COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED TRANSPORTATION UNION	:	
	:	
v.	:	Case No. PERA-C-09-128-E
	:	(PERA-R-09-36-E)
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	
VICTORY DISTRICT	:	

FINAL ORDER

The United Transportation Union (UTU or Incumbent Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 27, 2009, challenging a Proposed Decision and Order (PDO) issued on July 7, 2009. In the PDO, the Board's Hearing Examiner concluded that the Southeastern Pennsylvania Transportation Authority-Victory District (SEPTA) did not violate Section 1201(a)(1) and (2) of the Public Employe Relations Act (PERA) when it refused to permit non-employe representatives of UTU to have access to employes during work time to discuss the upcoming representation election between UTU and the Association of Transit Operators (ATO or Rival Union). After the Board Secretary granted its request for an extension of time, SEPTA timely filed a brief in response to the exceptions on August 31, 2009.

The Hearing Examiner's findings are summarized as follows. Sometime in March of 2009, Victor Baffoni, Vice-President of UTU, was denied access to the drivers' room on SEPTA's property at 110 Victory Avenue, near the 69th Street Station. Baffoni had come to Philadelphia because of the upcoming April 1, 2009 representation election to determine whether UTU would continue to represent SEPTA's operators for purposes of collective bargaining. Baffoni never sought SEPTA's permission to be on its property. The drivers' room was specifically posted as an area for authorized SEPTA employes only. Baffoni was not a SEPTA employe. SEPTA drivers are paid from the time they report to the dispatcher's window in the drivers' room. SEPTA also did not allow non-employe representatives of ATO in the drivers' room.

On April 1, 2009, the day of the election, James Michael Lewis, an International Organizer for UTU, was stationed at the intersection of the trolley and bus platforms in the 69th Street Station. That location is private property owned by SEPTA, where the riding public is allowed. Lewis was there to speak to SEPTA employes that were walking from their initial reporting location (the dispatcher's window in the drivers' room) to the 69th Street Station where they boarded their trolley or bus. The employes were "on the clock" from the time they arrived at the reporting location. SEPTA representatives ordered Lewis off the property with the threat of arrest if he failed to comply. UTU also had a van parked on SEPTA property, immediately under a "No Parking" sign, but did not have SEPTA's permission to park there. SEPTA ordered UTU to move its van from that location, which was specifically reserved for SEPTA vehicles.[1]

In the PDO, the Hearing Examiner found that SEPTA did not violate Section 1201(a)(1) and (2) of PERA by refusing to permit non-employe UTU representatives to have access to employes during work time to discuss the upcoming representation election between UTU and ATO. In support of his decision, the Hearing Examiner cited Lechmere, Inc. v. NLRB, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed. 79 (1992), in which the United States Supreme Court held that an employer cannot be compelled to allow non-employe union organizers onto private property open to the public unless the union shows that without such access the employes are beyond the reach of reasonable efforts to communicate with them. The Hearing Examiner also cited Metropolitan District Council of Philadelphia and Vicinity United Brotherhood of Carpenters and Joiners of America v. NLRB, 68 F.3d 71 (3rd. Cir. 1995), in which the Court of Appeals relied on Lechmere in holding that non-employe

[1] The Hearing Examiner dismissed the portion of UTU's charge that relates to the directive to move the van. Because UTU does not except to this ruling by the Hearing Examiner, the Board need not address this matter.

union representatives do not have a right of access to the employer's property if there are reasonable alternative means available for the exercise of protected activity.

In its exceptions,[2] UTU argues that the Hearing Examiner erred by relying on Lechmere and Metropolitan District. UTU contends that Metropolitan District involved the construction industry and a union's efforts to distribute handbills to the public, and thus has no applicability to this case that does not involve the construction industry or attempts to hand-bill the public. UTU further contends that Lechmere dealt with organizational activity at an unorganized workplace, and thus is not applicable to a case such as this one in which the current bargaining representative was on the employer's property as it had been many times before discussing union matters with bargaining unit employes. UTU cites numerous National Labor Relations Board decisions in support of its claimed right of access to SEPTA's property based on an alleged past practice of being permitted such access.

However, the cases cited by UTU concern the right of an incumbent bargaining representative to have access to employes to represent them concerning grievances or other contractual matters. In contrast, UTU representatives admittedly sought access to SEPTA employes for organizational purposes due to the upcoming election. As the Board noted in South Allegheny Education Association v. South Allegheny School District, 21 PPER ¶ 21161 (Final Order, 1990), there is a substantial distinction between cases that concern a union's right of access to employer property to organize and cases that involve an incumbent bargaining representative's right of access for purposes of representing employes regarding grievances and other matters. Thus, the cases cited by UTU are inapposite and are not determinative of the outcome here.

UTU also contends that the Hearing Examiner erred in relying on Lechmere and Metropolitan District because those cases dealt with the removal of non-employes from the employer's privately-owned property, whereas SEPTA is not a private corporation and its 69th Street terminal is allegedly public property. UTU further contends that even if the 69th Street terminal is private property, federal labor law decisions after Lechmere indicate that an employer may only deny non-employe union representatives access to its property if the employer has the right under applicable state law to prevent trespass. UTU argues that under Pennsylvania's criminal trespass law, 18 Pa.C.S. §3503(c)(2), it is a defense to prosecution when "the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining on the premises." UTU argues that SEPTA did not have the right to deny its organizer access to the terminal under state trespass law because the terminal was open to the public and the UTU organizer complied with all lawful conditions imposed for access to the premises.

Initially, we note that UTU did not raise this argument before the Hearing Examiner regarding state trespass law, and therefore waived the issue. Bucks County Schools I.U. No. 22 v. PLRB, 466 A.2d 262 (Pa. Cmwlth. 1983)(issues are waived where not raised before Hearing Examiner).[3] Even if the issue was not waived, the Hearing Examiner found that the drivers' room where the UTU organizer attempted to conduct organizing activity is not open to the public, and UTU does not except to this finding.

In any event, UTU overlooks the Hearing Examiner's findings that all attempted contact with the employes occurred while they were on work time. Conduct of union business by non-employes on work time unrelated to contract administration is not protected activity under PERA. Pennsylvania State Correction Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Fayette SCI, 38 PPER 4 (Final

[2] Because neither UTU nor ATO received a majority of the ballots cast at the election, a run-off election would be necessary if the Hearing Examiner's order is affirmed. Therefore, UTU does not seek another election as a remedy for SEPTA's alleged violations of PERA, as one must take place anyway. Rather, UTU seeks an order directing SEPTA to cease and desist from engaging in unfair practices in violation of PERA and an order requiring SEPTA to post a notice of its violation.

[3] Indeed, the Hearing Examiner found that UTU waived all issues by not making an opening statement or closing argument at the hearing, or filing a post-hearing brief.

Order, 2007). Because UTU's attempted contacts with employes during work time were not protected activity under PERA, there can be no violation of Section 1201(a)(1). Pennsylvania State Corrections Officers Association, supra (in order to find an unfair practice under Section 1201(a)(1), the employer must interfere, restrain or coerce employes in the exercise of protected activity). Accordingly, the Hearing Examiner did not err in dismissing UTU's charge under Section 1201(a)(1) of PERA.

With regard to UTU's allegation of a violation of Section 1201(a)(2) of PERA, it is well-settled that Section 1201(a)(2) prohibits "company unions" and is directed at employer domination of, or assistance, to employe organizations. See IBPAT, Local 1968 v. Girard School District, 38 PPER ¶ 124 at 366 (Final Order, 2007) ("The Board has determined that Section 1201(a)(2) is intended to prevent an employe organization from becoming so controlled or assisted by the employer that the employe organization is indistinguishable from the employer.") Because UTU presented no evidence that SEPTA provided such assistance, the Hearing Examiner did not err by dismissing UTU's charge of a violation of Section 1201(a)(2).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss UTU's exceptions and affirm the Hearing Examiner's conclusion that SEPTA did not commit unfair practices in violation of Section 1201(a)(1) and (2) 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 by UTU are hereby dismissed, and 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, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of September, 2009. 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.