P.E.R.C. NO. 74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH JERSEY PORT CORPORATION
Public Employer

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL LODGE 801, AFL-CIO
Petitioner

Docket No. RO-418

and

AMERICAN FEDERATION OF TECHNICAL ENGINEERS LOCAL 18, AFL-CIO
Intervenor

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees employed by the South Jersey Port Corporation, a hearing was held on May 16, 1972 before Leo M. Rose, Hearing Officer of the Commission, at which all parties were given the opportunity to present evidence, examine and cross-examine witnesses and to argue orally. Thereafter, on August 4, 1972, the Hearing Officer issued his Report and Recommendations. Exceptions to that Report and Recommendations were then timely filed by the Petitioner.

The Commission has carefully considered the record, the Hearing Officer's Report and Recommendations and exceptions, and on the basis of the facts in this case finds:

1. The South Jersey Port Corporation is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to the provisions thereof;

2. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge 801 (hereinafter Boilermakers) and the American Federation of Technical Engineers, Local 18 are employee representatives within the meaning of the New Jersey Employer-Employee Relations Act.

3. On March 24, 1972 an amended petition was filed by the Boilermakers in which the Petitioner described the collective negotiating unit claimed to be appropriate for the purpose of exclusive representation as being composed of "all maintenance employees of South Jersey Port Corporation at North Yard, Broadway and Morgan Streets, Camden, New Jersey."[1/] The Public Employer refuses to recognize the Boilermakers as the exclusive negotiating representative for the above unit. Accordingly, a question concerning the representation of public employees exists and this matter is properly before the Commission for determination.

4. The Boilermakers assert that the Hearing Officer was in error in determining that the ten employees in the instant proceeding should be treated as an accretion to the existing collective negotiating unit of hourly paid employees employed by the South Jersey Port Corporation (hereinafter Port Corporation) at the Beckett Street Terminal in Camden and represented by Local 18 of the American Federation of Technical Engineers (hereinafter Intervenor).

1/ The original petition was filed on February 15, 1972 by the Boilermakers requesting a unit of "all maintenance employees" employed by the South Jersey Port Corporation. However, the amended petition was filed on the above date after it became evident that the wording of the original petition did not conform with the intent of the Boilermakers as the petitioning party, i.e., it did not seek to represent all the Employer's maintenance employees, but only those at the North Yard.

The Boilermakers do not dispute that the ten maintenance employees involved in the instant proceeding have been employed by the Port Corporation since January 1, 1971 after their employment with their predecessor employer, the New York Shipbuilding Corporation, had been terminated on December 31, 1970 shortly after the sale of the North Yard facility to the Port Corporation. The Boilermakers also do not dispute that these ten individuals have been treated as new employees by the Port Corporation with no accured seniority rights in accordance with the terms of a severance pay arbitration award. However, the Boilermakers insist that the ten aforementioned maintenance men are entitled to be certified as a separate independent negotiating unit as a consequence of the Boilermakers' long history of collective bargaining with respect to the employees formerly employed by the New York Shipbuilding Corporation at the North Yard.[2/]

In support of its position the Boilermakers rely upon the determination of Howard W. Kleeb, an Impartial Umpire under the AFL-CIO Internal Disputes Plan, that the Intervenor organization was in violation of Article XX, Section 2 of the AFL-CIO Constitution in attempting to represent certain maintenance employees of the South Jersey Port Corporation, notwithstanding the fact that the Boilermakers had an established collective bargaining relationship for these maintenance employees who had formerly

2/ From 1949 until 1970 the North Yard facility was the property of New York Shipbuilding Corporation and was operated as a shipyard during most of this period. During this same period, contractual relations were in effect between the Boilermakers and the Shipbuilding Corporation concerning workers at the North Yard, numbering at one time approximately 10,000 employees, only ten of which remained on as a "skeleton" maintenance work force when the Shipbuilding Corporation phased out its operation and discontinued its shipbuilding activities.

been employed by the New York Shipbuilding Company, their predecessor employer.[3] The Boilermakers conclude that if the instant petition is dismissed and it is held that these former New York Shipbuilding Company employees have been properly accreted to the Intervenor's aforementioned existing collective negotiating unit, then the Commission will have effectively deprived the maintenance employees in question of any collective negotiating representative in light of Umpire Kleeb's decision which mandated that the Intervenor withdraw as the collective bargaining representative for these individuals.[4]

The Commission, pursuant to statutory mandate, must determine whether a unit sought is appropriate for the purpose of collective negotiations "with due regard for the community of interest among the employees concerned."[5] In determining whether a recently acquired facility of a public employer such as the South Jersey Port Corporation constitutes a

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3/ The South Jersey Port Corporation and the Intervenor had mutually agreed to include the following provision, referred to as Article II, Section 3, within their present contract that covers hourly paid blue collar workers employed by the Corporation:

"The Corporation will further recognize the Union as the bargaining agency for its employees, as defined in Article I of this Agreement in other facilities operated by the Corporation within the County of Camden which are created as a result of expansion or change in operation, if and when the Union shows proof that a majority of the employees in such new facility are members of the Union in good standing, provided that the Union will not be required to show proof of majority in the event the other facilities in Camden County constitute a legitimate accretion to the existing facility, and shall then extend this Agreement to such facility; to the extent that the provisions of this Agreement are not properly applicable to such new facility, the parties will negotiate supplementary agreements."

4/ The President of the American Federation of Technical Engineers, William Clary, in a letter dated January 18, 1972 stated that as a result of the Impartial Umpire's decision the Intervenor had taken the position that the employees involved in the dispute would be dropped from their roster, effective immediately, and would no longer be directly affected by the collective bargaining agreement between the Intervenor and the South Jersey Port Corporation.

5/ N.J.S.A. 34:13A-5.3

separate unit for collective bargaining or is an accretion to an existing unit of other employees of the same employer, all relevant facts, as they relate to the concept of "community of interest", must be taken into account, including such matters as the geographic proximity of the facilities involved; the extent of functional integration between the facilities and the job skills of the employees involved therein; the amount of centralized administrative control over the management of said facilities; and the extent of employee interchange.[6/]

The Commission finds upon complete examination of the record that the unit sought by the Boilermakers is not an appropriate unit for purposes of collective negotiations.

The two facilities under the control of the South Jersey Port Corporation are the Beckett Street Terminal (formerly known as the Camden Marine Terminal) and the former New York Shipbuilding Corporation properties now known as the Broadway Terminal (formerly known as North Yard). These properties are geographically proximate to each other, located in the City and County of Camden, New Jersey approximately two miles apart.

It is the intent of the South Jersey Port Corporation to operate both of the above terminals as essentially a single unit for "general marine cargo" purposes whereby each facility would be engaged in the operation of public berths, where any shipowner could dock his ship and have his cargo loaded or discharged upon payment of normal wharfage and dockage charges. The Port Corporation has taken measures to insure that the recently acquired Broadway Terminal, formerly operated by the New York Shipbuilding Corporation as a facility engaged in the construction and

6/ The Commission notes as a background fact that the operations of the Port Corporation parallel that of a traditional industrial facility rather than a conventional governmental operation.

maintenance of sea-going vessels, will offer services to shipowners that are functionally identical to those services at the Beckett Street Terminal. Specifically, the Port Corporation, on January 1, 1972, filed a new tariff with the Federal Maritime Commission outlining the rates, practices, procedures, and regulations for handling ships to be applied uniformly, without exception, at both terminals. The Executive Director of the Port Corporation testified that the Corporation was effectively prohibited from engaging in any type of operation associated with those types of activities that New York Shipbuilding Corporation was formerly involved in; specifically, the construction and/or repair of ships.

The Executive Director of the Port Corporation has overall administrative responsibility for the day to day management and operation of both the Beckett Street and Broadway Terminals. In addition, all managerial determinations concerning these facilities, including those specifically relating to labor relations policy, are made centrally.

Furthermore, the job titles, functions, and skills of seven of the ten maintenance employees petitioned for by the Boilermakers, who have been designated by the Port Corporation as either Mechanics and Maintenance Repairmen or Laborers since August of 1971, are essentially identical to those of other hourly paid blue collar workers employed by the Port Corporation who have not been petitioned by the Boilermakers.[7/] These seven

7/ When the ten maintenance employees petitioned for by the Boilermakers first became employees of the Port Corporation on January 1, 1971, they were temporarily designated as Utility Men, pending an evaluation of their job skills and the needs of the Port Corporation. Notices of job openings in the classifications of Mechanics and Maintenance Repairman (posted July 6, 1971) and Powerhouse Personnel (posted July 30, 1971) were then circulated. Shortly thereafter, nine of the ten former New York (Continued)

individuals have performed maintenance functions at both the Beckett Street and Broadway Terminals and have been utilized by the Port Corporation in the same manner as other employees of the Corporation, presently represented by the Intervenor, who occupy these same job classifications. The Executive Director of the Port Corporation stated that he has endeavored to integrate the Port Corporation's "maintenance work force" to the maximum extent possible.

The three other maintenance employees petitioned for by the Boilermakers have been designated by the Port Corporation since August of 1971 as Powerhouse Personnel and are, at this time, licensed high pressure boiler operators. Although the record before the Commission is somewhat unclear on this point, it appears from the testimony of the Executive Director of the Port Corporation that the intent of the Port Corporation is to utilize these three individuals in both the Beckett Street and Broadway Terminals in a maintenance capacity since the high pressure boilers located only at the Broadway Terminal apparently are not in operation. 8/ It is clear to the Commission that the assigned maintenance tasks of these three individuals effectively complement the duties of all the workers employed by the Port Corporation who hold the occupational titles of Laborers or Mechanics and Maintenance Repairmen. The assigned duties of this "maintenance task force" employed by the Port Corporation are all

7/ (Continued) Shipbuilding Corporation employees were promoted to fill the advertised job openings. Specifically, six individuals were promoted to the position of Mechanic and Maintenance Repairman and three others were successful applicants for the positions of Powerhouse Firemen and Powerhouse Engineer. The tenth worker was reclassified as a Laborer.

8/ Although the notices of job openings concerning Powerhouse Personnel specified that the individuals filling these positions would work at the Broadway Terminal, there is evidence within the record that it was neither the intent nor has it been the practice of the Port Corporation to utilize these people exclusively at the Broadway Terminal.

integrally related to one another and it is apparent that all of the former New York Shipbuilding Corporation employees have been effectively integrated therein.

In view of all the above factors, the Commission concludes that the maintenance force acquired from New York Shipbuilding Corporation constitutes an accretion to the unit currently represented by the Intervenor and that the unit sought by the Boilermakers is not an appropriate unit for purposes of collective negotiations. The Commission does not find merit in the contention of the Boilermakers that the collective bargaining relationship established and maintained with the predecessor employer mandates that these individuals are entitled to be certified as a separate unit. A collective bargaining history is one of many factors to be carefully considered in determining whether a "community of interest among the employees concerned" does, in fact, exist, but it does not outweigh all other relevant considerations. Furthermore, the weight normally given to such a history does not obtain here in view of the fact that the successor employer, with an operation and function totally different in character from that of its predecessor, acquired only a small fragment of the unit which was previously represented by the Boilermakers and on which was built that long history of bargaining. The reduced size of the unit at the time of acquisition presents a distorted picture of the historical unit; that fact plus the difference in the functions of the two employing entities tends to diminish the weight to be given the bargaining relationship which existed over the years.

Umpire Kleeb's determination which favored the Boilermaker's contention relied heavily upon the Boilermaker's history of bargaining in

finding AFTE guilty of an Article XX violation by attempting to represent the employees in question. We are unable to accept the umpire's analysis and determination as dispositive of this case. In his discussion, Kleeb observed that "The Boilermakers...continues to have an established collective bargaining relationship with respect to the maintenance employees at the North Yard." He later concluded: "The change of ownership herein in which the employees involved were retained by the South Jersey Port Corporation, and where they are doing substantially similar work as in the past, leads to a conclusion that the Boilermakers retained their established collective bargaining relationship." As we read it, the umpire is relying on a theory of successorship whereby the successor employer inherits from its predecessor the pre-existing obligation to bargain, or conversely, a union's right to represent employees in an appropriate unit survives the transfer of ownership from one employing entity to another. That is a theory which enjoys currency in private sector labor relations. See the U. S. Supreme Court's decision in N.L.R.B. v Burns International Security Services, ___U.S.___; 80 LRRM 2225 (1972) and the cases cited therein for a complete exposition of that subject. Whether the instant case meets the conditions necessary for the application of the successorship doctrine is doubtful, but in any event we need not decide that issue, nor for that matter, whether the doctrine has a place in public sector labor relations, because the Boilermakers do not urge that theory here. In fact, it would be inconsistent with its filing of a representation petition, which has as its purpose the establishment of the right to represent and the duty to negotiate. The Boilermakers do not contend here that the Port Corporation has a duty to negotiate for

the employees in question as a result of the transfer in ownership. Yet that is implicit in Kleeb's determination and comes about apparently because the Boilermakers took a different position before Kleeb, i.e., that by virtue of the successorship doctrine the Boilermakers had the uncontested right to represent this group of employees. Consequently, we do not consider the umpire's determination to be relevant to the issue before the Commission.

For all the reasons indicated above, the Commission concludes that the petition should be and is hereby dismissed. 9/

BY ORDER OF THE COMMISSION

John F. Lanson
Acting Chairman

DATED: February 23, 1973
Trenton, New Jersey

9/ In its exceptions to the Hearing Officer's Report and Recommendations, the Boilermakers contend that the Hearing Officer erred in determining that both its original petition, filed on February 15, 1972 and its amended petition, filed on March 24, 1972 were equally untimely, pursuant to Section 19:11-15(d) of the Commission's Rules and Regulations. The Boilermakers assert that a prematurely filed petition should never be dismissed as untimely if, as in the instant matter, a hearing has been held on a petition and the Commission's decision will issue after the earliest date for the timely filing of this representation petition. Assuming, arguendo, that the Boilermakers' exceptions regarding the timeliness question are sustainable, the Commission's determination that the petitioned for unit is inappropriate makes unnecessary a consideration of the timeliness issue.

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LOCAL 18
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HEARING OFFICER'S REPORT AND RECOMMENDATION

Pursuant to a Notice of Hearing dated April 27, 1972, a hearing was held before the undersigned Hearing Officer of the Commission on May 16, 1972 in Trenton, New Jersey.

South Jersey Port Corporation (hereinafter employer) was represented by Frank McDermott, Esquire.

International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, Local Lodge 801, AFL-CIO (hereinafter Boilermakers) was represented by Richard Kirschner, Esquire.

Local 18, American Federation of Technical Engineers, (hereinafter intervenor) did not appear, nor was it represented.

Parties appearing had full opportunity to present evidence, oral argument, to examine and cross-examine witnesses and to file briefs. The parties declined to file briefs.

A petition was filed on February 15, 1972 by the Boilermakers, requesting a unit of "all maintenance employees" but excluding office clericals,

guards and supervisors. On March 24, 1972, an amended petition was filed by the Boilermakers in which the requested unit was described as "all maintenance employees of South Jersey Port Corporation at North Yard, Broadway and Morgan Streets, Camden, New Jersey."

Upon the entire record in this proceeding, the undersigned finds:

1. South Jersey Port Corporation is a public employer within the meaning of the Act and is subject to the provisions thereof;
2. International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, Local Lodge 801, AFL-CIO is an employee representative within the meaning of the Act.
3. Because the Boilermakers claim to represent certain employees of the employer for the purpose of collective negotiations, and the employer refuses to recognize the Boilermakers, there is a question concerning representation before the Commission and it is appropriate for the Hearing Officer to hear and recommend concerning this issue.

DISCUSSION

The employees here in question are employed at a facility known as Broadway Terminal (previously referred to as North Yard). From 1949 until 1970 said premises were the property of New York Shipbuilding Company (hereinafter Company) and were operated as a shipyard during most of the period mentioned. During the same period, contractual relations were in effect between Boilermakers and Company, the last agreement taking effect in 1966. Said agreement contained a self-perpetuating clause which made it operative until January 31, 1971, but was terminated by letter dated November 30, 1970 from the Company to the Boilermakers. Said letter was pursuant to the terms of the agreement.

On the same date as the letter, November 30, 1970, the premises of

Broadway Terminal were purchased by the Corporation, and they remain the property of the Corporation.

The Agreement of Sale, in which the terms of the conveyance of this property are set forth, carries a clear disclaimer of responsibility to any employer-employee agreement, written or verbal. (Ex PE-3). Additionally, the employees in question were informed prior to the time of purchase by the Corporation that they would be retained as new employees of the Corporation and be placed in job titles suited to their qualifications. Said placement took place (EX PE-1) for the employees here in question some time later, and all of these employees began checking-off dues in February 1971 to AFTE.

Subsequent to the above-mentioned sale, on October 18, 1971 Boilermakers filed an Art. XX proceeding with the Internal Disputes Section of the AFL-CIO, seeking to assert (or re-assert) the jurisdiction of that union over the work performed by the men involved here. The finding of the arbitrator was in favor of the Boilermakers, and AFTE made a prompt disavowal of interest in the employees in question by letter of June 18, 1972. (Ex U-2).

Insofar as timeliness is concerned, counsel for Boilermakers pointed out that the AFTE agreement (Ex PE-4) is for a period of three years. The effective date of said agreement is August 1, 1970, running to July 31, 1973. Therefore, if timeliness is in issue here, and counsel purports to be moving under 19:11-15(d) of the Rules and Regulations of the Commission, which reads, in pertinent part, "... or two (2) years from the effective date of the agreement... unless unusual circumstances exist which will substantially affect the unit or the majority representation", then it would seem that the original petition and the amended petition are equally untimely, as the protected period of the AFTE agreement would run until August 1, 1972.

The abrogation of the collective bargaining agreement by New York Shipbuilding Company, (an act which terminated the relationship, disregarding its length), a clear denial of responsibility for the employee status of the concerned employees, both in terms of the Company's paying severance, albeit reluctantly, and a clear statement in the Agreement of Sale to the same effect, and, finally, an unequivocal stand by the Corporatin that the employees in question would be accepted by the Corporation, but as new employees would appear to put a quietus on the Boilermakers claims.

It seems that both Company and Corporation did everything in their power, openly and without subterfuge, to sever all obligation to the continuity of employment of the employees concerned, that their respective conduct was licit in all respects and punctilious in serving of notice prior to action.

The salient facts contained in the foregoing exposition of this situation are not in dispute. On the one hand the Boilermakers are filing a de novo petition, whereas the Corporation chooses to regard the unit involved as already absorbed into the AFTE existing unit, therefore covered by the terms of that agreement.

The untimeliness of the instant petition, already discussed above, considered in the light of patent laches by the Boilermakers (i.e. termination of agreement by Company took place November 30, 1970 and Art. XX proceedings began October 18, 1971) represent sporadic attempts by Boilermakers to revive a defunct unit by means of asserting a claim against a new owner who owes them no obligation. Furthermore, Counsel for Corporation, on December 11, 1970 met with the affected employees and made an offer of employment to them, the bona fides of which are apparent. By July, all of the men involved had been placed in positions appropriate to their skills by means of the job bidding procedures. This, in effect integrated them into the existing AFTE unit, indeed, it accomplished that, and more, because in the interim, these employees have been freely interchanged as

the occasion and the need arose. (Tr Pg. 46 L5) (Tr pg. 39, L1 & L6) They commenced paying dues in February 1971 to AFTE. Clearly, then, in the period beginning with the acquisition by Corporation of the former North Yard, now known as Broadway Terminal, until October 1971 when Art. XX proceedings were initiated, both Corporation and AFTE behaved in such manner as to lead the undersigned to conclude that the whole affair was treated as a routine accretion. This would be consonant with the language and obvious intent of the AFTE-Corporation agreement, ART. II, Sec. 2, which says in part, "this agreement shall follow the Corporation's operation should there be any change in the geographical location within the County of Camden, New Jersey." It is conceded that the facility here in question is in Camden.

('A propos of this provision, Boilermakers did not advance a claim of a successor relationship in their terminated agreement from which the undersigned infers that such provisions did not exist.)

Finally, the undersigned does not believe that private mechanisms for dispute settlements (such as Art. XX proceedings under the AFL-CIO constitution) have or should have any binding effect on the Commission, and the reliance of the Petitioner thereon is misplaced in this proceeding.

Regarding what the undersigned has already characterized as laches (i.e. delay from November 1970 to October 1971), and which the umpire chose to consider de minimis, the undersigned drastically differs with the umpire. The latter dismissed the lengthy interval in question as "tantamount to establishing some kind of statute of limitations." The inequity of permitting a claim to be open-ended ad infinitum, which is implicit in the umpire's remarks is generally apparent. Presence of an alleged claim imputes a duty to press same forthwith. In the present circumstances, wherein the disposition of ten employees is involved, such delay is distinctly undesirable.

It is, therefore, the finding of the undersigned that Boilermakers petition in the instant matter is untimely (vis' a vis the AFTE agreement), that said agreement does in fact cover employees at Broadway Terminal and that the employees in question are de facto members and ought to be de jure members of AFTE. Concluding thus, the undersigned respectfully recommends that the petition in this matter be dismissed and that the unit sought be considered as an accretion to the existing AFTE unit. In spite of the non-participation by AFTE in this hearing, notice is hereby taken as to the employer representative status thereof.

Leo M. Rose
Hearing Officer

DATED: August 4, 1972
Trenton, New Jersey