

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.)	Probable Cause
)	Determination
DIAMOND STATE PORT CORPORATION,)	
)	
Respondent.)	

The Diamond State Port Corporation (“DSPC” or “Respondent”) 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”).

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).

On or about November 16, 2012, the ILA filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the DSPC in violation of §§1307(a)(1), (3), (4), (5), (6) and (7).¹ Specifically, the Charge alleges “sometime

¹§ 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.

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*. The ILA filed a contractual grievance protesting the assignment of the work to the private contractor which 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 award:

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 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*.

The ILA asserts that at the arbitration hearing the parties agreed the ILA’s position was correct and the arbitrator, consistent therewith, issued his decision and award effectively sustaining the grievance. 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 returned a number of its employees to perform the work. Before full compliance occurred, the

-
- (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.

dispute escalated when the private contractor filed an unfair labor practice charge with the National Labor Relations Board (“NLRB”) asserting a violation of §10(k) of National Labor Relations Act. The ILA alleges DSPC has communicated it intends to ignore the arbitration award.

On January 18, 2013, Respondent filed its Answer to the Charge and New Matter. Respondent alleges that it is the private contractor who has the responsibility to decide whether to assign the work in question to DSPC employees. In the absence of this designation, DSPC has no ability to assign the work to its bargaining unit employees. DSPC admits that grievance was resolved at the arbitration hearing but denies that the parties’ agreed that the work belonged to DSPC bargaining unit employees. DSPC acknowledges that it attempted to have the private contractor assign the work to DSPC employees but the contractor refused claiming that the arbitrator’s award had no effect on it as it is not party to the collective bargaining agreement between ILA 1694-1 and DSPC.

DSPC’s Answer also included New Matter in which it asserts the Charge fails to state a claim under the PERA and that the Charge is barred by the statute of limitations established by 19 Del.C. §1308. DSPC also asserts PERB should adopt a post-arbitral deferral policy and defer the current issue by requiring the ILA to seek judicial enforcement 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.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause

to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

Based on the pleadings, even when considered in a light most favorable to the ILA, there are no facts to support the claim that DSPC's alleged failure or refusal to abide by a final and binding arbitration award may have violated 19 Del.C. §1307(a)(4) and/or (a)(7) as alleged. Wherefore, these portions of the Charge are dismissed.

The Charge alleges DSPC has violated its good faith obligation under the PERA by failing or refusing to abide by an arbitrator's decision. Essentially the assertion is the Port'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. This 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.

The allegations of violations of 19 Del.C. §1307(a)(1), (3) and (6) are derivative charges concerning the effects of the purported *per se* violation of DSPC's good faith obligation on

bargaining unit employees and the union.

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. The pleadings raise a factual and legal question concerning the scope of DSPC's control over the work in question. The ILA alleges in its Charge that the work is currently being performed "by a private contractor on the premises of Diamond State Port Corporation." *Charge ¶4.* DSPC responds in its Answer,

...[T]he private contractor makes the decision whether to assign the disputed bargaining unit work to Diamond State Port Corporation (DSPC). Thus, if the disputed bargaining unit [work] is assigned to DSPC for completion, DSPC has the ability to assign it to members of the Union to perform. If the private sector contractor does not assign the disputed work to DSPC, then DSPC has no ability to assign it to members of the Union to perform. *Answer ¶4.*

DSPC's Answer to the Charge includes new matter asserting the Charge fails to state a claim for relief under the PERA. Based upon the foregoing discussion, that defense is dismissed as being without merit. DSPC further alleges that the Charge is untimely, but provides no factual or legal basis for this assertion; wherefore, it is also dismissed.

DSPC also argues that PERB should adopt a post-arbitral deferral policy, similar to that of the National Labor Relations Board as established in *Spielberg Manufacturing Co.*² and its progeny. Upon completion of the factual record in this case, argument will be accepted from the parties and this issue will be addressed in the resulting decision.

DETERMINATION

The pleadings do not support a finding that there is probable cause to believe that the State violated 19 Del.C. §1307(a)(4) and (a)(7). Consequently, that portion of the Charge is dismissed.

² *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

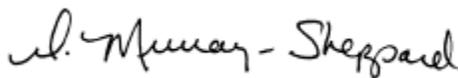
Considered in a light most favorable to the Charging Party, the pleadings support a determination that there is probable cause to believe a violation of 19 Del.C. §1307(a)(1), (a)(3), (a)(5) and/or (a)(6) may have occurred. The pleadings raise questions of fact which can only be resolved following submission of a complete evidentiary record upon which the legal issues may be considered and a decision may be rendered.

WHEREFORE, a hearing will be promptly scheduled for the purpose of establishing a factual record upon which a decision can be rendered concerning:

WHETHER DSPC 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?

Having found probable cause based on the pleadings, DSPC's assertion that the charge fails to state a claim upon which relief can be granted is denied. DSPC's assertion that the Charge is untimely is also dismissed as it is not factually or legally supported by the pleadings. Upon completion of the factual record in this case, argument will be accepted from the parties on this argument and it will be addressed in the resulting decision.

DATE: April 17, 2013



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