COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PORT AUTHORITY OF ALLEGHENY COUNTY	:	
	:	
v.	:	Case No. PERA-C-02-319-W
	:	
AMALGAMATED TRANSIT UNION	:	
LOCAL #85	:	

FINAL ORDER

On June 2, 2003, the Port Authority of Allegheny County (Authority) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated May 13, 2003. In the PDO, the Hearing Examiner concluded that the Amalgamated Transit Union, Local No. 85 (Union) did not engage in unfair practices in violation of Section 1201(b)(3), (5) or (8) of the Public Employe Relations Act (PERA) by filing a petition to vacate an interest arbitration award in the Allegheny County Court of Common Pleas rather than submitting certain disputed issues to interest arbitration. The arbitrator retained jurisdiction until a new collective bargaining agreement (CBA) was executed. On June 23, 2003, the Union filed a response to exceptions and a supporting brief.

The Authority and the Union were parties to a CBA that expired November 30, 2001. The parties' collective bargaining relationship is governed by both PERA and the Second Class County Port Authority Act of 1956 (Act), Act of April 6, 1956, P.L. (1955) 1414, as amended, 55 P.S. §§ 551-586. The parties initiated bargaining a successor contract in February 2001. Unable to reach an agreement by contract expiration, they entered into two contract extensions in the hopes of reaching agreement without submitting to the fact-finding process mandated by the Act. Unable to reach agreement after two extensions, the parties then entered into fact finding. At the first fact-finding meeting, the parties agreed to a final best offer bargaining/arbitration process to reach a new CBA for the rank and file unit. On March 5, 2002, the parties executed a written instrument memorializing their agreement (Agreement). The Agreement provided that if the parties were unable to reach a new CBA by a particular date, they would engage in final best offer arbitration.[1] Paragraph 15 of the Agreement provided that any disputes regarding the interpretation and application of any part of the Agreement shall be resolved by the arbitrator. On May 8, 2002, the arbitrator issued an interest arbitration award (Award) for the rank and file unit. The Award stated that the arbitrator adopted the Authority's final offer, which was appended to the Award. Paragraph 10 of the Authority's adopted final offer stated that "[t]he arbitrator retains jurisdiction to resolve any and all disputes until all of the language has been agreed upon and incorporated into the new agreement and signed off by both parties." (F.F. 5). On May 9, 2002, the arbitrator issued a clarification of his award at the request of the

[1] The Agreement was subsequently amended on April 26, 2002 to add an additional day of mediation, which consequently changed the dates for the submission and selection of final package offers. The Agreement remained the same in all other respects.

parties. On or about June 6, 2002, the Union filed a petition to vacate the Award in the Court of Common Pleas of Allegheny County. On July 9, 2002, the Union filed a rule to show cause why the Award should not be stayed. On August 9, 2002, the court dismissed the merits of the Union's request for a stay of the Award pending the Union's petition to vacate. The Union appealed the common pleas court's denial of its stay request to Commonwealth Court, and that appeal was pending as of the hearing in this matter on December 17, 2002. On February 4, 2003, the common pleas court dismissed the merits of the Union's petition to vacate the interest arbitration award.

The Authority did not file exceptions to the Examiner's dismissal of its charge that the Union violated Section 1201(b)(5) and (8). Section 95.98(a)(3) of the Board's regulations provides that "[a]n exception not specifically raised shall be waived." 34 Pa. Code § 95.98(a)(3). Both the Commonwealth Court and this Board have held that "issues are waived for purposes of appellate review where they are not properly raised and preserved through the filing of timely exceptions with the Board." Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1999); accord Muhlenberg Township Police Labor Organization v. Muhlenberg Township, 30 PPER ¶ 30142 (Final Order, 1999). Therefore, the Authority has waived any challenges to the dismissal of its charge under Section 1201(b)(5) and (8) of PERA.

In its exceptions, the Authority claims that the Examiner erred in failing to find as fact that the parties disputed the meaning of language in the Award applying to layoffs and recalls and that this disagreement prevented the integration of the Award into a new CBA because the Union refused to submit the dispute to the arbitrator for resolution as required by the Award. The Authority argues that the Union agreed to be bound by a process which requires the Union to submit disagreements over language in the Award to the jurisdiction of the arbitrator and, by subjectively interpreting the disputed language, the Union is reneging on its agreements and bargaining in bad faith.

However, the dispute regarding layoffs and recalls did not arise until after the Authority filed its charge of unfair practices against the Union. In PLRB v. Millcreek Township Sch. Dist., 7 PPER 215 (Final Order, 1976), the Board held that "[t]he Board in its determination of whether or not an unfair practice has been committed cannot predicate its determination on the merits of the charge upon conduct which occurs subsequent to the date the [c]harge was filed." Id. at 216. Moreover, where activities occurring subsequent to the filing of an unfair practice charge would constitute unfair practices independent of the facts pleaded in the original charge, the original charge must be amended or an additional charge must be filed. Id.; Philadelphia Department of Recreation, 14 PPER ¶ 14017 (Final Order, 1982). In addressing the post-charge evidence in Millcreek, the Board stated that "[it] did not consider the post-Charge conduct of either of the parties in its determination. It could not. If there was a violation of [PERA] by the post-Charge conduct of Respondent, a Charge based on the post-Charge conduct should have been filed." Millcreek, 7 PPER at 216.

The charge in this case was filed on July 9, 2002, and the record reveals that the first evidence of a disagreement over layoffs occurred on or about August 14, 2002, more than one month after the charge. Therefore, the disputes over layoffs and recalls are not acts that

support the charge. Indeed the factual allegations in the charge make no reference to any dispute concerning layoffs and recalls. Accordingly, the dispute regarding layoffs and recalls is not relevant to the charge, and the Examiner properly omitted any such finding.

Also, the Examiner was required to set forth only those facts that were necessary to support his decision. He was not required to summarize all the evidence presented, make findings that are unnecessary or make findings that would support another decision, even if there is substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988); AFSCME v. Dep't Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). The Authority's proposed finding in this case is not necessary to support the Examiner's conclusion that challenging the validity of the Award in common pleas court did not constitute an unfair practice. The proposed finding simply is unrelated and does not support the Authority's documented reasons for filing the charge.

The Authority also claims that the Examiner erred in concluding that the Union did not commit unfair practices by raising issues in direct appeal of the award which the Authority alleges should have been submitted to the arbitrator who retained certain jurisdiction. In support of this claim, the Authority relies on PLRB v. Bald Eagle Area Sch. Dist., 499 Pa. 62, 451 A.2d 671 (1982) and Chester Upland Sch. Dist. v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), for the proposition that arbitrability of grievance matters must first be submitted to an arbitrator, and an employer commits an unfair practice by seeking a stay of arbitration in the courts or to otherwise litigate the grievance issue in court without affording an arbitrator an opportunity to first address the arbitrability of the grievance. The Authority contends that the mandates of Bald Eagle and Chester Upland are equally applicable here in the context of a final and binding interest arbitration award where jurisdiction over the interpretation of the award lies with an arbitrator. Consequently, argues the Authority, litigating issues in court, which first should be brought before the arbitrator, constituted a refusal to bargain in good faith by reneging on the parties' Agreement to be bound by the Award, which required the parties to submit disputes regarding interpretation and application of Award language to the arbitrator. We disagree.

The Authority has erroneously confused two distinct concepts, i.e., interpreting or applying specific provisions of the Award and a judicial challenge to the legality of the Award itself. The latter is within the exclusive jurisdiction of the judiciary, not the arbitrator who issued the award. Washington Arbitration Case, 436 Pa. 168, 259 A.2d 437 (1969). As previously concluded herein, the only actions that could support the charge are those acts that occurred or existed as of the filing of the charge on July 9, 2002. As of that date, the only relevant evidence in the record regarding the Union's petition to vacate the Award is the petition itself and attached exhibits. In the petition, the Union directly challenged the jurisdiction of the arbitrator and the legality of his award, which is not a matter that it could have taken back to the arbitrator. Indeed the right to file a petition to vacate an arbitration award and the scope of review of an interest award specifically permit an aggrieved party to bring those challenges in court. Moreover, under the Judicial Code, the Union was

required to file the petition to vacate within thirty (30) days of the issuance of the Award to successfully preserve its court challenge. 42 Pa. C.S. § 5571(b). The contract provisions referenced in the petition to vacate therefore did not raise interpretation issues before the court. Rather reference to those provisions related to the Union's allegations of fraud, misrepresentation and lack of jurisdiction in its judicial challenge to the legality of the underlying award. The Union was not seeking an interpretation of the referenced provisions in its appeal of the Award.

