STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Verizon New England	:	
	:	
v.	:	**A.A. No. 12-131**
	:	
Department of Labor and Training,	:	
Board of Review	:	

JUDGMENT

This cause came before Jabour J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is affirmed.

Dated at Providence, Rhode Island, this 10th day of January, 2014.

Enter: By Order:

/s/ /s/

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DECISION

JABOUR, J. This matter is before the Court filed pursuant to R.I. Gen. Laws § 42-35-15, seeking judicial review of a final decision rendered by the respondent, Board of Review, Department of Labor and Training (hereinafter cited as "the Board"). Verizon New England, Inc. (hereinafter cited as "Verizon") urges that the Board erred in reversing the decision of the Director of the Department, thus allowing for the award of unemployment benefits to its employees (hereinafter cited as "Claimants").[1] Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to R.I. Gen. Laws § 28-44-52.

TRAVEL OF THE CASE

Claimants last worked on August 6, 2011. Pursuant to R.I. Gen. Laws § 28-44-16 of the Rhode Island Employment Security Act, claimants filed for unemployment benefits for the time period of August 13, 2011 through August 23, 2011. On August 29, 2011, the Director

[1] It should be noted that Claimants (Verizon employees) are members of the International Brotherhood of Electrical Workers ("IBEW") Local 2323 ("Union").

determined that claimants became unemployed as a result of a labor dispute and consequently denied benefits for that time period. On August 30, 2011, Claimants appealed the Director's decision to the Board of Review. Claimants' appeal came on for consideration before the Board on November 1, 2011. The Board conducted further limited inquiry of the parties and their counsel on February 2, 2012.

BOARD'S DECISION

The issue before the Board is "whether the claimants are eligible for Employment Security benefits under section 28-44-16 of the Rhode Island Employment Security Act." (Decision at 2). Under R.I. Gen Laws § 28-44-16(a), claimant(s) are not entitled to benefits if he or she became unemployed because of a strike or other industrial controversy. See §28-44-16. More specifically, subsection (b) provides that an individual shall be entitled to benefits if his or her unemployment is the result of his or her employer's withholding of employment for the purpose of resisting collective bargaining demands or gaining collective bargaining concessions. Id.

The Board made the following findings. Claimants were employed by Verizon[2] pursuant to a collective bargaining agreement (hereinafter referred to as "agreement"). This agreement was set to expire at 12:00 am on August 7, 2011. From June 6, 2011 to August 6, 2011, both parties, through their appointed negotiators, began negotiating a new agreement. During this time, and specifically between July 1, 2011 and July 15, 2011 the bargaining unit members voted on the issue of whether to authorize a strike. In the event that negotiations

[2] Verizon provides telephone service through copper lines, digital subscriber line (DSL) high speed internet access through copper lines, Fiber Optic Services (FiOS) television, FiOS internet, and FiOS telephone services to its customers. (Appellant's Brief at page 2).

broke down, the members voted to authorize union leadership to strike. On July 26, 2011 Verizon notified claimants, in writing, that "… if we do not reach an agreement by August 6th, the arbitration provisions of the various labor contracts would not be in effect for grievances…"

On August 5, 2011 Verizon collected from claimants, keys, identification, swipe cards, laptops, cell phones and various other tools and equipment. However, on the morning of August 6, 2011 Verizon informed claimants that a counterproposal would be presented prior to the expiration of the agreement, but no such proposal was presented. Therefore, around 12:01 am on August 7, 2011 claimants were notified by their business manager that a strike had been called against Verizon.

Verizon denied claimants' access to their computers. The denial included access for both business and personal information.[3] At this time, Verizon locked doors, chained gates, and at certain work sites, had Verizon personnel deny claimants access to work[4]. Verizon would allow claimants to return to work if the current contract was modified by removing the arbitration provisions. On August 23, 2011 and after further negotiations, claimants returned to work under the terms of the agreement, which included the arbitration provisions.

In the Board's conclusion, it stated that evidence on the record established that claimants continued to work under an expired unmodified agreement in 2003 and 2008.

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[3] Verizon's computer system held claimants personal information relating to retirement accounts, health insurance, and sick and vacation time, etc.

[4] However, in the years 2003 and 2008, claimants continued to work under the unmodified expired agreement while a new agreement was being negotiated.

However, on July 26, 2011, Verizon informed claimants that as of August 6, 2011 "…the arbitration provisions…would not be in effect for the grievances…." On August 5, 2011 Verizon began taking back ID cards, cell phones, laptops, tools and equipment, etc. As of August 7, 2011 at 12:00 midnight, Verizon had not offered to continue operations under the status quo. Finally on August 23, 2011, the parties agreed to continue the employment relationship when the arbitration provision was reinstated.

The Board held that the collection of various items from the claimants proved to be indicia that Verizon had no intention of changing its position prior to August 7, 2011. The Board further held that at 12:00 am on August 7, the pre-existing terms and conditions of employment had been substantially altered by deleting the arbitration provisions. The claimants currently working are doing so under different conditions and the status quo had changed. On August 23, 2011, Verizon agreed to the inclusion of the arbitration provision, the status quo was reinstated. (Decision at 2)

To support its decision, the Board analogized the facts of the case at bar to Newman-Crosby Steel, Inc. v. Fascio, 423 A.2d 1162 (R.I. 1980). In that case, the employer reduced compensation and benefit levels. The Board relied on Newman-Crosby Steel in concluding, that Verizon's actions, in deleting the arbitration provisions, constituted a substantial change in the status quo and thus constituted a lockout under R.I. Gen. Laws § 28-44-16(b). To further support its decision, the Board cited Robert Derecktor of Rhode Island, Inc. v. Employment Sec. Bd. of Review, Dep't of Employment Sec., 572 A.2d 58 (R.I. 1990). Robert Derecktor, in the Board's opinion, stood for the proposition that the "constructive lockout morphed into an actual lockout when [Verizon] took overt actions of chaining gates,

locking doors, failing to staff security kiosks, and denying access to its computer system." (Decision at 3.) Ultimately, the Board held that Verizon's actions constituted both a constructive and actual lockout, resulting in the allowance of benefits for Claimants.

One member of the Board provided a dissenting opinion. In the dissent, the Industry Member concluded that there "is no or insufficient evidence to establish that the claimants offered to continue working under pre-existing conditions or terms of employment." (Decision at 3). The dissent further opined that neither a constructive lockout occurred nor any such constructive lockout transitioned into a lockout because Verizon took action to safeguard its equipment during the claimants absence from work.

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review which the District Court must apply is set forth under G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The scope of judicial review by this Court is limited by § 28-44-54, which, in pertinent part, provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive. Thus, on questions of fact, the District Court ". . . may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are clearly erroneous. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15(g)(5)).

Stated differently, this Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). "Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision." Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

DISCUSSION

The issue before the Court is whether the decision of the Board to award unemployment benefits pursuant to R.I. Gen. Laws § 28-44-16(b) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. This Court must determine whether the decision is "[m]ade upon lawful procedure " or "affected by other error of law, RI Gen Laws § 42-35-15(g)(3)(4). University

of Rhode Island v Department of Employment and Training, Board of Review 691 A2d 552, 554 (1997).

R.I. Gen. Laws § 28-44-16 provides;

> (a) An individual shall not be entitled to benefits if he or she became unemployed because of a strike or other industrial controversy in the establishment in which he or she was employed. This section shall not apply if it is shown to the satisfaction of the director that the claimant is not a member of the organization or group responsible for the labor dispute and is not participating in or financing or in any way directly interested in the labor dispute.
>
> (b) Lockouts. Notwithstanding the provisions of subsection (a) of this section, an individual shall be entitled to benefits if his or her unemployment is the result of his or her employer's withholding of employment for the purpose of resisting collective bargaining demands or gaining collective bargaining concessions, unless:
>
> > (1) The claimant's employer is a member of a multi-employer collective bargaining group and the lockout is in response to a strike at another member of that multi-employer collective bargaining group; or
> >
> > (2) The claimant's employer establishes to the satisfaction of the director that it has offered to the labor organization representing the claimant an extension of then existing wages, hours, and working conditions, including enforceable no strike and no lockout prohibitions, for up to three (3) days and the lockout is in response to the labor organization's refusal to execute the extension. § 28-44-16.

