

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
 :
 v. : Case No. PF-C-10-11-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On January 28, 2010, the Pennsylvania State Troopers Association (PSTA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth), violated sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by "unilaterally authoriz[ing] non-unit civilian employees of the Pennsylvania State Police to perform Motor Carrier Safety Inspections" that "were duties historically and exclusively performed by bargaining unit members." On February 5, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 22, 2010. The hearing examiner held the hearing as scheduled and afforded both parties a full opportunity to present testimony and to cross-examine witnesses. At the conclusion of the PSTA's case-in-chief, the Commonwealth moved to dismiss the charge for lack of proof that bargaining unit members had historically and exclusively performed the motor carrier safety inspections at issue or that non-members of the bargaining unit have performed any such inspections to date (N.T. 28). Upon the request of the PSTA, the hearing examiner took the motion under advisement pending the filing of briefs (N.T. 29). On July 13, 2010, the Commonwealth filed a brief by hand-delivery. On July 28, 2010, the PSTA filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing, makes the following:

FINDINGS OF FACT

1. The Commonwealth has recognized the PSTA as the exclusive representative of a bargaining unit that includes sworn members of the Pennsylvania State Police (PSP) working as motor carrier inspectors (MCIs) for the Commonwealth. Civilian motor carrier enforcement officers (MCOEs) are not members of the bargaining unit. (N.T. 12-13, 19, 25, 32)

2. Effective March 2, 2001, administrative regulation 8-5 (AR 8-5) of the PSP provided in pertinent part at section 5.07 E as follows:

"MCSAP Inspections: In 1999, the U.S. Department of Energy (USDOE) and the Commercial Vehicle Safety Alliance (CVSA) entered into an agreement that approved the use of enhanced inspection standards on shipments of highway route-controlled quantities of radioactive materials. These inspections are performed by Motor Carrier Inspectors (MCIs) trained in Motor Carrier Safety Assistance Program (MCSAP) Level VI Enhanced North American Standard (ENAS) inspection procedures and out-of-service inspection criteria. However, at the present time, the enhanced inspections are required only for USDOE-contracted shipments of spent nuclear fuels. The CLEAN Message disseminated from the Bureau of Emergency and Special Operations will indicate if the shipment is USDOE-contracted and therefore requires a MCSAP Level VI ENAS inspection. Department members shall be guided as follows:

1. USDOE-Contracted Shipments:

- a. Shipments originating in and/or destined for Pennsylvania shall be inspected by Department MCIs trained in Level VI ENAS inspection procedures. This paragraph shall not apply to shipments that have passed a Level VI ENAS inspection conducted by a trained Level VI ENAS inspector of another Commonwealth agency."

(N.T. 13, 37; Complainant Exhibit 1)

3. On December 22, 2009, the PSP's commissioner (Colonel Frank E. Pawlowski) revised AR 8-5 to provide in pertinent part at section 5.07 E as follows:

"MCSAP Inspections: In 1999, the U.S. Department of Energy (USDOE) and the Commercial Vehicle Safety Alliance (CVSA) entered into an agreement that approved the use of enhanced inspection standards on shipments of highway route-controlled quantities of radioactive materials. These inspections are performed by **Department personnel** trained in Motor Carrier Safety Assistance Program (MCSAP) Level VI Enhanced North American Standard (ENAS) inspection procedures and out-of-service inspection criteria. However, at the present time, the enhanced inspections are required only for USDOE-contracted shipments of spent nuclear fuels. The CLEAN Message disseminated from the Bureau of Emergency and Special Operations will indicate if the shipment is USDOE-contracted and therefore requires a MCSAP Level VI ENAS inspection. **Department personnel** shall be guided as follows:

1. USDOE-Contracted Shipments:

- a. Shipments originating in and/or destined for Pennsylvania shall be inspected by **Department personnel** trained in Level VI ENAS inspection procedures. This paragraph shall not apply to shipments that have passed a Level VI ENAS inspection conducted by a trained Level VI ENAS inspector of another Commonwealth agency."