Indeed, the Union specifically sought to have a court set aside the award by alleging the following: that the arbitrator "abused and misused the process by deliberately providing improper and misleading information to the Union," (Employer Exhibit 4, ¶ 31), "breached his solemn duty to fairly and impartially evaluate evidence and proposals," (Employer Exhibit 4, ¶ 33), the Award is "beyond the scope of his authority," (Employer Exhibit 4, ¶ 34), "[t]he irregularity of the proceeding and the misleading information provided by the Port Authority's counsel resulted in a basic unfairness to the process and requires the Arbitrator/Mediator's decision to be set aside," (Employer Exhibit 4, ¶ 35), and the "conduct by the Arbitrator/Mediator provides sufficient irregularity, corruption, misconduct or fraud to materially prejudice the rights of the Union and requires that the [Award] be set aside." (Employer Exhibit 4, ¶ 36).

The Union does not engage in unfair practices by exercising its rights to petition a court of competent jurisdiction to set aside an interest arbitration award. Accordingly, the Authority has failed to meet its burden of proving, as of the date of the filing of the charge, either that there were disagreements over the meaning and interpretation of Award language or that the Union affirmatively refused to submit interpretation issues to the arbitrator. Merely appealing the Award with reference to certain provisions to support its claim of misrepresentation does not satisfy these claims.

Bald Eagle and Chester Upland are inapposite. Without addressing the fundamental differences between voluntary interest arbitration pursuant to the Act and mandatory grievance arbitration pursuant to PERA, which governed the decisions in those two cases, the Union's petition to vacate the Award is simply not analogous either procedurally or substantively to the issues addressed in either Bald Eagle or Chester Upland. Taken together, the courts held that a grievance arbitrator, not the courts, has jurisdiction to decide, in the first instance, the arbitrability of a grievance, subject to judicial review of the resultant award. In other words, an employer must first submit grievance disputes to arbitration, even if the employer subjectively believes that arbitration is not proper, then seek review of the arbitrator's award, on either arbitrability or the merits of the grievance, in the courts if not satisfied with the arbitrator's decision. Here, the Union procedurally complied with that exact course of conduct. The Authority and the Union submitted to interest arbitration that resulted in an award, which a party claimed was illegal. Thereafter, the Union sought review of the Award in the court akin to the power of a reviewing court to review a grievance award as interpreted in Bald Eagle or Chester Upland. There simply are no Bald Eagle or Chester Upland issues here.

Moreover, the Authority's view could foreclose judicial review of the Award. By characterizing the nature of the Union's appeal as one seeking judicial interpretation and application of the Award, within the sole jurisdiction of the arbitrator, the Authority is forcing the Union to submit post-arbitration review to the arbitrator only, thereby effectively preventing the Union from preserving its court challenge; a right that expires after 30 days of the issuance of the Award. Accordingly, the Authority would have this Board determine that the Union engaged in unfair practices by exercising its right to appeal the validity of the Award within 30 days.

The Authority contends that the Examiner erred in characterizing the Authority's charge as one challenging the refusal of the Union to seek clarification of the Award. Rather, argues the Authority, the basis for its charge was that the Union violated its duty to bargain in good faith by refusing to return to the arbitrator to resolve disputes as required by the parties' agreed upon process. Again, there are no such disputes specifically alleged in the specification of charges; there is no evidence in the record of any such disputes as of the date of the filing of the charge; and there is no evidence in the record to support the Authority's position that, as of the date of the charge, the Union refused to resolve language interpretation disputes by submitting such disputes to the arbitrator. If subsequent Award interpretation disputes arose which the Union refused to submit to the arbitrator for resolution, the Authority could have filed a charge alleging the nature of those specific disputes and refusals and set them forth as the basis of the charge as of that date. Acts subsequent to the filing of the charge simply cannot support or form the basis for the charge. Millcreek, supra.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

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 dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Anne E. Covey, Member, this nineteenth day of August, 2003. 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.