COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMALGAMATED TRANSIT UNION, LOCAL 85	:	
v.	:	
	:	CASE NO. PERA-C-11-225-W
PORT AUTHORITY OF ALLEGHENY COUNTY	:	

PROPOSED DECISION AND ORDER

On July 22, 2011, the Amalgamated Transit Union, Local 85 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Port Authority of Allegheny County (Authority) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act).[1] The Union specifically alleged that the Authority violated its collective bargaining obligations when it unilaterally subcontracted bus routes to Lenzner Coach Lines, effective March 27, 2011. The Union further alleged that, prior to the unilateral changes, the Authority changed its position in bargaining the subcontracting and the resulting layoffs, thereby creating a moving target for the Union.

On August 11, 2011, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on Wednesday, January 25, 2012, in Pittsburgh. The hearing was continued at the request of the Union's counsel, due to a conflict in his schedule, and was rescheduled for March 25, 2012. On February 9, 2012, Counsel for the Authority requested a continuance, due to a conflict in his schedule, and the matter was rescheduled for September 5, 2012, in Pittsburgh. During the hearing on that date, all parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses.

On March 11, 2013, the Union filed its post-hearing brief. The Authority filed its post-hearing brief on April 29, 2013. On June 27, 2016, the undersigned Hearing Examiner deferred the matter to the grievance arbitration process, which had long since concluded.[2] On June 20, 2017, the Union filed a request for a decision on the merits of the unfair practice charge stating that it has no record of a grievance being filed on the matter. By letter dated July 11, 2017, the Authority filed a response to the Union's request and therein advocated for dismissal of the charge under the Board's post-arbitral deferral policy because the Union failed to assert an appropriate factual basis, under Pine Grove Area School District, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Charge Until Further Order of the Board, 1979), for retaining jurisdiction and removing the deferral.

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[1] During the hearing in this matter, the Union withdrew its claims under Section 1201(a)(3). (N.T. 22).

[2] Due to hiring freezes and personnel losses through attrition during this time period, the Board experienced backlogs in cases causing significant delays in issuing decisions.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)

3. On March 30, 2011, the Union filed Grievance No. 9912. (Port Authority Exhibit 3)

4. Grievance No. 9912 provides, in relevant part, as follows:

> The Union hereby grieves Port Authority's agreeing to allow Lenzner Coach Lines to perform the work of bargaining unit employees in violation of the Union's jurisdiction clause in its collective bargaining agreement. In addition, the Union grieves the Employer's failure to require Lenzner Coach Lines to become bound by the terms of the parties' collective bargaining agreement and 13(c) agreement (Section 5333(b) of title 49 of the U.S. Code. Chapter 53) as a condition precedent to allow Lenzner Coach Lines to perform work covered by the parties' collective bargaining agreement, including but not limited to, work previously performed by bargaining unit employes. In addition, Port Authority has refused or failed to provide dismissal or displacement allowances to those employees losing employment as a result of Port Authority's agreement to allow Lenzner Coach Lines the right to perform bargaining unit work.

(Port Authority's Exhibit 3)

5. The parties litigated Grievance No. 9912 at a grievance arbitration hearing before Neutral Arbitrator William J. Miller, Jr., on January 10, 2012. (Port Authority's Exhibit 6)

6. Arbitrator Miller issued his Award on August 23, 2012, before the hearing in this unfair practice case, which subsequently became final when the Authority's partial arbitrator also signed the Award on November 6, 2012. (Port Authority's Exhibit 6, Board Exhibit 3)

7. In the Arbitration Award, Arbitrator Miller concluded that the Authority did not violate the collective bargaining agreement, as alleged by the Union in Grievance No. 9912, when it issued bus route permits to Lenzner Coach lines and subcontracted certain bus routes, resulting in layoffs. (Port Authority's Exhibit 6)

8. The Union admitted during the hearing that Grievance No. 9912 was filed relative to the Union's claim of improper subcontracting. The parties have arbitrated subcontracting and the transfer of work outside of the bargaining unit a number of times in the past generating a body of arbitration decisions governing the parties. (N.T. 68-69)

9. During the September 5, 2012 hearing, the Authority explicitly requested a deferral of unfair practice claims since the grievance on subcontracting had already been litigated. (N.T. 17-18)

10. On July 27, 2016, the undersigned Hearing Examiner deferred the unfair practice charge to the grievance arbitration process under the Board's Pine Grove, supra, post-arbitration standard. (Board Exhibit 1)

11. The July 27, 2016 deferral letter provides as follows:

> This letter confirms that I have deferred this matter to the grievance arbitration process. A grievance has been filed that is rooted in the parties' collective bargaining agreement. The discrimination claim originally charged was withdrawn on the record at the hearing and an arbitration award disposing of the same issues in dispute has been issued.
>
> Accordingly, the Board's Pine Grove standard has been satisfied. The Union will contact the Secretary of the Board to withdraw the charge of unfair practices at once, unless there are allegations that the arbitration proceedings were not fair and regular, or that the result is repugnant to the Public Employe Relations Act. Since an arbitration award has been issued, there is no need for the Board to retain jurisdiction unless such allegations are forthcoming.

(Board Exhibit 1)

12. On June 20, 2017, the Union requested a decision on the merits of the unfair practice charge. (Board Exhibit 2)

13. The Union's June 20, 2017 letter provides as follows:

> I am writing in regard to your July 27, 2016 letter in the above referenced matter, a copy of which is enclosed for your convenience. As you know, the above dispute went to a hearing and was thereafter extensively briefed by the parties. However, in your letter, you indicate your decision was being deferred to the parties' arbitration process based upon a pending grievance that was rooted in the parties' collective bargaining agreement. After exhaustive research by my office and my client, I wanted to inform you that a grievance was never filed by the Union relative to the issues before you nor has there been an arbitration Award issued disposing of the claims submitted to you for resolution, as the issue before you- a good faith bargaining claim- is not a grievable issue under the parties' labor agreement.
>
> Finally, please note that ATU Local 85 has not withdrawn the charge, nor does it intend to. Accordingly, ATU Local 85 is requesting a decision on the merits be issued.

(Board Exhibit 2)

DISCUSSION

The Union's June 20, 2017 letter asserts that deferral was improper because there has been no grievance filed regarding the issue before the Board for resolution in the unfair practice charge. The Union further posits that the issue before the Board is a good-faith bargaining claim which is not grievable under the parties' labor

contract. From this position, the Union states that it has not withdrawn, and it will not withdraw the charge.

The Union's request for removal from deferral emphasizes the obvious condition in all deferral cases, i.e., that there is indeed both a statutory claim, over which the Board has jurisdiction, and a contractual claim, over which an arbitrator has jurisdiction. However, in the typical deferral context, as here, the so-called two separate issues are really just two sides of the same coin. The Union's claim that their research has turned up no grievances filed with respect to the good-faith bargaining claim is simply belied by the record which contains testimony from a Union witness acknowledging the grievance litigation with respect to the subcontracting to Lenzner Coach Lines, which was the subject matter of the unfair practice dispute. (N.T. 68-69).

The Board has held that, under Section 702 of the Act, a public employer has the managerial prerogative to make policy decisions concerning quality and level of services by exercising discretion over the functions and programs of the public employer. Colonial Intermediate Unit 20 Education Association v. Colonial Intermediate Unit 20, 36 PPER 113 (Final Order, 2005)(citing City of Philadelphia (First Responder) v. PLRB, 588 A.2d 67, 72 (Pa. Cmwlth. 1991)). A public employer may seek to effectuate changes in quality and level of services through subcontracting. However, the employer has the obligation to bargain in good faith to a bona fide impasse before subcontracting any bargaining unit work. Bargaining gives the Union a real opportunity to meet the employer's determined service goals and needs before the bargaining unit loses the work. Morrisville School District v. PLRB, 687 A.2d 5, 8 (Pa. Cmwlth. 1997).

In this regard, good-faith bargaining is inextricably interwoven with the subcontracting. Unlike a claim alleging a refusal to engage in good-faith bargaining resulting in the failure to reach an initial or new collective bargaining agreement, where the remedy may be a bargaining order, there is no good-faith bargaining claim if the employer never follows through with subcontracting. Colonial Intermediate Unit 20, 36 PPER at 323 (holding that the employer had no duty to bargain the elimination of programs where it did not subcontract). It's the act of subcontracting that triggers the union's right to challenge the manner by which the employer bargained before it subcontracted. It is the subcontracting sought to be remedied by establishing that the manner by which the employer bargained was legally insufficient to constitute good-faith bargaining. Any alleged lack of good-faith bargaining by itself is not what is sought to be remedied in a subcontracting claim. Evaluating the nature of bargaining is a means to rescinding the subcontract and reinstating the work. The goal is not a bargaining order in a subcontracting claim like it is in a bargaining claim for no contract.

In the instant case, the premise for the good-faith bargaining claim was the Authority's subcontracting of bus routes to Lenzner Coach Lines and resulting layoffs. For the Union to assert that its unfair practice claim hinged only on a lack of good-faith bargaining, over which there could be no grievance, ignores the legal and factual reality that there could not be a good-faith bargaining claim in this

case without the subcontracting, over which there was indeed a grievance filed and the reversal of which is the remedy sought by the Union in this case. The only way to have separated the statutory bargaining claim for subcontracting from the contractual claim for subcontracting, the way the Union wants, was to withdraw one of the claims before either was resolved, which opportunity lapsed once Arbitrator Miller's decision became final, absent the recognized factors that would warrant the rescission of the deferral order.

The Union filed Grievance No. 9912 specifically challenging the transfer of work to Lenzner Coach Lines and the loss of bargaining unit positions as a result. The Union cited the jurisdiction provisions of the parties' CBA. Although the analysis of the unfair practice claim (focusing on the manner in which the Authority bargained before subcontracting) is different than the arbitrator's analysis focusing on the contract, the contractual remedy and the statutory remedy are the same, i.e., if the Union prevails the work is returned and so are the lost jobs. Deferral does not require that the analysis be the same for both types of claims. It only requires that the unfair practice claims will be resolved by an arbitrator in addressing the contractual claims. There is always a separate, viable statutory claim when deferral is involved. But severability of the claims is not the relevant legal inquiry. Deferral only requires that the matter in question is also rooted in the parties' agreement and will be similarly remedied by the arbitrator if the grievance is sustained. Therefore, the existence of a statutory claim, by itself, does not preclude deferral, as the Union posits here.

One of the practical reasons that this Board defers cases in arbitration is not only because the arbitrator has expertise in contract interpretation, but also because it is bad labor policy to have potentially two inconsistent decisions from two different fora, where the union gets two bites at the apple and only needs to win in one forum to prevail. The Board will not sanction the practice of requiring an employer to engage in duplicitous litigation to potentially receive two inconsistent results. In this case, Arbitrator Miller dismissed the subcontracting grievance. If this Board were to decide that the Authority did not properly bargain before it subcontracted, the Authority would have two inconsistent results. This would create even more discord in labor relations between the parties as they further disagree over which decision to follow. The Board's deferral policy, therefore, protects the parties from a potential Board ruling that is inconsistent with an arbitration award, which could only create more litigation over which decision binds the parties.

Potentially, the Board could receive unfair practice charges from either side claiming that one or the other refuses to follow the decision that is favorable to the claimant. Two inconsistent decisions on subcontracting in this case would be like having no decision at all, after time and money had been spent on duplicative litigation. The Union is not entitled to litigate the subcontracting issue seeking the same remedy twice, especially after receiving an unfavorable result in arbitration.

Moreover, the Union has not alleged or proven on the record, after having an opportunity to do so, that the arbitration proceedings

were delayed; that they were not fair and regular; or that Arbitrator Miller's decision is somehow repugnant to the Act. In this regard, there is no basis for this Board to retain jurisdiction or address the merits of the unilateral subcontracting unfair practice claims. Accordingly, the charge is dismissed and the complaint rescinded.

CONCLUSIONS

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Authority is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Board's post-arbitration deferral policy has been satisfied.

5. The Board no longer has subject matter jurisdiction over the charge of unfair practices and the claims contained therein.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourteenth day of July, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner