COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TRANSPORT WORKERS UNION OF PHILADELPHIA, LOCAL NO. 234 AFL-CIO	:	
v.	:	Case No. PERA-C-97-278-E
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

FINAL ORDER

On October 8, 1998, the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the proposed decision and order (PDO) entered on September 18, 1998. In the PDO, the hearing examiner concluded that SEPTA violated Section 1201(a)(8) of the Public Employe Relations Act (Act or PERA) by failing to comply with a grievance arbitration award. SEPTA also requested oral argument on the exceptions.[1] By envelope postmarked October 28, 1998, the Transport Workers Union of Philadelphia, Local 234, AFL-CIO (Union) filed a brief in response to SEPTA's exceptions. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

91. In June 1997, SEPTA provided the Union with a copy of the request for proposal (RFP) which was issued regarding the paratransit work performed by Access Paratransit before its bankruptcy. In August 1997, SEPTA gave the Union a copy of a letter of understanding between SEPTA and Atlantic Paratransit, which outlined Atlantic's bid on the work formerly performed by Access. The letter of understanding stated that for up to 325,000 billable service hours, Atlantic would charge SEPTA $32.95 per billable service hour in the first year of a contract, $33.58 in year two, and $34.22 in year three. This document also specified the cost to SEPTA if the billable service hours exceeded 325,000. The additional information which SEPTA provided to the Union on or about September 29, 1997 (Finding of Fact 66, PDO at 16) included the evaluation by SEPTA's staff of the bid submitted by Atlantic. (N.T. 307-322, 362-364, 569-570; C-29, C-34, C-35, R-11)

DISCUSSION

The essential facts of this case are as follows. Under the state-mandated "Shared Ride Program" and pursuant to the Americans With Disabilities Act, SEPTA is obligated to provide door-to-door transportation to senior citizens and disabled individuals within its service area who are unable to use ordinary modes of transportation to perform their daily functions. These services differ from the fixed route services which have traditionally been provided by SEPTA through its own employes and are referred to as "paratransit" services.

SEPTA has historically contracted out its paratransit services to third party providers. Indeed, until late 1996, all paratransit services provided by

SEPTA were performed by employes of outside contractors. One of the outside contractors was Access Paratransit, which performed approximately 42% of the paratransit services provided by SEPTA.

In October 1996, Access filed for bankruptcy. SEPTA responded by immediately beginning preparation of a request for proposal (RFP) seeking bids from outside contractors on the paratransit work which Access had been performing. However, preparation of an RFP typically requires 4-6 months. Therefore, SEPTA decided that in the intervening period it would bring the work formerly performed by Access in-house (which included transportation of individuals to necessary medical treatment such as dialysis and chemotherapy). The in-house paratransit operation was known as "Freedom Paratransit."

The Union represents SEPTA employes in the Trenton-Philadelphia Coach Bargaining Unit (hereinafter referred to as the "TPC" bargaining unit). In November 1996, SEPTA entered into an agreement with the Union that it would offer the Access paratransit workers employment in its in-house Freedom Paratransit operation under the terms of the collective bargaining agreement covering the TPC bargaining unit. SEPTA then hired approximately 185 employes and commenced in-house performance of the paratransit work formerly performed by Access. SEPTA continued to use outside contractors to perform the majority of its paratransit services.

In April 1997, SEPTA informed the Union that it intended to contract out some of the paratransit work previously performed by Access in Montgomery County to a third party provider (Atlantic Paratransit) on a temporary basis. Thereafter in May 1997, SEPTA advised the Union that it intended to resume use of an outside contractor to perform all of the paratransit work formerly performed by Access. The Union responded by filing grievances under the collective bargaining agreement and a charge of unfair practices with the Board. In June 1997, SEPTA provided the Union with a copy of the RFP that was issued regarding the paratransit work at issue.

On July 11, 1997, SEPTA and the Union commenced negotiations for a new collective bargaining agreement for the TPC bargaining unit. During several bargaining sessions held that month, the parties discussed subcontracting of the paratransit work formerly performed by Access. The Union proposed contract language prohibiting subcontracting of TPC bargaining unit work, but SEPTA rejected that proposal. SEPTA provided the Union with a comparison of the cost of the in-house paratransit operation and the proposal submitted by Atlantic Paratransit. The Union questioned the figures utilized by SEPTA and requested further information.

At a public meeting on July 24, 1997, SEPTA's board of directors approved a resolution to subcontract the paratransit work formerly performed by Access to Atlantic Paratransit based on a cost of $32.95 per service hour for year one, $33.58 for year two, and $34.22 for the third year of the contract. Union president Steven Brookens was present at the meeting and made a presentation to the board opposing the resolution.

SEPTA and the Union agreed to expedited arbitration of the Union's grievances over the subcontracting and hearings were held before a panel of arbitrators on August 4 and 5, 1997. Also in August, SEPTA provided the Union with a copy of a letter of understanding between Atlantic Paratransit and SEPTA, which outlined Atlantic's bid on the work previously performed by Access. On September 12, 1997, the majority of the arbitration panel issued an award sustaining in part and denying in part the Union's grievance. The award authored by the neu-

tral arbitrator stated in part as follows:

> "On the basis of the entire record, the Chairman is fully persuaded that the Authority promised the Union that while the Access work was being brought in-house subject to an RFP that would issue within four to six months, and while there was no guarantee that the work would remain in-house, the Union would have an opportunity to bid on that work by demonstrating it could perform that work competitively. Essentially, then, the Authority obligated itself to negotiate with the Union before contracting out that work, to provide the Union a meaningful opportunity to demonstrate it could perform the work competitively and to make its case as to why the work should be retained by the Authority for performance in-house by Freedom with bargaining unit employees. This conclusion, drawn from all of the testimony of the various witnesses, seems best to capture the essence of the deal reached by the Authority and the Union. It is consistent with the Authority's interest in continuing without interruption to provide the paratransit service formerly performed by Access, without a whole-scale, irrevocable change in its theretofore consistent policy of contracting out all of its paratransit operations . . . It is fully consistent with the SEPTA Board's reluctance to bind itself to keep the work in-house once it was brought in . . .
>
> Having obligated itself to negotiate with the Union before contracting out the Freedom work, it follows that the Authority's action in contracting out the Freedom work without so much as discussing its intended course with the Union is a violation of the Union's rights and is subject to remediation . . . [T]he Union was never provided an opportunity to demonstrate that Freedom could perform the work competitively with other third-party providers. This is an opportunity to which the Union is entitled, the denial of which renders the contracting out of such work to Atlantic a violation of the TPC Agreement.
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> While this decision finds that the Authority is obligated to negotiate with the Union before contracting out the work in question, this decision must not be read as requiring that the work be retained in-house. The record does not support a finding that the Union ever was offered any guarantee that the work would be retained upon a showing that the work could be performed competitively in-house. Rather, the Authority obligated itself only to provide the Union with an opportunity to demonstrate that it could perform the work competitively, and to bid on the work on that basis.
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> * * *

DECISION

Consistent with the foregoing, the grievance is sustained in part

> and denied in part. The Authority's action in subcontracting the Freedom Paratransit work to Atlantic Paratransit, Inc. without first negotiating with the Union . . . is in violation of the TPC agreement. Accordingly, the Authority is hereby directed to negotiate with the Union prior to effectuating its proposed subcontracting action. This decision must not be read as precluding the Authority from subcontracting the Freedom work if it so chooses having first negotiated with the Union."

Following issuance of the arbitration award, from which neither party took an appeal, SEPTA and the Union conducted five negotiation sessions regarding the proposed subcontracting of the work performed by Access before its bankruptcy. On October 3, 1997, SEPTA informed the Union that because of driver and management staff resignations, it was necessary for SEPTA to temporarily transfer seven tours to an outside vendor "to meet our obligations to the senior and disabled community." SEPTA provided the Union with additional information relevant to the issue of subcontracting, including its staff's evaluation of the bid submitted by Atlantic Paratransit. During the negotiations, the Union made detailed presentations regarding the cost of continued in-house performance of the work versus subcontracting to Atlantic based on the information which had been provided by SEPTA. Thereafter, on October 15, 1997, SEPTA informed the Union that a decision had been made to contract out the work to Atlantic. Several days later, SEPTA laid off its Freedom Paratransit employes and Atlantic began performance of the work. The Union then amended its previously filed unfair practice charge alleging a refusal to bargain over subcontracting to also allege a refusal to comply with the grievance arbitration award.

In the PDO, the hearing examiner did not sustain the Union's charge of a refusal to bargain in good faith over subcontracting in violation of Section 1201(a)(1) and (5) of PERA. However, the hearing examiner interpreted the arbitration award as similarly imposing a duty to bargain in good faith, requiring SEPTA to enter negotiations with an open mind and sincere desire to reach agreement to keep the work in-house. The hearing examiner determined that SEPTA did not enter negotiations with such a state of mind and therefore failed to comply with the arbitration award in violation of Section 1201(a)(8).

Although not excepting to the hearing examiner's failure to find a violation of its statutory bargaining obligation under Section 1201(a)(5) of PERA, SEPTA argues that the hearing examiner erred in interpreting the award in such a manner so as to essentially impose the same bargaining duties that would exist if there was a statutory obligation to bargain over the proposed subcontracting. SEPTA contends that "there is no statutory duty to bargain over subcontracting where, as here, the work in question was neither historically nor currently performed exclusively by employes in the bargaining unit," and therefore the hearing examiner erred by imposing "upon SEPTA the same bargaining duties as . . . are attendant to the statutory duty-to-bargain under Section 1201(a)(5) of the Act" (exceptions at 1). SEPTA also contends that it complied with the award where it "met and negotiated with the Union over a series of meetings, where the Union was able to fully present its arguments for keeping the work in-house," and "the Union had all information necessary to articulate its position that the paratransit work at issue should be performed on a cost competitive basis in-house" (exceptions at 2). SEPTA further contends that the hearing examiner erred: (1) "in concluding that SEPTA entered into negotiations without an open mind based on a statement in a letter of Patrick Battel [SEPTA's chief labor relations officer] that SEPTA had a predisposition to contract because paratransit was not regarded as part of SEPTA's core business where the Arbitrator acknowledged that SEPTA could consider facts other than costs"; and (2) "in

relying upon the October 1997 contract of seven tours as evidence of a violation of Section 1201(a)(8) of the Act because the Union was unavailable to discuss these tours at that time, the contract was in response to an emergency need for service, the contract was temporary pending the negotiations, and the amount of work involved in that contract was de minimis" (exceptions at 2).

SEPTA is correct in its argument that the facts here do not support the finding of a statutory duty to bargain over the proposed subcontracting. Under Board caselaw, such a duty exists only where the complainant establishes that the work at issue was consistently performed exclusively by the bargaining unit, or that the employer made a significant change in the established practice of assignment of such work. See, e.g., Commonwealth, Department of Public Welfare, 27 PPER ¶ 27188 (Final Order, 1996), citing AFSCME v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992). The Union did not establish that paratransit work was consistently performed exclusively by the bargaining unit. To the contrary, with the exception of the portion of paratransit services that was temporarily brought in-house during preparation of a request for bids, paratransit work was always performed exclusively by outside contractors. Moreover, in view of the fact that this work was only brought in-house on a temporary basis for a number of months subject to a request for bids from outside contractors, the Union also failed to prove an established practice of assignment of this work to the bargaining unit. Therefore, SEPTA did not have a statutory duty under PERA to bargain over the subcontracting of this work and the issue is not whether SEPTA bargained in good faith under the Act. Rather, the only issue is whether SEPTA met its obligations under the arbitration award.

We concur with SEPTA's argument that the hearing examiner applied the wrong standard for assessing whether it complied with the arbitration award, and that SEPTA met its obligations under the award. Although the statutory duty to bargain in good faith under PERA requires a party to enter negotiations over proposed subcontracting of bargaining unit work with an open mind and sincere desire to reach agreement to keep the work in-house if the employe representative is able to meet the employer's legitimate concerns, the work at issue is not properly characterized as bargaining unit work for the reasons already discussed and there is no statutory duty to bargain. Moreover, as the above-quoted portion of the award indicates, the arbitrators expressly recognized that SEPTA was predisposed to contract out the work formerly performed by Access upon issuance of the RFP in accordance with "its theretofore consistent policy of contracting out all of its paratransit operations," and did not require SEPTA to set aside its opinion that paratransit services are not part of the core business of the Authority which should be performed in-house. To the contrary, the arbitration award expressly indicates that even if the Union is able to demonstrate that the bargaining unit can perform the work competitively, SEPTA is free to nevertheless contract out the work without violating the award. Therefore, we find that the hearing examiner's consideration of whether SEPTA entered negotiations with an open mind, although appropriate where there is a statutory duty to bargain, is not consistent with the arbitration award, which imposed a lesser burden on SEPTA more akin to meet and discuss under Section 1201(a)(9) of PERA.

We agree with the hearing examiner that the arbitration award should be interpreted to require SEPTA to provide the Union with the information necessary to attempt to demonstrate that the work can be performed competitively in-house. However, we disagree with the hearing examiner's determination that necessary information was withheld in violation of the award. As additional finding of fact 91 above indicates, the Union was provided with a copy of the RFP, the dollar figure of Atlantic's bid, the service hours upon which the bid was based, and the evaluation of Atlantic's bid by SEPTA's staff. Moreover, the findings of

fact in the PDO indicate that the Union was provided with a breakdown of the costs attributed to the in-house paratransit operation, such that it was able to present detailed comparisons of the cost of subcontracting versus retention of the work in-house and to explain its view that SEPTA was overstating the cost of in-house performance of the work. Thus, the findings of fact establish not only that the Union had in its possession the information necessary to attempt to demonstrate that the work could be performed competitively in-house, but also that SEPTA complied with the arbitrators' direction that it provide the Union with the opportunity "to make its case as to why the work should be retained by the Authority for performance in-house by Freedom with bargaining unit employees." Although SEPTA's conduct may have fallen short of that required under Section 1201(a)(5) of PERA, that provision of the act is inapplicable here and the hearing examiner's decision that the arbitration award imposed the same negotiation standard is not supported by a reading of the award as a whole. Accordingly, we will vacate the hearing examiner's conclusion that SEPTA violated Section 1201(a)(8) of PERA.[2]

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions in part and set aside the Proposed Decision and Order consistent with the above discussion.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3 inclusive and CONCLUSION number 5, as set forth in the Proposed Decision and Order, are hereby affirmed and incorporated by reference herein and made a part hereof.

That CONCLUSION number 4 of the Proposed Decision and Order is hereby vacated and set aside and the following additional conclusion is made:

6. That SEPTA has not committed unfair practices in violation of Section 1201(a)(8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby sustained in part, that the order on pages 30-32 of the Proposed Decision and Order be and the same hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the charge of unfair practices is dismissed and the complaint issued thereon is rescinded.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of June, 1999. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

CHAIRMAN JOHN MARKLE JR. DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF

THIS CASE

[1] The request is denied because this case does not involve novel issues of fact or law.

[2] In view of our disposition of this matter, we need not reach the other exceptions raised by SEPTA.