(N.T. 24; Complainant Exhibit 4)

4. From at least eight years ago through the date of the hearing, no MCI or MCEO inspected a USDOE-contracted shipment of spent nuclear fuel. (N.T. 15-16, 33-34)

DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by "unilaterally authoriz[ing] non-unit civilian employees of the Pennsylvania State Police to perform Motor Carrier Safety Inspections" that "were duties historically and exclusively performed by bargaining unit members." The PSTA filed the charge after the Commonwealth revised an administrative regulation of the PSP (AR 8-5) to provide that "**Department personnel**" are to inspect USDOE-contracted shipments of spent nuclear fuel (finding of fact 3). AR 8-5 previously provided that "Motor Carrier Inspectors (MCIs)" were to perform those inspections (finding of fact 2). MCI's are members of the bargaining unit, while motor carrier enforcement officers (MCOEs), who would be included among "**Department personnel**," are not (finding of fact 1).

The Commonwealth has moved to dismiss the charge for lack of proof that bargaining unit members historically and exclusively inspected USDOE-contracted shipments of spent nuclear fuel or that non-members of the bargaining unit have performed any such inspections to date.

A transfer of bargaining unit work from members of the bargaining unit to non-members of the bargaining unit occurs when the employer uses a non-member of the bargaining unit to perform work that members of the bargaining unit had performed on an exclusive basis over time. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2006). Thus, if the employer uses a non-member of the bargaining unit to perform work that members of the bargaining unit had not been performing, then no transfer of bargaining unit work may be found. Commonwealth of Pennsylvania, 29 PPER ¶ 29148 (Final Order 1998). Nor may a transfer of bargaining unit work be found if non-members of the bargaining unit have yet to perform work that members of the bargaining unit had been performing. Commonwealth of Pennsylvania, Pennsylvania State Police, 35 PPER 114 (Final Order 2004).

A close review of the record shows that from at least eight years ago through the date of the hearing no MCI or MCEO inspected a USDOE-contracted shipment of spent nuclear fuel (finding of fact 4). The record may be searched in vain for any evidence that an MCI inspected a USDOE-contracted shipment of spent nuclear fuel before then. Thus, the record does not show that any member or non-member of the bargaining unit has ever inspected a USDOE-contracted shipment of spent nuclear fuel. There is, therefore, no basis for finding that a transfer of bargaining unit work occurred when the Commonwealth revised AR 8-5 to provide that "**Department personnel**" rather than "Motor Carrier Inspectors (MCIs)" are to inspect USDOE-contracted shipments of spent nuclear fuel. Accordingly, the Commonwealth's motion to dismiss must be granted.

Without any citation to authority, the PSTA contends that inspecting USDOE-contracted shipments of spent nuclear fuel is bargaining unit work because the Commonwealth authorized members of the bargaining unit (MCIs) to perform those inspections before it revised AR 8-5. Under City of Allentown, supra, however, whether or not work is bargaining unit work depends on whether or not members of the bargaining unit had been performing the work. Thus, in and of itself, the fact that the Commonwealth authorized bargaining unit members to perform the inspections is irrelevant.

Without any citation to authority, the PSTA also contends that inspecting USDOE-contracted shipments of spent nuclear fuel is bargaining unit work because the Commonwealth did not seek to privatize that work during the parties' last round of interest arbitration. Again, however, under City of Allentown, supra, whether or not work is bargaining unit work depends on whether or not members of the bargaining unit had been performing the work. Thus, in and of itself, the fact that the Commonwealth did not seek to privatize inspecting USDOE-contracted shipments of spent nuclear fuel during the last round of interest arbitration is irrelevant as well.

Without any citation to authority, the PSTA further contends that "[i]f the Department has failed to assign such inspections to actually be carried out, it cannot use that failure now as a bootstrapping argument to take the work away from bargaining unit members." Brief at 5. The record does not show that the Commonwealth "has failed to assign such inspections to actually be carried out," however. Moreover, the PSTA admits that "the record reflects that there has not been any call up to now for such inspections to take place." Id. Thus, there is no dispute that no non-member of the bargaining unit has inspected a USDOE-contracted shipment of spent nuclear fuel. Under the circumstances, no transfer of bargaining unit work may be found. See Commonwealth of Pennsylvania, Pennsylvania State Police, supra (transfer of bargaining unit work charge was prematurely filed where non-members of the bargaining unit had yet to perform the work at issue).

CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The PSTA is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint 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 second day of August 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner