

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-R-16-261-E
SOUTHEASTERN PENNSYLVANIA :
TRANSPORTATION AUTHORITY :

FINAL ORDER

A Petition for Representation was filed with the Pennsylvania Labor Relations Board (PLRB or Board) on September 15, 2016, by Transport Workers Union, Local 234 (Petitioner). The Petitioner alleges that it represents certain employees of MV Transportation, Inc. (MV) in a bargaining unit certified by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 - 168, and seeks certification by the Board under Section 603 of the Public Employee Relations Act (PERA) as the representative of those same employees for purposes of collective bargaining with the Southeastern Pennsylvania Transportation Authority (SEPTA), as a joint employer of the employees. On October 5, 2016, the Secretary of the Board issued a letter declining to direct a hearing on the Petition for Representation. In his letter, the Secretary stated that the Board does not conduct elections or certify bargaining units of employees of alleged joint employers where one of the alleged employers is not subject to the jurisdiction of the Board. On October 24, 2016, the Petitioner filed timely exceptions to the Secretary's decision.

On exceptions, the Petitioner argues that SEPTA exercises control over hiring, training, scheduling, supervision and discipline of MV employees, and thus is a joint employer. Petitioner cites **Costigan v. Local 696, AFSCME**, 462 Pa. 425, 341 A.2d 456 (1975), **Novembrino v. International Association of Machinists & Aerospace Workers Lodge 2462**, 601 A.2d 916 (Pa. Cmwlth. 1992), and **Browning-Ferris Industries of California, Inc.**, 362 NLRB No. 186 (August 27, 2015), for the proposition that in a joint employer relationship, each employer may have separately enforceable bargaining obligations with respect to the same employees. Thus, the Petitioner argues that the Board has jurisdiction over SEPTA, a public employer, and therefore may certify an employee representative to negotiate with SEPTA with respect to employee wage, hour and working condition matters that are within SEPTA's control.

However, the cited cases did not involve division of jurisdiction over the employees under both federal and state law. Indeed, **Costigan** involved employees who were jointly employed by the City of Philadelphia and the Register of Wills, both of which were public employers under PERA. **Novembrino** involved the division of supervision over city employees between the city controller and city council, again both of which are public employers under PERA. Similarly, **Browning-Ferris** involved employees who were jointly employed by two private sector companies that were both subject to the NLRB's jurisdiction under the NLRA.

Relying on **United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Steamfitters Local 449 v. PLRB**, 613 A.2d 155 (Pa. Cmwlth. 1992), the Petitioner argues that irrespective of the NLRB's jurisdiction over MV as a private sector employer, the Commonwealth Court has effectively held that the PLRB may separately certify a bargaining unit and enforce the bargaining obligations against SEPTA as the public employer in a joint employer relationship. In **Steamfitters Local 449**, the union alleged that the University of Pittsburgh discriminated against an employee for reasons of union animus in violation of Section 1201(a)(3) of PERA. The Board and Commonwealth Court noted that the University was a public employer and had control over the hiring and firing of employees working at the University through Bryan Mechanical Company, a private contractor. The Court stressed that the Board's jurisdiction to find the unfair practice and remedy the University's alleged act of discrimination extended only to the University and only insofar as the University had control and the ability to effectuate the remedy

without interference with the rights and obligations of Bryan Mechanical, the private employer.

We disagree with the Petitioner that the holding in **Steamfitters Local 449** should be extended to the Board's jurisdiction to certify a bargaining representative, or to enforce bargaining obligations, in an alleged joint employer relationship where one employer is not within the jurisdiction of the Board. See **Black Horse Pike Regional School District**, 35 NJPER ¶125 (New Jersey Public Employment Relations Commission, 2009) (holding that in exercising jurisdiction over the public employer in an unfair practice case, the commission did not need to address whether it would certify a representative where public and private employers were joint employers). Unlike remedial relief for an unfair practice by a public employer, representation proceedings are fundamentally different. Representation proceedings do not remedy past conduct, but identify the appropriate representative and bargaining unit of employees for purposes of prospective assertion of bargaining rights and obligations between the certified representative and the employer or employers. Indeed, where there is a joint employer relationship, identifying the obligation to bargain over matters of wages, hours or working conditions by one of the employers necessarily affects the bargaining obligations with respect to the other employer. See **Novembrino**, *supra*. Thus, where one of those employers is under the jurisdiction of the NLRA, issues of preemption and conflicts between state and federal statutory bargaining obligations arise. *E.g.* **San Diego Building Trades Council v. Garmon**, 359 U.S. 236 (1959) (NLRB has exclusive jurisdiction over suits concerning any activity which is arguably subject to the NLRA); **Western Pennsylvania School for the Deaf v. PLRB**, 438 A.2d 1025 (1982) (PLRB may not act in cases within the jurisdictional ambit of the NLRB); see also **University of California**, 23 PERC ¶ 30058 (California Public Employment Relations Board, 1999) (allegation that University of California and UCSF-Stanford Health Care (USHC), a private corporation, are joint employers would impermissibly extend PERB jurisdiction to matters involving the regulation of labor relations of USHC and its employees, in violation of established federal preemption principles); **Cesar Chavez Academy and the Leona Group**, 19 MPER ¶66 (Michigan Employment Relations Commission, 2006) (holding that because both the Academy (a public employer) and the Leona Group (a private corporation) were involved in the management of the school, the state labor board must defer to the NLRB for a determination of the employer under the NLRA).

Indeed, were the Board to exercise jurisdiction and find that the employees of MV are in a joint employer relationship with SEPTA for purposes of collective bargaining, the Board would in effect be usurping the purview of the NLRB to determine the representative of the employees under Section 9 of the NLRA. 29 U.S.C. §159.¹ For example, if there was a change in the exclusive representation of the employees under the NLRA as regards MV, either by recognition or an election conducted by the NLRB, no such change in representation would be effective for those employees as regards SEPTA absent a separate election proceeding and certification by the PLRB under PERA. See 43 P.S. §1101.602(a) (requirement that a certification of representative be issued by the PLRB). Therefore, the Board's exercise of jurisdiction under PERA would interfere with the employees' free choice of representative under Section 7 of the NLRA. 29 U.S.C. §157. By declining to assert jurisdiction to conduct an election and certify a bargaining unit in a joint employer relationship where the employees are, or could be, represented in a bargaining unit under the NLRA, the PLRB is not leaving the employees without the ability to be represented, nor acting contrary to law, but is respecting the principles of federal preemption and the jurisdiction of the NLRB.

Accordingly, the Board will continue to hold that in an alleged joint employer relationship where one of the employers is a private employer under the jurisdiction of the NLRB, the Board will decline to exercise jurisdiction over those same employees in a representation proceeding under PERA. **Lancaster Guidance Center**, 16 PPER ¶16025 (Proposed

¹ The NLRB has held that in representation proceedings where there is alleged to be both a private company and governmental employer, it will not conduct a joint employer analysis. **Management Training Corporation**, 317 NLRB 1355 (1995). Instead, in such situations, the NLRB will assert jurisdiction and conduct an election among the employees of the private employer. *Id.*

Decision and Order, 1984); *see also*, **Harbor Creek School District**, 20 PPER ¶20187 (Final Order, 1989) (where Naval Science Instructors were jointly employed by the school district and the United States Navy and the PLRB lacks jurisdiction over the latter employer, the PLRB will not include employees of the joint employers in a unit consisting of only school district employees); **Wattsburg Area School District**, 47 PPER 38 (Proposed Decision and Order, 2015), *affirmed*, PERA-U-12-240-W (Final Order, July 19, 2016) (holding that when a joint employer relationship exists where only one of the joint employers is within the Board's jurisdiction, the Board will not certify those employees into a bargaining unit limited to the public employer). As such, after a thorough review of the exceptions and all matters of record, the Secretary of the Board did not err in declining to direct a hearing on the Petition for Representation, and the exceptions to the Secretary's October 5, 2016 decision shall be dismissed.

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 the Transport Workers Union, Local 234 are hereby dismissed, and the October 5, 2016 decision of the Secretary of the Board be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Robert H. Shoop, Jr, Member, this seventeenth day of January, 2017. 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.

MEMBER ALBERT MEZZAROBÀ DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.