2006 into 2010 (and perhaps for some period of time prior to 2006), the need for non-vessel container work on the Pacific Seaways ships was "sporadic" and usually

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<sup>2</sup> The Master Agreement between the Maritime Association and ILA was admitted into the record over the relevancy objection of the Charging Party. Because the issue concerns the scope of DSPC's control of the work in question, I find this document material and relevant to understanding the nature of the relationship between the various employers and workers at the Port of Wilmington, and therefore relevant to the disposition of the Charge.

<sup>3</sup> References to the hearing transcript are noted as *TR* followed by the page number.

required less than a full man day to accomplish. *Testimony of MMS President.*<sup>4</sup> Prior to the middle of 2010, with the agreement of the deep sea local (ILA Local 1694), MMS would call DSPC and request the assignment of manpower and equipment to perform the non-vessel container work. Coulahan testified MMS "... would call [DSPC] and say there's container work that needs to be done. We don't have the manpower, we don't have the equipment, can you do it?" *TR p. 26.* DSPC would send Local 1694-1 bargaining unit members to perform the work. MMS would then bill Pacific Seaways for the services, and forward payment for the work performed by ILA 1694-1 members to DSPC. ILA 1694-1 bargaining unit members were paid by DSPC for the non-vessel container work performed at MMS' request.

At some point in or about 2010, the volume of non-vessel container work MMS was required to provide increased. The deep sea local 1694 made a demand for the work. MMS began assigning the work to Local 1694 employees and ceased requesting DSPC's assistance in performing this work. According to the unrefuted testimony of DSPC's Director of Operations, "Murphy Marine [was] no longer calling and asking for labor and therefore [we] were no longer assigning 1694-1 to do labor they're not being asked to provide." *TR p. 69.*

ILA 1694-1 filed a contractual grievance with DSPC protesting MMS' assignment of the work to the deep sea local. The grievance was processed to arbitration pursuant to the terms of the parties' collective bargaining agreement. At the conclusion of the arbitration, the arbitrator issued the following consent award, with the agreement of the parties:

The Parties to this case, after interchanges of their respective views, have agreed to the following arbitration award as of April 4, 2012:

The receiving, checking, stacking, storage, unstacking and delivery of containers, other than loading containers onto the ship during ship operations at the Port, once unloaded from

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<sup>4</sup> DSPC presented two witnesses, John Coulahan (President of Murphy Marine Services) and Frank Vignuli (DSPC Director of Operations). Their testimony was unrefuted. ILA 1694-1 chose not to present any witnesses.

a ship of Pacific Seaways or any similar entity, is exclusively the work of the bargaining unit members of ILA 1694-1.

The employer is hereby directed to, within seven (7) days, take all steps necessary to communicate to and notify all affected parties of the terms of this award and to ensure that it is put into place within seven (7) days of the date of this award. *Charge Exhibit A.*

MMS was not a party to the grievance and no representative of MMS appeared or testified in the arbitration proceeding.

Thereafter, various members of DSPC's management staff attempted to convince MMS to reassign the non-vessel container work to DSPC. DSPC Director of Operations Vignuli contacted MMS President Coulahan to request the work be reassigned to DSPC, but Coulahan responded the work was within the jurisdiction of 1694 and that they had claimed the work. On or about July 24, 2012, DSPC's Executive Director Bailey contacted MMS President Coulahan and Delaware River Stevedore Inc.'s (DRS) President Robert Palaima by letter, which stated in relevant part:

RE: Local 1694-1 Work Jurisdiction

There continues to be a work jurisdiction issue between ILA Locals 1694 and 1694-1 with respect to "Backhauling jurisdiction"<sup>5</sup> and "Non-vessel container handling" (receiving, checking, mounting, storage, dismounting and delivery of containers) for Pacific Seaways or any similar entity. There have been discussions and meetings with hopes of clarifying and setting the standards for these operations, but to no avail.

**Non-Vessel Container handling – Pacific Seaways or any similar entity**

Diamond State Port Corporation, employer of Local 1694-1 recently attended an arbitration over the jurisdiction of performing non-vessel container handling for Pacific Seaways or any similar entity. The arbitrator's ruling dated April 4, 2012 (Enclosure #1) stated that this work is the exclusive work of bargaining unit members of ILA 1694-1...

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<sup>5</sup> The issue of "backhauling jurisdiction" is not part of the pending Charge which is limited to a claim that DSPC has failed or refused to abide by the binding arbitration consent award of April 4, 2012.

...The Diamond State Port Corporation has signed a CBA with Local 1694-1 and is obligated to comply with the April 4, 2012 ruling of the arbitration. Effective Monday, July 30, 2012 members of Local 1694-1 will be employed to perform the non-vessel container handling for Pacific Seaways. With collective efforts, I look forward to a smooth transition of these duties and responsibilities.

There have been and will continue to be changes and challenges that we will attempt to resolve mutually with a positive impact on the working environment of our mutual customers. We have the benefit of an outstanding labor force and great customer base in the Port of Wilmington, and together we will provide unimpeded excellent service.