Verizon asks this court to find that the Board lacked substantial evidence to support a finding of an actual physical lockout based on locked doors, chained gates, the prevention of certain workers from accessing worksites as well as the collection of identification cards, laptops, tools and equipment. Verizon cites the testimony of Union Business Manager

William McGowan that only two out of fifty of its locations lacked physical access. Further, that management employees testified that the collection of equipment was for security measures, and they did so in a similar manner at the expiration of prior contracts with some minor procedural differences. Verizon therefore argues that Claimants inadequately sustained their burden of proving a lockout throughout the state.

To the contrary, the Board found that locking doors, chaining gates, collecting equipment and ID cards, etc., clearly provided the Board with sufficient evidence to find an actual physical lockout. It concluded that denying Claimants access to its computer systems, which held employer business and claimant's personal business, further supported a lockout. Since the computer system held both employer proprietary information and employee personal information (i.e. 401 accounts, health insurance, sick and vacation time, etc.), such actions were unrelated to security, and were clearly evidence of Verizon's attempt to lockout its employees. The Board was within its authority and expertise to conclude that Verizon intended to lockout its employees. See Derecktor.

Next, Verizon insists that the Board's decision was clearly erroneous in finding that there was constructive lockout. Verizon cites the Board's Decision which provides in its Findings of Fact that the Claimants were notified by their business manager that a strike had been called against Verizon. Furthermore, Verizon avers that the Board failed to properly consider relevant documented evidence. (See Gomes v. Orefice, WL 3645519 (2011), holding that the Department abused its discretion when it placed no weight at all on the relevant and material evidence; and Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1017 (R.I. 2004), holding that the Board and District Court erred by refusing

to give any evidentiary value to the transcripts of the arbitration hearing). In the case at bar, Verizon is specifically referring to Exhibits A and B, which provide that the Claimants themselves referred to the work stoppage as a strike[5] (see Tr. 11/1/11 at 59-60). This alone, Verizon contends, is sufficient to warrant reversal of the Board's Decision.

Notwithstanding, the Board considered the testimony of Claimants, that many of them arrived at their locations seeking to work as scheduled or to get information as they were instructed to do by their supervisors. Mr. Corey Kraus, a Splice Service Technician with Verizon, testified that he attempted to come back to work after the work stoppage began on August 7 and was denied access to the his garage in Lincoln. (Tr. 11/1/11 at 64-65). Mr. Kraus stated that upon arriving at the Lincoln Garage he was "greeted to locked gates and cops," and no management was present. Id. Furthermore, the testimony of Miss Lori Gorman, a Central Office Technician in Cumberland, provided that on Friday August 5, she turned in her company ID, keys, cell phone, etc., which was "[e]verything I needed to either A, get in the building or do my job." Id. at 65-66. Miss Gorman further testified that she asked her boss "if we are working on Monday, how am I gonna get into the building?" She stated that his response was to just show up and wait. Id. at 70.

Verizon counters that such testimony evidences a strike and that Claimants had no intention to work but merely arrived at certain locations in order to strike. Nevertheless, the Board accepted the testimony of said Claimants that they only began picketing upon arriving

[5] Union representative Bill McGowan testified that the strike authorization vote was held between July 1 and July 15. The members voted to authorize the Council to strike if necessary against Verizon. However, the Council never voted to go on strike. (Tr. 11/1/11 at 35)

at locations only to find chained gates and police. Id. at 64; see also testimony of Lori Gorman at 70-71). Therefore, the Board found that a lockout occurred.

Finally, in arguing the lack of evidence of a constructive lockout, Verizon asserts that the Board erred in determining that their failure to actively encourage and invite the Claimants to come back to work constituted a lockout. They maintain that the issue is not whether they encouraged the Claimants to come back to work but whether Claimants were refused work upon an attempt to come back to work. In support of this position, Verizon cites the testimony of Verizon Managers Ferrare, Britto, and Palin, which provided that management never directed them to prohibit Claimants from coming back to work, i.e. cross the picket line, and that if the claimants wanted to come back to work then they could have come back to work. (Tr. 2/1/12 at 109-110).

This argument ignores the Boards finding that "[t]he employer would allow claimants to return to work if the current contract were modified by removing the arbitration provisions" (Decision at 2). Verizon constructively locked out Claimants when they changed the status quo by notifying Claimants that the arbitration provisions would not be in effect upon the expiration of the agreement, i.e. Claimants would be working under different conditions than those prior to the expiration of the agreement. (Decision at 2); (see also Newman-Crosby Steel, 423 A.2d at 1164 (holding that "[t]he law is well established that when an employe(r) makes unreasonable demands upon his employees to return to work and it would be unreasonable for them to accept such a proposal, the resulting work stoppage is a lockout and not a strike)." Thus, even if Verizon did actively encourage Claimants to come back to work, they would have been working without the arbitration

provisions. In N. L. R. B. v. Katz, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), and as Verizon points out, "unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." Id. at 747.

Here, Verizon unilaterally changed the terms of the preexisting agreement by collecting various items and equipment from its claimants prior to the expiration of the collective bargaining agreement. In addition, it notified Claimants that the arbitration provisions would not be in effect upon the expiration of the agreement, thus it changed the status quo. At no time prior to August 23, 2011, was there an agreement to continue working under the terms of the expired agreement (including the arbitration provisions) as the parties had done in 2003 and 2008. (Decision at 2). Therefore, it was not until August 23, 2011 that the status quo had been reinstated when the parties agreed to continue under the terms of the expired agreement, including the arbitration provisions.

Upon review of the entire record this Court

> must not substitute its judgment for that of the agency in regard to the credibility of witnesses or the weight of the evidence on questions of fact. Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision. Baker, 637 A.2d at 363.

The Board heard testimony over two separate hearings; one on November 1, 2011 and another on February 1, 2012. The Board considered and weighed the testimony regarding the circumstances surrounding the work stoppage and ultimately concluded that a lockout had occurred. This conclusion is supported by competent evidence of the record.

Both on direct and cross examination of witnesses, the Board considered evidence of a strike as well as evidence of a lockout. Based upon the Board's finding and an examination of the record, the Board awarded more weight to the testimony of the Claimants' witnesses rather than Verizon and concluded that a lockout had occurred based on the totality of the testimony and evidence of the record. The Rhode Island Supreme Court has held that if "there is sufficient evidence in the record to support the Board's finding of an actual lockout, it is unnecessary for this court to address the issue of a constructive lockout…" Robert Derecktor, 572 A.2d at 61. Therefore, based on the Board's finding of a constructive and actual lockout, it awarded unemployment benefits to the claimants.[6]

CONCLUSION

The decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Upon a thorough review of the entire record, this Court finds that the decision of the Board was supported by the reliable, probative, and substantial evidence on the whole record. This Court finds that the decision

[6] Upon finding that the Board had sufficient evidence before it to conclude that a lockout occurred, it is unnecessary for this Court to address Verizon's preemption argument. However, it should be noted that Verizon's preemption argument is misplaced under this set of facts. As the Board found, by informing the Claimants through the July 26, 2011 letter, Verizon's actions changed the status quo by informing Claimants that the Arbitration Provisions will not be in force upon the expiration of the agreement. Therefore, Verizon eliminated any grievance remedies for the Claimants had they continued to work under the expired agreement.

of the Board of Review was made upon lawful procedure and was not affected by error of law. R.I. Gen. Laws § 42-35-15(g)(3),(4).

Accordingly, the decision of the Board is affirmed.