

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

DIAMOND STATE PORT CORPORATION,)	PERB Review of
Appellant,)	Decision to Deny
v.)	Subpoena
)	
INTERNATIONAL LONGSHOREMEN’S ASSOCIATION,)	<u>BIA 07-12-610</u>
LOCAL 1694-1,)	
Appellee.)	

Appearances

Thomas LoFaro, SLREP/HRM/OMB, for DSPC

Bernard N. Katz, Esq., Meranze & Katz, for ILA 1694-1

BACKGROUND

Diamond State Port Corporation (“DSPC”) is a public employer within the meaning of section 1302 (p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”) and is the Appellant in this request for review.

The International Longshoremen’s Association, Local 1694-1 (“ILA”) is an “employee organization” within the meaning of §1302(i) of the PERA and is the exclusive bargaining representative of a bargaining unit of Port employees as defined in DOL Case 103, within the meaning of 19 Del.C. §1302(j).

DSPC and ILA 1694-1 have a long-standing collective bargaining relationship. They were parties to a collective bargaining agreement which by its terms expired on September 30, 2007. At all times relevant to this appeal, the parties have been engaged in negotiations for a

successor agreement. During the course of these negotiations, Thomas LoFaro has served as the Chief Negotiator for DSPC, and Bernard N. Katz, Esq., has served as the Chief Negotiator for the ILA.

On or about November 26, 2007, the parties were scheduled for the first of three mediation sessions to begin at 10:00 a.m. By e-mail to the PERB Deputy Director on the morning of November 26, the DSPC Chief Negotiator made the following request:

This is to request that the PERB issue a subpoena to ILA Local 1694-1 in the above-captioned matter directing that it provide me with a copy of any and all contract [*sic*] covering warehouse employees for which ILA is the bargaining representative consistent with the above-captioned request.

I have made three requests for these documents. In a response dated November 16, 2007, Mr. Katz provided a copy of two collective bargaining agreements: 1. the 2004-2010 Agreement with the Philadelphia Marine Trade Association; and 2. the 2004-2010 United States Maritime Alliance, LTD Agreement. These agreements cover Deep Sea employees and are not relevant to the warehouse local contracts I requested. Therefore, I am making this subpoena request. Thank you.

The mediation session proceeded as planned but did not result in a settlement of the negotiations.

By letter dated November 28, 2007, the ILA's Chief Negotiator responded to PERB concerning DSPC's subpoena request:

When I returned to my office (after two days of 'negotiations' at your premises) I had in my mail a copy of Mr. LoFaro's communication to you asking for you to issue a 'subpoena'. Mr. LoFaro's request is wholly inappropriate. I assured him that he could have total access to any other contracts of which we had copies. As a matter of fact, I had earlier provided him with a copy of the collective bargaining agreement between Local 18 IFPTE and the South Jersey Port Corporation. This contract reflects the substantially higher wage levels of an identical unit which does not have the type of disturbing 'lower rated' category which the existing contract, that we have been attempting to negotiate in the above-captioned matter, contains.

I have further advised Mr. LoFaro that we have no objections to his making direct request to the ILA District Council for whatever contracts he seeks. In addition, I have advised him that we would be happy and intended to have ILA International Vice President James Paylor attend one of our sessions and set forth an explanation of why the data, which I sent to him (LoFaro), was applicable to the issues in our present negotiations. I have also assured him all appropriate informational cooperation – in areas which

we have the data. I have reiterated to him that we have no objections to his making direct requests and being supplied by other ILA entities with appropriate relevant data that would aide him in bringing his thinking into the 21st century. Moreover, he should know that the Diamond State Port Corporation itself is fully aware of the earnings system enjoyed by the Local 1694 (not 1694-1) under a separate collective bargaining agreement to which DSPC is both directly and indirectly bound. If Mr. LoFaro desires anything more, he should feel free to contact me directly and I will be happy to open my relevant files to him and let him trot through them for himself.

I am uncertain as to whether or not your procedure has appointed Mediator Sean Rogers, Esquire reporting to you or keeping you advised. If you are being kept 'in the loop' then you will know that the DSPC position reflected by Mr. LoFaro's letter to you of November 26, 2007, is some type of ploy. The position being taken by the Employer in these negotiations clearly portrays its intent to conclude an unfair, substandard, Employer-tilted labor agreement.

DSPC responded by e-mail addressed to PERB (providing a courtesy copy to ILA Counsel) dated November 30, 2007:

In response to Mr. Katz' letter of November 28, this is reconfirm [*sic*] my request that the PERB issue the subpoena referenced below and compel production of the requested contracts.

We do not dispute that Mr. Katz has provided us the South Jersey Port Corporation contract with another union, or that he has offered to have an ILA International official meet with us. However, his letter and comments are non-responsive to my request for any and all ILA warehouse contracts. Thank you. (*emphasis in the original*)

The ILA responded to the DSPC Chief Negotiator by letter dated December 3, 2007, which states in relevant part (PERB was provided a courtesy copy):

Apparently, you have misplaced, or forgotten, or simply neglected my communication to you of November 16, 2007, with the enclosures which were also forwarded to you at that time. These are not the contracts of Local 1694-1. They are other contracts which – in response to your request- we went to great length to procure in order to accommodate you. In addition there is a collective bargaining agreement involving Local 1694 and a number of other ILA Local unions. This was included in the documents I sent to you on November 16, 2007.

In addition to these documents, you had at your disposal the full contract of Local 1694 (one of the groups bargaining with the Association). If you have lost that contract, please advise and I will attempt to provide you with

another copy. At this juncture, we are continuing to try to help you in straightening out research work for which you are responsible. I thought that we had successfully accomplished that accommodation. We (Local 1694-1) have no standing or formal access by which to obtain any additional documents especially when we do not know what documents you are seeking. We will continue to reflect the same type of “above and beyond the call of duty” cooperation that we have been giving you in the past. If you have any specific contracts with names, please feel free to direct your request to the entities who are parties to those contracts. We certainly have no objection to your obtaining them directly – assuming you have some idea of what you are seeking.

The ILA transmitted a proposed settlement agreement to DSPC by letter dated December 4, 2007, prior to the scheduled third and final mediation session on December 6, 2007. That letter again referenced DSPC’s request for subpoena, stating in relevant part:

You have further indicated to me that I have not fully provided you with all of the other contracts – stating to me that you need “warehouse” type of agreements. I thought that I had fully responded *again* by my letter to you of December 3, 2007. However, as a result of our telephone conversation today, I am stating to you that I do not have in my possession, nor know of any other ILA contracts which shore warehousing units. However, if there are such and they are of any relevance, we have no objection to your being provided with them directly. You have been provided with the only other existing shore side warehouse agreement to which I had access and which I supplied to you (Local 18 IFPTE and SJPC). I will be happy to further discuss the availability of such data with, upon his return, Vice President Paylor and – as I noted to you before – he will be happy to make himself available to provide you with any data in his possession relevant, to the issues which you pose or to the questions of any area ILA warehouse type of rates. We know of none.

... Incidentally, I note that the December 3, 2007, *BNA Labor Relations Reporter*, sets forth that the average first year wage increase for all contract settlements was 3.6 percent. This includes industries whose jobs require far less skill, ability and exertion than [*sic*] others in that category. The report goes further noting that: “...excluding construction, the non-manufacturing average increase was 3.9 percent compared with 3.7 percent in 2006 ...”

By letter dated December 5, 2007, PERB’s Deputy Director advised DSPC and the ILA that she declined to issue the requested subpoenas, stating:

At this time, PERB declines to issue the requested subpoena for a number of reasons. First, this impasse is currently in mediation and has been assigned to the control of Mr. Rogers. Complicating the mediation process with the issuance of subpoenas serves no useful purpose. It is my understanding that

the parties will meet tomorrow for a third mediation session and that the ILA tendered a counterproposal in the last few days (in response to the Port's offer of November 27) which will be considered at that time.

Secondly, the ILA has repeatedly asserted that it has provided access to all of the information it has in response to the State's request. In his letter of December 4, Mr. Katz clearly states, "I do not have in my possession, nor know of any other ILA contracts with shore warehousing units."

Finally, the information requested by the State should also be available to the State through its association with other area and regional ports. I trust that the Port has done its homework and assembled the information on key issues from surrounding ports well in advance of this point in the negotiation process.

I am encouraging both parties to focus their energies on resolving this impasse through sustained, good faith efforts in mediation. I trust that progress has been made and that the best interests of the Port, the employees and the citizens of Delaware are foremost in all of your minds as you continue to narrow your differences.

DSPC and the ILA did not resolve their differences at the final mediation session and the impasse was processed to binding interest arbitration. By e-mail addressed to the Deputy Director on December 12, Mr. LoFaro renewed DSPC's request for subpoena:

As you know, the parties in the above captioned case did not reach agreement through mediation. In a letter dated December 10, 2007 Mr. Katz requested that the process move to binding interest arbitration. In a separate letter of the same date, after my specific request made at the last mediation session, Mr. Katz said he would provide another Local 1694-1 warehouse contract that he had previously withheld. The balance of the letter amounts to stonewalling our request.

With these new developments, this is to renew my request that the PERB issue a subpoena to the ILA Local 1694-1 directing that it provide me with a copy of any and all warehouse employee contracts for which the ILA is the bargaining representative consistent with the above attached request.

In your letter of December 5, you stated: "At this time, PERB declines to issue the requested subpoena for a number of reasons." For the purpose of this renewed request, I would like to provide you with information about the final reason you declined to issue the subpoena, which was: "the information requested by the State should also be available to the State through its association with other area and regional ports. I trust that the Port has done its homework and assembled the information on key issues from surrounding ports well in advance of this point in the negotiation process."

In fact, that information is not available to the State. Please be advised that the Port and the State have made extraordinary efforts to obtain information and other warehouse contracts through contacts made to other ports, as well as employer associations, to no avail. They have informed us that such contracts, and wage and benefit information are considered proprietary in nature and, as such, they will not share any of this information with us for competitive reasons. The reality the port industry faces is cut-throat competition in which customers pit ports against each other in demanding the lowest possible charges. Thus, customers have shifted their business from one port to another literally over pennies per tonnage charges.

Therefore, the only source of these warehouse contracts is the ILA itself. Its International Union has copies of all such contracts, and it can readily provide Mr. Katz the requested contracts. For these reasons, the issuance of the requested subpoena for information essential to the process is necessary. Our request for "any and all" such contracts is without limitation. The parties will have the opportunity to make arguments about the relevance of any particular contract or category of contracts which, of course, is a matter that the arbitrator will rule on.

I would appreciate it if the PERB would issue the requested subpoena in short order. Thank you.

The ILA responded to the PERB Deputy Director by letter dated December 12, 2007

(again, DSPC was provided with a courtesy copy):

Upon my return to my office at 3:45 p.m., I was shown Mr. LoFaro's e-mail to you of this date. It is not only an absurdity but further, it is an affront and an insult. At no time in any way, shape, or form had I previously "withheld" any document from Mr. LoFaro. It simply never occurred to me (or to anyone else on our Committee) that there conceivably could have been any relevance to the minuscule private warehousing operation which Mr. LoFaro and I discussed a few days ago and which I assured him that he would receive a copy of that wholly unrelated contract.

Further, I *did* supply Mr. LoFaro with all relevant contract documents which I had in my possession. These included the Local 18 IFPTE and South Jersey Port Corporation agreement, ILA agreements with other Ports that encompassed all of the data which could conceivably be of relevance to our present issues and an offer to provide him with the 1694-1 agreement with MTC as soon as I received an executed copy which hopefully, will be this week.

Further, I find it difficult to accept Mr. LoFaro's contention that neither DSPC nor he have made efforts to obtain other contracts or have not been successful. On the contrary, I have previously advised Mr. LoFaro that neither Mr. Paylor of the ILA, nor I have any objections to any ILA

agreements being distributed to him. I am formally requesting – indeed demanding – the name, address, and phone number of any Port or Corporation official who has refused to make available to him any relevant contracts. I repeat, that we not only have no objection to such contracts being released to him, but further, I have repeatedly stated that any such requests may be accompanied by our comment that any relevant information sought by Mr. LoFaro may be given to him.

Further, I again must emphasize the willingness of International Vice President Paylor to appear at a negotiating session or at any other type of appropriate meeting and set forth all of the information and contracts which conceivably could be relevant to any frame of reference which DSPC might legitimately pursue. That offer still exists. Further, if there are in fact specific contracts with other ILA entities that are in the possession of the International Union – and Mr. LoFaro advises me of which contracts he is seeking – we will be happy to oblige. I assume that when Mr. LoFaro makes the statement that he has : “... *made extraordinary efforts to obtain information and other warehouse contracts through contacts made to other Ports, as well as employer associations, ...*” he at least knows of whom the requests were made. It would be proper for him to immediately supply me with the names, addresses and phone numbers of the persons to whom he refers in the fourth paragraph of the first page of his e-mail.

Frankly, we are concluding that Mr. LoFaro and his Committee are engaging in a stratagem which we do not understand and which is probably designed solely to avoid concluding any agreement, whatsoever. I am urging that the Employer Negotiating Committee (including Mr. LoFaro) prove me wrong by behaving with the type of mature and sincere desire to conclude an agreement to which Local 1694-1 and its members are entitled. If you or Mr. LoFaro have any further questions or comments, please get back to me.

DSPC’s Chief Negotiator again responded by e-mail to the PERB Deputy Director on the morning of December 14, 2007:

As you know, Mr. Katz faxed a letter to you, dated December 12, 2007, in response to my renewed request with commentary that I will not dignify with an answer.

As previously noted, in response to my direct question to Mr. Katz to provide me with a copy of another Local 1694-1 warehouse contract in the presence of Mediator Sean Rogers on December 6, he said he would provide it to me “next week”, referring to this week. Instead, he sent me a self-explanatory letter (second attachment above) evidencing his failure to follow through on the above-captioned commitment, much less provide me with all ILA warehouse contracts which the ILA International Union possesses.

At this point, I simply would like to know if you are going to issue the requested subpoena. Thank you.

The ILA's Counsel responded first by letter dated December 14:

This fax is being dictated from a session in which I am involved, some 100 miles from my office. My secretary advises me that Thomas LoFaro e-mailed two communications to her – on at 11:47 a.m. and the other at 12:41 p.m. It is impossible for me to ascertain just what he is attempting to convey or if some mischief maker has decided to send e-mails in his name. At very least, it has become clear that he is attempting to divert attention from what would seem to be DSPC's clear bargaining in bad faith – if indeed these interchanges are taking place at the Employer's direction.

At any rate, I will attempt to deal with the subject matter of the two e-mails of today when I return to the office on Monday, December 17, 2007 – and read them for myself. My affirmative response, to Mr. LoFaro's request for a copy of the irrelevant MTC contract with Local 1694-1 was based upon the assumption that I had the actual agreement, i.e., a document bearing signatures of the parties. This is essential so that we could be assured that, as irrelevant as it might be, we were sending the correct document. That was explained to Mr. LoFaro "in print". I would hope that he is reading my communications.

Insofar as the other documents are concerned – which neither my officer nor Local 1694-1 has copies, I have offered a meeting with International Vice President Paylor in order for Mr. LoFaro to convey directly to him what he (LoFaro) is seeking. Mr. Paylor has assured me that he would not attend such a meeting but, will be appropriately cooperative. I will further answer the e-mails of today when I have returned to my office on Monday and read them directly.

ILA Counsel further responded by letter dated December 17, 2007:

Upon my return to the office, I read Mr. LoFaro's curious e-mails. It does not warrant any further elaboration than my fax of December 14, 2007. However, I am advising you and Mr. LoFaro that at 3:00 p.m. today, I received the contract booklet, so fervently being sought with anxiety and threats by Mr. LoFaro, regarding MTC Delaware, LLP and Local 1694-1. I have been advised that this private sector undertaking, as of the present time, has only 11 or 12 active employees and that its wholly, unrelated operation is tenuous at best. A copy of the executed labor agreement is presently being duplicated by my office and, despite its lack of any relevance, will be dispatched to Mr. LoFaro tomorrow.

Local 1694-1 has no other agreements over and above what I have sent to or offered to share with Mr. LoFaro in the past. Hence the continued request for a "subpoena" of the Local Union is both meaningless and absurd.

I renew my offer to have International Vice President Paylor attend a meeting of the Local and the Employer to set forth all of the data conclusively establishing that the position of ILA 1694-1 is completely supported by all relevant contracts, wage levels and benefit provisions in the area ILA industry.

I will await further advice in this area.

On December 17, 2007, the Deputy Director declined to issue the subpoena requested by DSPC, in a letter setting forth the reasons for doing so:

PERB declines to issue the subpoena requested by the Diamond State Port Corporation for “a copy of any and all contract[s] covering warehouse employees for which the ILA is the bargaining representative.” The ILA has responded to the Port’s request by repeatedly asserting that it did supply Mr. LoFaro with all relevant contract documents in its possession, including the Local 18 IFPTE and South Jersey Port Corporation agreement, ILA agreements with other Ports, and an offer to provide a copy of the 1694-1 agreement with MTC as soon as an executed copy is received. Additionally, the ILA has offered to make its International Vice President available to the Port to further discuss the information the Port seeks.

Whereas PERB has broad subpoena power for witnesses and documents relating to matters pending before it, that power is exercised with discretion and directed toward the goal of promoting harmonious and cooperative collective bargaining relationships. It is PERB’s practice to consider responses to requests for subpoena. In this case the back and forth correspondence between the parties has been prolific and vitriolic. The Port has requested general, non-specific information and, despite the ILA’s repeated assertion that it has provided all the information in its control responsive to the request, the Port has neither refined its request nor requested that the subpoena be issued to an entity that may actually have the information it is seeking. If the Port has specific contracts in mind, it is reasonable to presume that both unions and employers are parties to those agreements. By identifying the agreements it seeks, the Port could request those agreements directly from the source.

The parties have an obligation to bargain in good faith and to provide relevant information within their control upon request. The NLRB has held that both employers and unions have a responsibility to respond in good faith by providing information which is relevant to negotiations, requested in good faith and advances the parties’ efforts to reach a negotiated settlement. *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 567, C.A.D.C. (1979).

In this case, there is no useful purpose served by issuing a non-specific subpoena to which the ILA will certainly respond that it has complied to the best of its ability.

The alternative is for the Port to file an unfair labor practice charge to which the ILA may respond in kind. The filing of a charge would necessitate creation of a factual record on which a determination could be made as to whether the Port's request was reasonable, relevant and made in good faith, as well as whether the ILA's response was responsible, justified and similarly made in good faith.

The parties' time would be better spent in seeking mutual resolution of the issues in their impasse and improving their relationship through direct conversation and discussion rather than waging a paper war over copies of purported agreements from third parties. Presumably, the positions which resulted in the impasse are well-supported and based upon information which has been gathered and shared well prior to this point in the negotiations.

The parties were directed by the Executive Director in his letter of this date to provide their last, best final offers on or before **Thursday, January 3, 2007**. Please provide your offer directly to the PERB. Upon receipt of both offers, this office will swap the offers. This is the one instance in which the parties are not required to provide a simultaneous copy to opposing counsel in order to allow each party to develop and maintain the integrity of its offer without an unfair advantage for either party.

By letter dated December 18, 2007, ILA 1694-1 provided to DSPC's Chief Negotiator a copy of the executed collective bargaining agreement between Local 1694-1 and MTC Delaware, LLP.

On December 19, 2007, DSPC requested review by the full Board of the Deputy Director's decision not to issue the requested subpoena; ILA 1694-1 filed its response on December 26, 2007. A copy of the complete record in this matter was provided to each member of the Board.

The full Board convened in public session on January 16, 2008, to consider this request for review. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

Upon consideration of the record and arguments of the parties, the Board denies DSPC's appeal of the PERB Deputy Director's refusal to issue the requested subpoena. The Deputy Director did not abuse her discretion, commit an error of law, nor did she err in her application of the law to the facts present. Therefore, the Board affirms the Deputy Director's decision to decline to issue the subpoena requested by DSPC during the course of negotiations.

Section §1306 of Title 19 incorporates by reference the powers of the Public Employment Relations Board, which are set forth in the original enabling statute at 14 Del.C. §4006, stating in relevant part:

- (h) To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers...
 - (2) To hold hearings, subpoena witnesses, administer oaths and take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas requiring the production and examination of any books or papers, including those of the State and/or a board of education relating to any matter pending before it, and to take such other action, including the granting of interim or other relief as may be necessary to discharge its powers and duties. In no case, however, should it be empowered, either directly or through a fact-finder, to mandate to the public school employer action which involves an economic cost to the public school employer.

The Rules and Regulations of the Delaware Public Employment Relations Board also specifically address the issuance of subpoenas:

7.7 Witnesses and Subpoenas

The Board shall, where it deems necessary, subpoena witnesses and issue subpoenas requiring the production and examination of books, papers, or other documents it deems relevant to the issue before it. The parties involved in a hearing may, no later than seven (7) days before the hearing to which the subpoena pertains, request that the Board issue subpoenas. The Board may decline to honor such request for a subpoena if the Board determines that the evidence sought does not relate to the matter to be heard, that such subpoena request does not describe with sufficient particularity the evidence whose production is requested, or that

the subpoena seeks to compel the appearance of witnesses who would offer testimony which would merely be repetitive of other witnesses who will be produced.

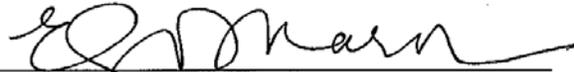
In this case, there was no request for subpoena in connection with a PERB hearing. The mediation provision of the PERA, 19 Del.C. §1314, does not provide for the issuance of subpoenas. The binding interest arbitration provision, 19 Del.C. §1315, empowers the arbitrator to administer oaths and issue subpoenas either on behalf of the parties or on the arbitrator's own behalf. In this case, no request was made to the arbitrator in connection with a binding interest arbitration hearing; the request was made on December 12, 2007, more than a month before PERB issued its determination that the impasse was ripe for binding interest arbitration on January 17, 2008.

Rule 7.7 provides that a request may be denied "where such subpoena request does not describe with sufficient particularity the evidence whose production is requested". The Deputy Director twice advised DSPC that its request was non-specific, overly broad and did not request information directly from the organizations who possessed the information it sought. DSPC argued that requesting information from ILA Local 1694-1 was the most convenient method for it to get copies of the collective bargaining agreements it thought would be relevant to the presentation of its case. ILA Local 1694-1 repeatedly advised DSPC it did not have the contracts DSPC wanted. There is no obligation under the PERA for the Local to provide collective bargaining agreements which it does not possess and/or to which it is not a party.

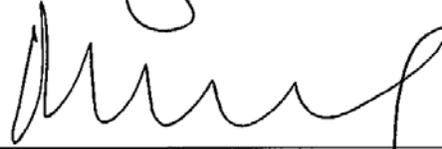
DECISION

Consistent with the foregoing discussion, the decision of the Deputy Director not to issue the requested subpoena during the course of negotiations is affirmed.

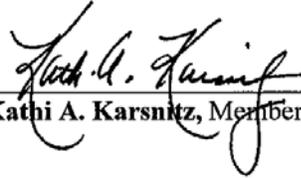
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: July 15, 2008