By letter dated July 26, 2012, PMTA, MMS and DRS responded through their counsel:

... On July 24, 2012, you sent a letter to DRS and MMS concerning the jurisdiction of ILA Local 1694-1 concerning: (1) the non-vessel Container Handling and (2) Backhauling. You attached an arbitration award as to the former and a 1981 agreement concerning Backhauling.

My clients have reviewed the April 4, 2012 arbitration award which you attached. That Award was an agreement reached between the Port and its Union, Local 1694-1. Neither DRS nor MMS were party to that proceeding or the resulting agreed-upon Award and it has no impact upon them or their assignment decision. My clients believe that this work is properly that of Local 1694.

Also, counsel for ILA Local 1694 has written to the PMTA and advised that if MMS or DRS should seek to assign that work to ILA Local 1694-1, it will engage in picketing against the Employer.

On behalf of PMTA and its employer members, I am filing with the NLRB a section 8(b)(4)(D) unfair labor practice charge against Local 1694 and will seek a section 10(k) determination concerning the proper awarding of the work in dispute. Local 1694-1 will be permitted to participate in the 10(k) determination such that it is a tri-partite as opposed to your April 4 bi-partite settlement.

Alternatively, the PMTA will request that ILA District Council, of which both unions are members, internally adjudicate this dispute. PMTA and its members would agree to be bound by such determination, thereby obviating the need for a 10(k) hearing.

While the members await tri-partite adjudication, MMS will continue to assign the non-vessel container handling work to Local 1694 as has been done for the past two years.

Unable to meet the seven (7) day period for compliance provided for in the arbitration

award, in order to demonstrate its intention to fully comply with the award DSPC began to assign a number of its employees to perform the work when ILA Local 1694 members were performing non-vessel container work. DSPC has continued to assign to and pay ILA 1694-1 employees for non-vessel container operations on Pacific Seaways and similar entities, while deep sea local 1694 employees actually perform the work.<sup>6</sup>

### **ISSUE**

WHETHER DIAMOND STATE PORT CORPORATION VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH AND 19 DEL.C. §1307 (A)(1), (A)(3), (A)(5) AND/OR (A)(6) BY FAILING OR REFUSING TO ABIDE BY A FINAL AND BINDING ARBITRATION AWARD?

### **PRINCIPAL POSITIONS OF THE PARTIES**

#### **ILA Local 1694-1:**

ILA Local 1694-1 alleges DSPC improperly subcontracted a “substantial chunk of bargaining unit work to a private contractor,” which was then improperly performed by ILA Local 1694. The non-vessel container work at issue in this Charge is performed on DSPC property and at DSPC direction. Local 1694-1 asserts the non-vessel container work had been performed by its bargaining unit for a substantial period of time and is within its work jurisdiction.

In response to a grievance filed with DSPC under its collective bargaining agreement with ILA Local 1694, an arbitrator directed DSPC to take all steps necessary to ensure that the “... receiving, checking, stacking, storage, unstacking and delivering of containers ... is

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<sup>6</sup> Paying employees for work not performed is commonly referred to as “featherbedding”. The practice is expressly prohibited under the federal National Labor Relations Act. 29 U.S.C. §158 (b) states, “ It shall be an unfair labor practice for a labor organization or its agents ... (6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.” The NLRA is not applicable to public sector employees in Delaware and there is no provision in Delaware’s PERA similar to this provision of the NLRA.

exclusively the work of ILA 1694-1.” By not implementing the clear language of this award, DSPC has violated its good faith obligations under the PERA.

ILA 1694-1 requests PERB find DSPC committed an unfair labor practice and violated its statutory obligations by failing to abide by the arbitrator’s award and direct DSPC to provide all necessary back-pay to ILA 1694-1 members who should have been properly performing this work since April 4, 2012.

#### Diamond State Port Corporation

DSPC asserts it is not the entity that controls the work in question. Murphy Marine Services is a stevedore company that provides services, under contract, to Pacific Seaways, which includes the non-vessel container work at issue in this Charge. Prior to 2010, it was MMS’ practice to assign some of the non-vessel container work to DSPC, which then hired ILA 1694-1 bargaining unit employees to perform the work. At some point in 2010, MMS elected to assign the work to its own employees (bargaining unit members of the deep sea local, Local 1694).

The arbitration award does require DSPC to assign any non-vessel container work it performs to the ILA 1694-1 bargaining unit. DSPC made numerous, albeit unsuccessful, attempts to have Murphy Marine Services resume its prior practice of assigning non-vessel container work to DSPC. The record evidence reveals that DSPC has met its good faith obligations under the law and that it has not violated the arbitration award. Consequently, the charge should be dismissed.

#### **DISCUSSION**

The Charge alleges DSPC has violated its good faith obligation under the PERA by failing or refusing to abide by a final and binding arbitration award. ILA 1694-1 asserts DSPC’s

failure to fully implement a final and binding award constitutes a unilateral change to the negotiated grievance procedure, which is a mandatory subject of bargaining.

The Delaware Public Employment Relations Board has a long line of decisions establishing that a unilateral change in a mandatory subject of bargaining constitutes a *per se* violation of the duty to bargain in good faith. As clearly stated in the probable cause determination in this case, “In order to prevail in this matter, the ILA must establish by a preponderance of the evidence that DSPC has, in fact, failed or refused to implement a final and binding arbitration award, in violation of its statutory duties.”

Based upon a careful consideration of the evidence presented, I cannot conclude DSPC has violated its statutory obligations. The non-vessel container work required by Pacific Seaways and other similar entities is provided by Murphy Marine Services, pursuant to its contractual relationship to provide stevedore services to the shipping companies. Murphy Marine Services has no direct contractual relationship with ILA Local 1694-1, the Charging Party in this matter, nor does it have a contractual relationship with DSPC which requires it to provide non-vessel container services to its clients through DSPC.

No evidence was presented to refute the testimony provided by DSPC witnesses that Murphy Marine Services had a practice of requesting assistance from DSPC to provide non-vessel container work to MMS customers prior to 2010. The Charging Party asserts DSPC has an obligation under the arbitration award to exclude Murphy Marine and/or Pacific Seaways from doing business at the Port of Wilmington in order to comply with the arbitration award. No support was offered for this position, and, on its face, it appears contrary to common sense. DSPC has a lease relationship with Pacific Seaways, who contracts with Murphy Marine. No assertion was made or support provided that the lease requires the action the ILA is demanding.

The arbitration award of April 4, 2012, memorialized a consent agreement between

DSPC and ILA Local 1694-1. Pursuant to that consent award, DSPC through its Director of Operations and Executive Director, communicated with Murphy Marine Services on multiple occasions in an effort to convince it to reassign the work to DSPC. DSPC also made a commitment at this hearing that any non-vessel container work it is responsible to provide will be done by ILA Local 1694-1. By these actions, DSPC has met its good faith obligations to comply with the arbitration award.

This case presents a situation which involves both public and private sector employers, employees, and unions, as well as a dispute over work jurisdiction. The PERA creates rights and obligations exclusive to public sector employers and labor organizations which represent employees of the public employers, in this case DSPC and ILA Local 1694-1, respectively. This Board has no authority to compel private entities such as Murphy Marine Services, Pacific Seaways or any other private sector lessors at the Port of Wilmington to conduct its business in a manner which conforms to the obligation of public employers under the PERA.

The facts of this case are significantly different from those presented in *International Longshoreman's Association Local 1694-1 v. Diamond State Port Corporation* (ULP 11-02-787, VII PERB 5069 (6/21/11), affirming the decision of the Hearing Officer below (VII PERB 4977 (4/13/11)). The decision in that case<sup>7</sup> turned on the facts that DSPC had taken no steps to comply with the clear and unambiguous language of the arbitration award. Rather than the mutual agreement of the parties, that arbitration award was based on the arbitrator's consideration of a complete record

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<sup>7</sup> In reaching the decision in the 2011 case, the only issue properly before PERB was whether DSPC violated its duty under the PERA to maintain the status quo of a mandatory subject of bargaining. The Hearing Officer concluded, "The parties are entitled to the full measure of their negotiated agreement. DSPC and the ILA agreed that the final step of the negotiated grievance procedure is arbitration and that the decision rendered by the arbitrator (who was appointed pursuant to their agreed upon process) is final and binding. By refusing to implement the decision rendered by the arbitrator in this case, and not pursuing any rights the employer may have for review of that decision for more than eight months after its issuance, DSPC effectively altered the negotiated grievance and arbitration procedures, and thereby committed a *per se* violation of 19 Del.C. §1307(a)(5) and also violated 19 Del.C. §1307(a)(1)."

and argument made by the parties in that proceeding.

In the instant Charge, the arbitration award reflected an agreement of the parties, and does not resolve or address the work jurisdiction issues which surfaced after DSPC attempted to implement the award. DSPC does not have control or authority over the non-vessel container work performed by Murphy Marine Services; consequently that work is not subject to the arbitration award. The Charge does not allege that DSPC has failed or refused to provide any work described by the consent award, which is within its control, to ILA Local 1694 members to perform.

For the reasons stated above, the record does not support a finding that DSPC has violated its good faith obligations or any other responsibilities under the PERA, as alleged in the Charge.

### **CONCLUSIONS OF LAW**

1. The State of Delaware is a public employer within the meaning of 19 Del. C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). Diamond State Port Corporation (DSPC) is an agency of the State. DSPC operates the Port of Wilmington which is located in Wilmington, Delaware.

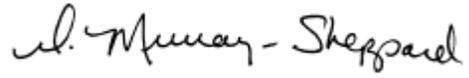
2. The International Longshoremen’s Association, Local 1694-1, (“ILA”) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1, the ILA is the exclusive bargaining representative of a bargaining unit of DSPC employees within the meaning of 19 Del.C. §1302(j).

3. The record does not support a finding that DSPC has failed or refused to implement the April 4, 2012 arbitration award or that it otherwise violated its obligations under the Public Employment Relations Act, as alleged.

**WHEREFORE**, the Charge is dismissed in its entirety.

**IT IS SO ORDERED.**

DATE: August 15, 2013



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DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.