

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of * Case No.: UPL-18-6690
*
INTERNATIONAL LONGSHOREMEN'S *
ASSOCIATION, LOCAL 809 *
*
and * Date Issued: October 6, 2020
*
DAVID C. TURLEY *
*

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member¹

Appearances:

Luke Liacos, Esq. - Representing ILA, Local 809
Joseph A. Padolsky, Esq. - Representing David C. Turley

AMENDED CERB RULING ON INTERLOCUTORY APPEAL
SUMMARY

1 The International Longshoremen's Union, Local 809 (Union) seeks interlocutory
2 review of two rulings made by a Department of Labor Relations (DLR) Hearing Officer
3 that resulted in her scheduling a sixth day of hearing in the above-captioned matter. For
4 the reasons set forth below, the Commonwealth Employment Relations (CERB) denies
5 the appeal.
6 Background

¹ CERB Member Kelly Strong recused himself from this matter.

1 At all material times, Charging Party David C. Turley (Turley or Charging Party)
2 has been employed by the Massachusetts Port Authority (Massport) as a Terminal
3 Operator. Turley is a member of the bargaining unit represented by the Union. In June
4 2018, Turley filed a prohibited practice charge at the DLR alleging that the Union had
5 violated Section 4A(4) of M.G.L c. 150A (the Law). After investigation, the DLR issued a
6 four-count complaint alleging that the Union violated Section 4A(4) by the manner in
7 which the Union, acting through its president Philip McGee (McGee), used McGee's office
8 to bid ahead of Turley and other members of the bargaining unit who had greater seniority
9 than McGee in the classification of Terminal Operator; withdrew two grievances that a
10 Union shop steward filed on Turley's behalf challenging McGee's bid, and attempted to
11 change Union bylaws to place McGee permanently above Turley on the seniority list.

12 Between November 5, 2019 and June 22, 2020, the Hearing Officer conducted five
13 days of hearing. At the close of the June 22 hearing, both parties confirmed that they
14 could appear before the DLR for a sixth day of hearing on August 11, 2020 if they decided
15 to submit rebuttal evidence. On July 6, 2020, the Hearing Officer granted a motion that
16 the Union filed prior to June 22 to submit seven affidavits in lieu of testimony.² At that
17 point, the Union rested its case subject to rebuttal. Between June 22, 2020 and August
18 25, 2020, the Hearing Officer made several rulings pertaining to rescheduling the August
19 11th date. The Union appeals from two of the rulings.³

20 August 10, 2020 ruling granting Turley's request to postpone August 11 hearing

² Turley did not object to the admissibility of the affidavits but disputed their substantive content.

³ A more complete statement of the facts is set forth in the Hearing Officer's Ruling on Show Cause and Ruling on Respondent's Motion to Close Record and Conclude Hearing.

1 The Hearing Officer made this ruling after making unsuccessful attempts to have
2 Turley, through his counsel, confirm whether he would submit rebuttal evidence. The
3 Hearing Officer initially sought this information via emails on July 1 and July 7. On July
4 10, Turley requested until July 15 to respond, and the Hearing Officer granted that request
5 over the Union's objection. Instead of providing dates, however, on July 15, Turley filed
6 a motion to submit two witness affidavits in lieu of testimony and included the affidavits
7 with the motion. The Union opposed the motion on July 21, 2020.

8 On Friday, August 7, 2020, before the Hearing Officer ruled on Turley's motion to
9 submit affidavits in lieu of testimony, the DLR, for the first time, issued a notice of hearing
10 for a sixth day of hearing on Tuesday, August 11. In a separate email, the Hearing Officer
11 explained that, in lieu of issuing a ruling on the Charging Party's motion to submit rebuttal
12 affidavits, the matter would go forward on August 11 "for the purpose of allowing the
13 parties to present rebuttal testimony, if any." Turley then filed a motion the same day
14 seeking postponement of the August 11 hearing date on grounds that, "because of how
15 it was left" he believed that the date had been reserved but was "not officially on" and
16 thus, he had not lined up witnesses. The Hearing Officer replied that she was prepared
17 to go forward unless Turley affirmatively stated that he was unavailable on August 11 and
18 absent a formal request from either party to reschedule. The Hearing Officer told Turley's
19 counsel that he was responsible for conferring with the Union to provide three mutually
20 agreeable alternative dates to reschedule the hearing, in accordance with the DLR's rules.
21 Counsel responded by reiterating that because he had not received a hearing notice for
22 August 11, he assumed the hearing date was not going to occur and did not line up
23 witnesses.

1 Turley's counsel and the Hearing Officer exchanged a series of emails on August
2 10, resulting in the first ruling at issue here. First, early that morning, the Hearing Officer
3 emailed Turley's counsel to notify him that because she had not heard from him with
4 dates, she was prepared to go forward with the hearing the next day. Counsel replied
5 explaining that he was about to go into an arbitration and could not reply other than with
6 the email. He reiterated that although he had initially agreed to August 11 for a sixth day
7 of hearing, he had done so before he filed the motion to submit rebuttal affidavits in lieu
8 of testimony. He further reiterated that he had not lined up witnesses because he did not
9 receive a notice of hearing until August 7. He finally indicated he had tried to line up
10 witnesses that day for August 11 hearing but was not successful. He therefore stated that
11 he was unavailable to proceed on August 11. The Hearing Officer then sent an email
12 indicating that she was treating the email as a motion to postpone due to unavailability of
13 witnesses. She gave Turley until August 13, 2020 to secure alternative dates for hearing
14 and stated that failure to provide a response by then would result in her closing the record
15 and concluding the hearing. About an hour later, the Union filed an opposition to the
16 motion to postpone. At around 1 p.m., the DLR, without further comment, stamped
17 "ALLOWED" on Turley's August 10 email and forwarded the ruling to the parties. The
18 Union appeals from the allowance of the postponement.

19 In a separate ruling issued the morning of August 10, 2020, the Hearing Officer
20 denied Turley's motion to submit affidavits in lieu of testimony.⁴ Turley did not appeal
21 from that ruling.

⁴ The Hearing Officer nevertheless found that the evidence contained in the affidavit submitted by Terminal Operator Jean Chervil was proper rebuttal evidence.

1 August 25 Ruling

2 Turley did not provide dates by August 13, 2020 as requested by the Hearing
3 Officer. As a result, the Hearing Officer sent a letter (Show Cause letter) to Turley directing
4 him, by no later than 5 p.m. on August 21, 2020, to “show cause why I should not close
5 the hearing record and conclude the case.”

6 On August 21, 2020, at 11:02 a.m., Turley’s counsel’s office emailed a response
7 to the Show Cause letter to the DLR. The final paragraph of Turley’s response
8 summarized his position:

9 For the reasons discussed above, it is quite clear that the charging party
10 has additional relevant evidence to add to the record to rebut the
11 Respondent’s evidence. Charging Party has endeavored to offer said
12 evidence in the same exact manner as the respondent was allowed to offer
13 its remaining evidence, but Charging Party’s request was denied.
14 Notwithstanding that endeavor, a hearing was not set for August 11th until
15 the Friday before that date, leaving the charging party with less than two full
16 business days to coordinate witnesses. Charging Party attempted to do so
17 but the witnesses were unavailable on such short notice. Charging Party’s
18 August 14th email explained that his response on dates was inadvertently
19 delayed as a result of counsel’s busy litigation calendar and further provided
20 available dates on which a final day of hearing could be held. Closing the
21 record in light of the above would be an error of law.

22 The Union apparently did not receive a copy of Turley’s show cause response.⁵
23 Thus, after 5 p.m. on August 21, the Union also filed a response to the Show Cause letter
24 and a separate Motion to Close the Record, arguing that due to the Charging Party’s
25 failure to file a timely response to the show cause letter, the Hearing Officer should close
26 the record.

⁵ Turley’s response contained a Certificate of Service indicating that it had been emailed to Union counsel, but Turley’s transmittal email to the DLR’s “Efile” address did not copy Union counsel.

1 On August 25, 2020, the Hearing Officer ruled that the Charging Party had shown
2 cause for his failure to respond to her August 10 directive based on “calendar availability
3 and based on the need to present rebuttal evidence.” She also found that Turley had
4 filed a timely response to the show cause letter because the DLR had received it at 11:02
5 am, several hours before the 5:00 p.m. deadline.

6 After the Hearing Officer issued her ruling, the Union filed a more substantive
7 response to the Show Cause letter, stating that due to the “Charging Party’s repeated
8 failure to adhere to agreed-upon hearing dates and the Hearing Officer’s duly-issued
9 deadlines,” Turley could not show cause to justify allowing this matter to proceed to a
10 sixth day of hearing. Citing Bernard v. United Brands Co., 27 Mass. App. Ct. 415 (1989),
11 the Union argued that Massachusetts courts have rejected excuses that a lawyer is “too
12 busy” in finding good cause or excusable neglect to grant extensions or postponements.
13 The Union also noted that Turley had not been tasked with anything more onerous than
14 providing alternative dates, and that in any event, he still had not conferred with opposing
15 counsel regarding those dates.⁶

16 Interlocutory Appeal

17 On September 4, 2020, the Union filed a request for review of the Hearing
18 Officer’s two rulings, claiming that she had abused her discretion by granting the
19 August 10 postponement, not closing the matter after Turley did not respond with dates
20 by August 13 and finally, by finding that Turley had shown insufficient cause to schedule

⁶ The Union also filed a motion to reconsider the ruling based partly on the fact that it had never received a copy of Turley’s show cause response. The Hearing Officer wrote back indicating that the DLR had no procedure that permits hearing officers to reconsider their own rulings but notified the Union of its right to file an interlocutory appeal pursuant to 456 CMR 13.04(1). The Union subsequently withdrew the motion.

1 the 6th day of hearing. The Union also pointed to Turley's failure to serve it with a
2 copy of the response to the show cause letter as required by the DLR's regulations. The
3 Union claims this prevented it from meaningfully responding to the Show Cause
4 letter and again demonstrates Turley's flouting of the DLR's procedural rules.

5 Turley filed a response stating, among other things, that the Union failed to
6 demonstrate why interlocutory relief prior to the close of hearing is necessary,
7 downplayed the difficulty of coordinating witnesses to appear for a full hearing when a
8 hearing is noticed with less than two business days between the hearing notice and the
9 hearing date. Turley also suggested that the purpose of the Union's various filings was to
10 prevent Turley from presenting his rebuttal testimony.

11 On September 2, 2020, the DLR sent out a Notice of Hearing to the parties that
12 Day 6 of the Hearing would be conducted on Tuesday, October 27, 2020 at 10:00 a.m.
13 Neither party has sought to postpone that date.

14 Ruling

15 Prior to the close of a hearing, Section 13.04 of the DLR's regulations, 456 CMR
16 13.04, permits a party to seek relief from a hearing officer's ruling by filing a written motion
17 addressed to the CERB that sets forth "with specificity the ruling or order from which relief
18 is sought and the grounds upon which the party believes it is entitled to relief." 456 CMR
19 13.04(1)(a), (b). When ruling on interlocutory appeals under Section 13.04 of the DLR's
20 rules, the CERB applies an abuse of discretion standard. City of Cambridge, 30 MLC 31,
21 32, MUP-01-3033 (September 3, 2003); Commonwealth of Massachusetts, 7 MLC 1477,
22 1480, SUP-2414 (October 29, 1980).

1 Here, there is no question that on at least three occasions, Turley disregarded the
2 Hearing Officer's deadlines and/or did not comply with DLR rules regarding seeking
3 postponements of hearing dates, providing alternative dates, or serving pleadings on
4 opposing counsel. We do not condone such behavior and agree with the Union that
5 ordinarily, the press of business should not constitute good cause for failing to submit
6 information as simple as providing alternative dates for a hearing. However, Turley's
7 counsel's busy schedule was not the only excuse he offered in this case for his delayed
8 responses. Rather, he contends, not unreasonably, that due to the pendency of his
9 motion to submit rebuttal affidavits in lieu of testimony, which was similar to a motion filed
10 by the Union and which the Hearing Officer had granted, and the absence of any Notice
11 of Hearing from the DLR in the interval between the time that he filed that motion and
12 August 7, it was not until August 7 that he knew for certain that the DLR intended go
13 forward with the hearing on August 11, just two business days later. By then, despite
14 professed efforts to do so, he could not secure the witnesses whose affidavits he had
15 previously proffered.

16 The DLR/CERB's mission is to provide a fair process to the parties before it to
17 facilitate stable labor relations. Absent evidence of prejudice to the parties, or undue
18 constraints on DLR resources, deciding matters on purely technical grounds may
19 undermine that mission. Commonwealth of Massachusetts, 26 MLC 43, SUP-3855, SUP-
20 3955 (September 14, 1999) (citing Commonwealth of Massachusetts, 21 MLC 1515,
21 SUP-4029 (December 30, 1994)).

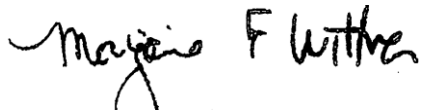
22 Here, although the Union may be understandably irritated by Turley's failure to
23 comply with certain DLR postponement rules or the Hearing Officer's rescheduling

1 requests, it has not shown that it will be prejudiced by allowing this matter to go forward
2 for a sixth day of hearing. Like Turley, it agreed to schedule a sixth day of hearing for
3 rebuttal testimony. Moreover, given the substance of Turley's motion to submit rebuttal
4 affidavits in lieu of testimony, and the Hearing Officer's ruling on same, including that the
5 testimony of one of the witnesses constituted valid rebuttal testimony, the Union can
6 neither claim surprise nor lack of preparation time to go forward on October 27, which is
7 still three weeks away. Finally, even though the Union had not seen a copy of Turley's
8 show cause response when it filed its reply, it cannot claim that it was unfairly prejudiced
9 by the Hearing Officer's ruling because the Show Cause letter was directed solely to
10 Turley and did not seek the Union's position on the issue.

Under these circumstances, and in accord with the principles set forth above, the Hearing Officer did not abuse her discretion either by provisionally allowing Turley's request for a postponement on August 10, 2020, or by finding sufficient cause on August 25, 2020 not to close the record and conclude the hearing. See Commonwealth of Massachusetts, 21 MLC at 43. See also Linda S. Eyster v. Jan A. Pechenik, 71 Mass. App. Ct. 771, 782 (2008) and cases cited therein (extending the time for filing a notice of appeal from a judgment in a divorce case where, among other things, there was confusion created by a register's failure to docket the appeal and other uncertainty resulting from the procedural posture of the case, and where the appeal was still technically possible and did not work unfair prejudice to other parties). Absent further developments, this

- 1 matter should go forward on October 27, 2020 as scheduled.
- 2 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER