

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

METROPOLITAN REGIONAL :
COUNCIL OF CARPENTERS :
 :
v. : Case No. PERA-C-14-218-E
 :
PENNSYLVANIA CONVENTION :
CENTER AUTHORITY :

TEAMSTERS LOCAL 107 :
 :
v. : Case No. PERA-C-14-222-E
 :
PENNSYLVANIA CONVENTION :
CENTER AUTHORITY :

ORDER DENYING PENNSYLVANIA CONVENTION CENTER AUTHORITY'S

MOTION TO DISMISS

On July 21, 2014, the Metropolitan Regional Council of Carpenters (MRC or Carpenters), filed a charge of unfair practices, at Case No. PERA-C-14-218-E, with the Pennsylvania Labor Relations Board (Board) against the Pennsylvania Convention Center Authority (Authority or Center). On July 24, 2014, Teamsters Local Union 107 (Teamsters) filed a charge of unfair practices, at Case No. PERA-C-14-222-E, against the Authority. Both charges alleged that the Authority violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA). Specifically, both charges allege that the Authority discriminated against employees represented by the MRC and the Teamsters (collectively "the Unions") by unilaterally setting an unreasonable deadline for the Unions' representatives to sign a new customer satisfaction agreement (CSA), while the Unions' principles were out of town, and then by subsequently banning employees represented by the Unions from entering Authority property and by redistributing their work when the two Unions failed to sign the CSA by the deadline.

On August 1, 2014, the Secretary of the Board issued a complaint and notice of hearing in each case designating a hearing date of October 14, 2014, in Harrisburg for both cases. On October 9, 2014, the Authority filed a Motion to Dismiss in both cases. The Hearing Examiner continued the October 14, 2014 hearing to give the Unions an opportunity to respond to the Authority's Motion. The hearing was rescheduled for January 6, 2015 and January 7, 2015. On October 31, 2014, the Unions jointly filed a response to the Authority's Motion. On November 14, 2014, the Authority filed a reply. The parties agreed that the facts as presented in their prehearing submissions were not in dispute and that a hearing on the jurisdictional question raised by the Authority in its prehearing Motion to Dismiss was unnecessary.¹ On December 22, 2014, the Examiner continued the hearings scheduled for January 6th and 7th, 2015, and rescheduled the hearings for February 11, 2015 and February 12, 2015. On February 2, 2015, I granted the Motion to Dismiss, limited to the jurisdictional question only, pending a written order, and cancelled the scheduled hearing dates. However, I have reconsidered that decision and herein reverse my prior ruling. Accordingly, the Motion to Dismiss is hereby denied in its entirety and hearings will be rescheduled in the near future.

The Examiner, based on all matters of record, makes the following findings of fact:

FINDINGS OF FACT

¹ Accordingly, the motion, the parties' briefs and the documents accompanying those submissions are the source for the findings of fact in this order.

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (64 Pa. C.S. §6001 et seq.; Auth. Mem. of Law at 2)
2. The Unions are employe organizations within the meaning of Section 301(3) of PERA. (Unions' Response Brief at 3)
3. Elliott-Lewis is a private employer and has been the labor supplier at the Center since 2003. Elliott-Lewis distributes payroll and benefits to all workers performing show labor at the Center. Employes represented by MRC and the Teamsters are not directly paid by the Authority. (Auth. Mem. of Law at 3, 4; Unions' Response Brief at 3)
4. In 2003, all the trade show unions, including the MRC and the Teamsters, became signatories to the CSA. This original CSA was valid for a ten-year period and expired in 2013. Any entity, exhibitor, contractor or other person engaged to perform or receive show labor services at the Center is obligated to contract with Elliott-Lewis for all necessary labor. (Auth. Mem. Of Law at 3, 4; Unions' Response Brief at 3)
5. Pursuant to a recognition agreement, the MRC is the exclusive collective bargaining representative of carpenters performing show labor work at the Center. Elliott-Lewis has negotiated private-sector collective bargaining agreements directly with the MRC and the Teamsters, covering wages, hours and other terms and conditions of employment. (Auth. Mem. of Law at 3-4; Exhibits A & B)
6. The CSA delineates work jurisdiction and rules among various groups of contractors and show laborers, each of which have different collective bargaining agreements with their private sector employers and Elliott-Lewis. All customers, exhibitors, contractors, Elliott-Lewis and participating labor unions must agree to be bound by the CSA before entering the Center premises. The MRC has frequently challenged the ability of exhibitors and customers to self-perform certain work within the work jurisdiction of the Carpenters. (Auth. Mem. of Law at 4; Unions' Response Brief at 3-4)
7. The Center experienced a decrease in bookings and a loss in renewal bookings. After polling customers, exhibitors, decorators, Authority staff, the Philadelphia Area Labor Management organization and the Philadelphia Convention and Visitors Bureau, the Authority learned that the loss in business resulted from dissatisfaction regarding exhibitors' rights to perform work within their own exhibit space, work assignments of show labor and a lack of training among show laborers. The Authority sought input from union representatives regarding methods to improve operations at the Center. (Auth. Mem. of Law at 5-6)
8. On or about August 1, 2013, following the expiration of the collective bargaining agreement between Elliott-Lewis and the MRC, and during discussions for a new CSA, the Carpenters engaged in a one-day work stoppage against Elliott-Lewis, which was honored by the Teamsters and three other trade unions in solidarity. (Auth. Mem. of Law at 6; Unions' Response Brief at 4)
9. Following the work stoppage, Elliott-Lewis entered one-year extensions to the trade unions' collective bargaining agreements and there were no formal discussions regarding the new CSA. In January 2014, the Authority, through its management firm, resumed discussions with the six unions and Elliott-Lewis regarding the new CSA. The Authority wished to expand the rights of customers and exhibitors with respect to exhibit space, the right to act within that space and the tools they could employ within their booths. By the end of April 2014, most trade unions, with the exception of the MRC, reached agreement on revisions to the CSA. The terms that the Carpenters were willing to accept were presented to and rejected by the Customer Satisfaction Committee of the Pennsylvania Convention Center Authority Board. (Auth. Mem. of Law at 6-8; Unions' Response Brief at 5)

10. As of May 1, 2014, the Authority Board conveyed a desire to continue discussions concerning a new CSA with all trades. Elliott-Lewis conveyed a desire to extend all collective bargaining agreements to engage in discussions regarding a new CSA. The MRC initiated a second one-day work stoppage. The second work stoppage was honored only by the Teamsters in solidarity with the MRC. (Auth. Mem. of Law at 8; Unions' Response Brief at 5).

11. The American Academy of Diabetes Educators cancelled its return show in 2019 as a result of the Carpenters' work stoppage in August 2013. A show that finished on May 2, 2014, notified the Authority that it was cancelling a future show scheduled for 2019, also as a result of the May 2014 work stoppage. (Auth. Mem. Of Law at 9)

12. On Sunday, May 4, 2014, the Authority presented a new CSA to all six trade unions, including the Carpenters, and required them to agree to the new work rules and work jurisdictions to continue to perform show labor work at the Center. The unions were given either a thirty-six or forty-eight-hour deadline. Four of the six trade unions signed the new CSA by the deadline period. At an Authority Board meeting on May 6, 2014, Authority Board member Ed Coryell, Sr., President of the Carpenters Union, publicly renounced the new CSA and refused to sign it on behalf of the Carpenters. Mr. Coryell abstained from voting. The remaining Authority Board members unanimously voted in favor of the new CSA. (Auth. Mem. of Law at 9-10)

13. The Board ordered the immediate realignment of work assignments and reconfigured work jurisdictions among the four trade unions that signed the new CSA, effective following the expiration of the Carpenters' and Teamsters' collective bargaining agreements on May 10, 2014. The Carpenters and the Teamsters eventually provided an executed copy of the new CSA after the deadline. Since that time, the Carpenters and the Teamsters have been banned from the Center. (Auth. Mem. of Law at 11; Unions' Response Brief at 5-6)

14. The opening paragraph of the CSA provides as follows:

The parties hereto have made and entered into this agreement ("Agreement") as an addendum to the existing collective bargaining agreements covering work performed at the Pennsylvania Convention Center to create an exhibition and working environment wherein all Parties are committed to creating and maintaining the highest level of customer satisfaction.

(Auth. Mem. of Law; Exhibit F at 2)

15. The "STATEMENT OF PURPOSE" section of the CSA provides as follows:

The purpose of this Agreement is to outline the manner in which work is performed at the Convention Center in order to ensure customer satisfaction in all facets of such work. The Parties hereto acknowledge and agree that Show Labor at the Convention Center shall be performed at the lowest reasonable cost and shall reflect the highest level of efficiency, productivity and quality.

To meet these objectives the Parties hereto have taken steps to create this Agreement to amend the existing collective bargaining agreements and incorporate all of the following terms and conditions as they relate to each bargaining unit.

(Auth. Mem. of Law; Exhibit F at 6)

16. Section III of the CSA, "SIGNATORY PARTIES" provides, in relevant part, as follows:

The following labor unions, based upon their historic participation at the [Authority], are eligible to become signatories to this Agreement and to

thereby amend their respective collective bargaining agreements and agree to take all necessary steps to ensure the enforceability of such agreements: the Carpenters; the Teamsters; the Laborers; the Riggers; the IATSE; and the Electricians.

In addition to the above signatories, the [Authority] has entered into this Agreement in its capacity as the owner and operator of the Convention Center facilities. Elliott-Lewis Corporation has entered into this Agreement in its capacity as the Labor Supplier at the Convention Center and SMG has entered in this Agreement in its capacity as manager of the Convention Center. Following the effective date of this Agreement, any entity subsequently retained by the [Authority] to manage the Convention Center or to serve as the Labor Supplier shall also be required to enter into this Agreement.

(Auth. Mem. of Law; Exhibit F at 7)

17. Section IV of the CSA designated "SCOPE" provides, in relevant, part as follows:

The scope of this Agreement shall encompass Show Labor performed at the Convention Center, except for housekeeping, meeting room setup, and maintenance work to the extent that they had been historically performed by the [Authority] or its designee.

The Parties acknowledge and agree that the terms and conditions of this Agreement shall apply only to Show Labor performed at the Convention Center and not to any of the work location.

(Auth. Mem. of Law; Exhibit F at 8)

18. Section VIII "WORK JURISDICTIONS" provides in relevant part as follows:

The [Authority], through its designated representative, after reasonable investigation, reserves the right to eject immediately from the Convention Center premises and to bar from returning any person who violates the provisions of this section, disrupts work at the Convention Center over a jurisdictional issue, and/or threatens to disrupt such work. Union representatives shall be subject to all terms and conditions contained within the [Authority] Code of Conduct, but may fully, fairly and effectively represent the interests of the bargaining unit so long as such representation does not violate the [Authority] Code of Conduct or this Agreement.

(Auth. Mem. of Law; Exhibit F at 15)

19. Section IX of the CSA: "HOURS OF WORK, OVERTIME AND HOLIDAYS" provides in detail the hours of work, the beginning and end of the work week and overtime. This section also designates nine paid holidays. (Auth. Mem. of Law; Exhibit F at 16)

20. Section XI of the CSA prohibits work stoppages and lockouts during the term of the CSA and provides, in relevant part, as follows:

A. **Prohibited Conduct.** The Parties to this Agreement agree that during its term or the term of any successor agreement, they shall engage in no strike, lockout, sympathy strike, work slowdown, interruption of work, or any other job action or work stoppage of any kind, and that there shall be no threats of any of the foregoing notwithstanding any language or rights contained in or arising out of any other collective bargaining agreement; provided however, that nothing contained herein shall in any way limit the Parties right to engage in any of the foregoing conduct that the expiration of any collective bargaining agreement arising out of any term contained in the collective bargaining agreement that is not modified by this Agreement. Any Party violating this paragraph is subject to

immediate discipline by the PCCA or its designee. Any appeal to an arbitrator because of discipline imposed for violation of this paragraph may only be based upon whether the appealing party violated this paragraph and the Arbitrator shall have no right to mitigate the discipline imposed.

- B. Violation of Code of Conduct. The Parties to this Agreement acknowledge and agree that a violation of this provision also constitutes a violation of the Code of Conduct and, therefore, that the offending person or entity may be ejected from the Convention Center premises and barred from returning to the Convention Center.

(Auth. Mem. of Law; Exhibit F at 18)

21. Section XII of the CSA is a detailed dispute resolution procedure. (Auth. Mem. of Law; Exhibit F at 19-21)

22. Section XVI of the CSA provides, in relevant part, as follows:

The Parties expressly agree that their respective collective bargaining agreements now in existence, in so far as such agreements apply to work performed at the Convention Center, are hereby amended by this Agreement and that this Agreement shall supersede any and all provisions of such collective bargaining agreements to the extent inconsistent herewith.

The Parties further agree that any and all new or successor collective bargaining agreements or modifications to existing collective bargaining agreements which are negotiated during the term of this Agreement shall include all terms and conditions contained herein, as such terms may be modified from time-to-time in accordance with the "Communication and Flexibility" section of this Agreement.

The Parties agree that the wage and benefit packages contained in each respective collective bargaining agreement will be adjusted by three percent (3%) per year across the board, inclusive of wages and benefits, during the term of this Agreement. Each year, the Labor Supplier will negotiate the breakdown of the wage and benefit increases with each of the Labor Unions to address their respective benefit fund issues consistent with these terms. In the event that the CPI for the Philadelphia MSA exceeds a five percent (5%) increase for a contract year, then the adjustment for the following contract year shall be adjusted upward by the difference of the actual CPI increase and five percent (5%).

(Auth. Mem. of Law; Exhibit F at 25)

DISCUSSION

In its Motion to Dismiss, the Authority sets forth several bases to dismiss the complaint before a hearing. A prehearing motion to dismiss is in the nature of a demurrer and all well-pleaded facts in the specification of charges and all reasonable inferences deduced therefrom must be accepted as true. *City of Philadelphia v. Buck*, 587 A.2d 875 (Pa. Cmwlth. 1991). Indeed, in determining whether to issue a complaint, the Secretary of the Board assumes that the allegations in the specification of charges are true. *Pennsylvania Social Services Union, Local 668 v. PLRB*, 481 Pa. 81, 392 A.2d 256 (1978). Legal conclusions, unjustified inferences, argumentative allegations and expressions of opinion are not deemed admitted. A demurrer will be sustained only when it appears with certainty that the law permits no recovery under the allegations pleaded. *Buck*, 587 A.2d at 877.

The Authority argues that the complaint should be dismissed because the charges do not state a plausible claim of discrimination under Section 1201(a)(3) of PERA. The Authority specifically contends that the charge fails to allege retaliation on the basis

of any protected activity under PERA. The Authority maintains that "[t]he Carpenters cannot establish that its members were engaged in protected activity in the first instance, or that the Authority engaged in adverse action or acted with anti-union animus against the Carpenters' bargaining unit members. The Authority claims that the Carpenters' work stoppages were unlawful and therefore unprotected.

The Unions counter-posit that those strikes were lawful and that proper notification procedures were followed. Consequently, argue the Unions, the Teamsters' honoring of that work stoppage was also lawful. The Authority's argument neglects the MRC's alleged vigilance in protecting its work at the Center and its refusal to sign the new CSA, by the Authority's deadline, after an alleged tentative agreement was rejected by the Authority. In this regard, the Unions have presented allegations of protected activity. Moreover, the parties have presented a factual and legal dispute regarding the notification procedures and the lawfulness of the work stoppages. I must, therefore, determine after a hearing whether the work stoppages were lawful and protected, and dismissal is improper.

The Authority also claims that the new CSA does not constitute adverse action against the Unions. The Union counter-argues that the Authority's refusal to permit the Unions to sign the new CSA (after a unilaterally imposed thirty-six hour deadline, while both Unions' principles were unavailable, resulting in a permanent lockout) constituted adverse employment action. The Unions further argue that the new CSA is not the sole adverse action. The adverse action included the permanent lockout of Carpenters and Teamsters and the complete reassignment of all of the Carpenters' work, after the Carpenters sought to limit the Authority's proposed reduction in bargaining unit work and engaged in two work stoppages. With respect to this issue, the parties have again favorably characterized facts and events and have drawn favorable conclusions therefrom. The resolution of these disputes over whether the Authority took adverse action against the Unions requires a hearing. Therefore, dismissal is improper.

The Authority further claims as follows:

The Assignment of work previously performed by Carpenters in the Center to the four current signatories to the New CSA is not an adverse action against members of the Carpenters' bargaining unit. The Carpenters' bargaining unit members are still employed by their employer Elliott-Lewis, however, due to the decision of the Carpenters' leadership not to sign on to the New CSA within the relevant timeframe, there is currently no work available to Carpenters at the Center.

(Auth. Mem. of Law at 15). The Authority contends that it does not have the power to hire, fire or direct show labor. It only has the right and obligation to establish rules to govern entry into and conduct at the Center. (Auth. Mem. of Law at 15). The Carpenters' decision not to sign the CSA cannot be construed as adverse action by the Authority. (Auth. Mem. of Law at 15)

The Authority's argument assumes the legal conclusion that the Authority is not a joint employer of the Unions' members and favorably characterizes the nature of its control over the employes and the terms of the CSA. As an alleged joint employer, the Unions have averred that the Authority has retaliated against them by unilaterally reducing bargaining unit work, which must be negotiated with its employes as a joint employer, and locked out those employes after they refused to agree to the imposition of reduced work and engaged in two allegedly lawful work stoppages. The determination of whether the Unions can demonstrate adverse action against its members depends on whether the Authority is a joint employer, with Elliot-Lewis, of the Unions' members.

The Authority also argues that, as a matter of law, it cannot be established that it acted with discriminatory motive because the Carpenters were provided with the same opportunities as all of the other unions to renegotiate and sign the new CSA. The Union counters by asserting that this argument depends on accepting the Authority's view that it is not a joint employer. As a joint employer, the Union contends that there is at

least a viable claim that the Authority retaliated against its employees by imposing an unreasonable deadline to accept a significant reduction in work for the Carpenters and by locking out its employees because they engaged in two work stoppages and refused to agree to a reduction in their work, by the deadline. Accepting the well-pleaded facts as true, there is a colorable claim of discrimination, provided a joint employer relationship exists.

The Authority also posits that the complaint should be dismissed because the specification of charges does not allege an independent violation of Section 1201(a)(1). However, this question has been mooted by the conclusion that the charge does not fail, as a matter of law, to set forth a viable claim of discrimination.

The Authority further contends that the Board lacks subject matter jurisdiction over the instant dispute because it does not involve any unfair labor practice outlined in Article XII of PERA. (Auth. Mem. of Law at 20). Instead, argues the Authority, the dispute centers around the new CSA, which sets standards for entry into and work in the Center and which is critical to ensure that customers, exhibitors and show labor work together at the Center in a safe and consistent manner. (Auth. Mem. of Law at 20-21). The Authority contends that there simply is no bargaining relationship between it and the Unions and the CSA represents its right to contract freely with vendors and control behavior on its premises. For the Board to take jurisdiction over a dispute centered around the CSA where no bargaining obligation exists would interfere with the Authority's right to contract.

Certainly, if the Authority is not a joint employer, there can be no viable claims against the Authority under PERA. Although the Carpenters objected to the reduction in bargaining unit work contained in the new CSA, the CSA is not the sole focus of the dispute. The Unions signed the new CSA, eventually accepting its terms. The alleged additional retaliatory employment action averred in support of the Unions' discrimination claim is the refusal to permit bargaining unit employees to enter the premises and continue working after missing the thirty-six-hour deadline and engaging in two work stoppages. Because dismissal centers on whether the Authority is a joint employer, that jurisdictional question becomes the central question of the Authority's Motion to Dismiss and the viability of the Unions' charges.

The Authority argues that the Board lacks jurisdiction over the parties because the Carpenters and the Teamsters are not public employees within the meaning of section 301(2) of PERA. Specifically, the Authority maintains that the employees at issue in this matter are not employed by the Authority or any other public entity. (Auth. Mem. of Law at 17-18).

The Teamsters and the Carpenters counter-argue that the Carpenters and the Teamsters are public employees of the Authority, which is a public employer, because the Authority is a joint employer with Elliott-Lewis. (Unions' Response Brief at 11-14). The Unions argue that the CSA is not merely a right of entry agreement, as characterized by the Authority, rather it is an agreement negotiated between the Authority and the Unions, without the involvement of Elliott-Lewis, delineating terms and conditions of employment at the Center. As such, contend the Unions, the Authority exercises direct control of these employees' terms and conditions of employment as a joint employer with Elliott-Lewis, and the Board has jurisdiction over the parties. (Unions' Response Brief at 12).

In *Sweet v. PLRB*, 457 Pa. 456, 322 A.2d 362 (1974), the Pennsylvania Supreme Court opined as follows:

The relation of employer and employe exists when a party has the right to select the employe, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. ***The duty to pay an employe's salary is often coincident with the status of employer, but not solely determinative of that status.***

Sweet, 457 Pa. at 462, 322 A.2d at 365 (citations omitted) (emphasis added). Also, in

Costigan v. Philadelphia Finance Dept. Employees Local 696, 462 Pa. 425, 341 A.2d 456 (1975), our Supreme Court reasoned as follows:

In the instant case, no single entity controls all of the terms of the employment relationship. The register of Wills is conceded by all parties to have the exclusive power to hire, fire, promote, and direct the work of the employees. The City of Philadelphia pays most of the employee salaries and other compensation costs of the office and exercises considerable control over the fringe benefits accorded the employees, which include enrollment under the City's group life and health insurance plans and coverage by the City's pension. Thus the Register and the City each exercise independent control over important "conditions of the relation [which] are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act," and both must be deemed employers for purposes of the Act.

Costigan, 462 Pa. at 434-435, 341 A.2d at 461.

In **Borough of Lewistown v. PLRB**, 558 Pa. 141, 735 A.2d 1240 (1999), a borough and two townships entered into an inter-municipal agreement to form a regional police department governed by a board of directors where each municipality appointed two representatives to the regional police department board. An Act 111 interest arbitration award ordered the municipalities to transfer their pensions to the regional police department and the Borough of Lewistown refused. Our Supreme Court relied on **Sweet** and **Costigan** and held that the Borough and the Townships were joint employers of the police officers because they exercised powers demonstrating the employment relationship through their designated representatives to the board of directors of the regional police department. **Lewistown**, 558 Pa. at 149-152, 735 A.2d at 1244-1246.

In **United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Steamfitters Local 449 v. PLRB (Steamfitters)**, 613 A.2d 155 (Pa. Cmwlth. 1992), Local 449 represented thirteen steamfitters who were employed by Bryan Mechanical Company, a contractor for the University of Pittsburgh. Approximately thirteen Bryan employees worked at the University of Pittsburgh main campus performing maintenance repair and installation of heating and air conditioning equipment. Two of the thirteen Bryan employees were foreman. However, the Bryan foremen were supervised by the University's Manager of Mechanical Systems.

Bryan was a member of the Mechanical Contractors' Association of Western Pennsylvania (MCA) and was a signatory to a collective bargaining agreement between Local 449 and the MCA. The collective bargaining agreement governed referrals, hiring, grievances, arbitration procedures, hours of work, holidays, overtime, shift work, pensions, work rules and subcontracting. All payroll, withholding and benefits were handled by Bryan. When steamfitters were subject to discipline, the University determined the severity of discipline and reserved the exclusive right to modify the discipline without any involvement from Bryan. The University's Director of Physical Plant Operations and Maintenance and its Manager of Mechanical Systems decided to lay off two steamfitters without consultation with Bryan.

In **Steamfitters**, the Board held that Bryan and the University were joint employers. However, the Board further held that, where one joint employer falls outside the jurisdiction of the Board because it is a private entity, as was Bryan, the Board cannot exercise jurisdiction over either joint employer. The Commonwealth Court reversed. Relying on **Sweet** and **Costigan**, the Commonwealth Court affirmed the Board's determination that Bryan and the University were joint employers, where Bryan controlled the payroll function as well as the maintenance of personnel files, benefits and insurance plans, and where the University controlled supervision and discipline. However, the Commonwealth Court held that the Board erred in concluding that it lacked jurisdiction because Bryan was beyond the Board's jurisdiction "where it is undisputed that the University exercises considerable control over the hiring, firing, and direction of the employees. Under these

facts, a remedial order directed only against the University could remedy any potential violation based on the underlying charge." *Id.* at 158.

The Unions in this case specifically argue that the Authority and Elliott-Lewis are joint employers each controlling significant aspects of the employment relationship with the Carpenters and the Teamsters. Moreover, the Unions contend that, under the holding of *Steamfitters*, the Board has jurisdiction over Unions' claims because one of the two joint employers in this case, i.e., the Authority, is a public entity. The Authority, however, contends that *Steamfitters* is distinguishable because the public University in that case had the power to fire and direct employes whereas the Authority in this case does not have the power to fire employes hired and employed by Elliott-Lewis. However, the Authority's attempt to distinguish *Steamfitters* on the basis that it cannot terminate the employment of show laborers employed by Elliott-Lewis, as was the case in *Steamfitters*, is misplaced. The Authority's argument presents a distinction without a difference and *Steamfitters*, as developed from *Costigan* and *Sweet*, is controlling in this case.

A thorough review of the CSA in this case erodes the Authority's position that it lacks a major involvement in the employment relationship with show labor at the Center and that it is not involved in major discipline, including termination, of show laborers within the meaning of *Steamfitters*. The CSA is an extensive agreement negotiated between the Authority and the Unions containing detailed provisions governing terms and conditions of employment, including supervision and discipline. The Authority exercises significant control over the behavior and direction of show labor and the employment relationship between show labor and the Authority. *Costigan* requires only that the Authority "exercise independent control over important 'conditions of the relation [which] are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act.'" *Costigan*, 462 Pa. at 434-435, 341 A.2d at 461. The Authority emphasizes that it cannot terminate employes who work for Elliott-Lewis but they have prohibited Carpenters and Teamsters from entering its premises where they worked. Although it did not technically sever their relationship with Elliott-Lewis, it terminated their ability work.

The CSA further provides that the CSA is an addendum to existing collective bargaining agreements and, in Section XVI, it *supersedes* any inconsistent provisions of any collective bargaining agreements. It provides that the purpose of the agreement is to outline the manner in which work is to be performed. The Authority clearly controls the direction of personnel. By its own terms, the CSA "amend[s] the existing collective bargaining agreements and incorporate[s] all of the following terms and conditions as they relate to each bargaining unit." (Exhibit F at 6) Section III of the CSA provides that it was a negotiated agreement with the signatory parties including Elliott-Lewis and the show labor unions. The Authority, as a joint employer therefore, was well aware of its obligations to bargain the distribution of work and other terms and conditions of employment for show labor, i.e., the Authority's employes.

The Authority also retains the right to eject any employe for violating work rules or disrupting work at the Center. (Exhibit F at 15). Permanently ejecting an employe from his/her place of employment is akin to a discharge. In Section XI of the CSA, the Authority retains the right to discipline employes for engaging in a prohibited work slowdown or stoppage, as determined by the Authority, including permanent expulsion from the Center premises, clearly affecting continuity of employment. There is an arbitration provision wherein the Authority has agreed to arbitrate disputes regarding the ejection and discipline of personnel relating to work stoppages and code of conduct violations. Moreover, the CSA provides a negotiated wage package for show labor employes at the Center. Although Elliott-Lewis is responsible for negotiating the breakdown of wage and benefit increases with the various unions, the CSA provides for three percent per year across the board wage increases plus an allowance for a cost of living increase based on the consumer price index in the Philadelphia area.

The undisputed facts presented by the parties demonstrate that the Authority exercises significant control over employes at the Center. It may not directly pay employes or have the ability to sever the employment relationship between an employe and

Elliott-Lewis, but it does exercise significant control over supervision, wages, bargaining unit work, direction, selection and ejection of personnel, which has the effect of terminating one's employment, at least temporarily. This exercise of independent control over important conditions is what the *Costigan* Court concluded was appropriate for collective bargaining. *Costigan*, 462 Pa. at 434-435, 341 A.2d at 461.

The Authority also relies on *Sheetmetal Workers Union Local No. 110 v. Public Service Company of Indiana, Inc.*, 771 F.2d 1071 (7th Cir. 1985), for the proposition that the Authority does not meet the test contained therein for determining whether an entity is a joint employer. However, a review of *Sheetmetal Workers* demonstrates why that analysis is inapplicable to a determination of whether a joint employer relationship exists between a public entity and a private employer.

In *Sheetmetal Workers*, an employe worked for Pullman Sheetmetal Works and was a member of the Sheetmetal Workers Local Union No. 110. The worker possessed benefits under a collective bargaining agreement between Pullman and the Union setting forth the worker's terms and conditions of employment. *Id.* at 1072. The Public Service Company of Indiana (PSI) owned a construction project called the Marble Hill Nuclear Generating Project. PSI contracted with companies, including Pullman, to perform various aspects of the construction work. The Pullman worker at issue worked at the Marble Hill site. Additionally, Local 110, Pullman and PSI were parties to a project agreement setting forth the rights and responsibilities of the parties. One day, the Pullman worker physically and verbally abused a PSI security guard at Marble Hill. The next day, PSI refused to permit access to the worker and informed Pullman. After an examination of the worker's record, Pullman terminated the worker. After the court dismissed Section 301 claims against PSI under the project agreement, because PSI had not agreed to arbitrate disputes under that agreement, the worker claimed that PSI was the joint employer of Pullman and was therefore bound by the arbitration provisions in that agreement.

The Seventh Circuit Court of Appeals adopted the test espoused by the National Labor Relations Board when determining whether a joint employer relationship exists **between two private entities**. *Id.* at 1074. The National Board examines the following factors: (1) an interrelationship of operations; (2) common management; (3) centralized control over labor relations; and (4) common ownership. *Id.* The critical factor, however, is centralized control over labor relations. *Id.*

These factors, however, cannot be utilized in determining whether there is a joint employer relationship between a public entity and a private employer. There cannot be an interrelationship of operations or common management or centralized control or common ownership between the public entity, such as the Authority in this case, and a private employer like Elliott-Lewis. None of the *Sheetmetal Workers* factors could ever be present because of the inherent distinction and separation between public and private employers. Significantly, the Appeals Court opined that "the cases concluding that a joint employer relationship does exist commonly involve parent and subsidiary corporations, or corporations linked by common controlling shareholders and corporate officers." *Id.* at 1075. Obviously, there will never be such a relationship between a public entity and a private employer and the *Sheetmetal Workers* case is inapposite.

The Unions seek the reinstatement of the permanently expelled Unions' members, jointly employed by the Authority and Elliott-Lewis. The remedy of permitting the Unions' members to enter the Center premises and return to the performance of work as outlined in the new CSA, which both Unions signed after the deadline, is clearly within the remedial power of the Authority and within the meaning of *Steamfitters*. Accordingly, the Authority's Motion to Dismiss is denied in its entirety and I have reversed my prior determination. I will issue a hearing schedule in the near future. This order is not immediately appealable to the Board.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Respondent's Motions to Dismiss Complainants' Charges of Unfair Practices at the above case numbers are denied and dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that no exceptions may be filed to this procedural order, pursuant to 34 Pa. Code § 95.96(a). If a proposed decision and order is issued pursuant to 34 Pa. Code § 95.91(k)(1) in the future, exceptions to this order may be filed pursuant to 34 Pa. Code § 95.98(a) at that time.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this sixteenth day of April, 2015.

Pennsylvania Labor Relations Board

Jack E. Marino, Hearing Examiner