

86-014

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
Fort Jennings Education Association, OEA/NEA,  
Employee Organization,  
and  
Fort Jennings Board of Education,  
Employer.

CASE NUMBER: 84-MF-08-1795

DIRECTIVE  
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix;  
April 3, 1986.

On August 20, 1984, the Fort Jennings Education Association (Association) filed with the State Employment Relations Board (SERB) a Notice to Negotiate pursuant to Ohio Revised Code Section 4117.14, stating that their collective bargaining agreement contained procedures for dispute resolution. On January 11, 1985, the Fort Jennings Board of Education (Board) asked SERB to implement the statutory dispute resolution. On June 17, 1985, the SERB Bureau of Mediation invoked the statutory procedure and appointed a mediator. On July 1, 1985, the Association filed a Motion to Stay Mediation Procedures. On July 26, 1985, SERB approved the Association's Motion to Stay the Statutory Impasse Procedure and directed this case to hearing to resolve the issue of the existence or nonexistence of a mutually agreed dispute settlement procedure. The hearing took place before a Board hearing officer on August 27, 1985.

The Board has reviewed the record, the hearing officer's recommendation, exceptions to the recommendation and responses. For the reasons set forth in the attached opinion, incorporated by reference, the Board approves the hearing officer's finding of fact and conclusions of law. Accordingly, the Board finds that the parties had a valid contract with a mutually agreed dispute resolution procedure which supersedes the formal impasse procedures of Ohio Revised Code Section 4117.14.

24

PERMANENT ORDER  
Case No. 84-MF-08-1795  
April 9, 1986  
Page -2-

It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.

*Jack G. Day*  
JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party  
on this 11<sup>th</sup> day of April, 1986.

*Jacquelin F. Davis*  
JACQUELIN F. DAVIS, GENERAL COUNSEL

JES:lrt/0039j

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OPINION

Day, Chairman:

In this case, the Fort Jennings Education Association (Association or union) invoked the impasse procedure in its 1983-84 contract when negotiations failed to yield a new contract with the Fort Jennings Board of Education (Board). The impasse procedure included final and binding issue arbitration. It has resulted in an arbitration decision which the Association now seeks to enforce in the Common Pleas Court of Putnam County.

The union contends that the impasse process is a mutually adopted dispute resolution procedure (MAD). But the Fort Jennings Board of Education argues that both the contract which contains the impasse procedure and the procedure itself are illegal. The Board's claim is founded on the proposition that the 1983-84 contract was concluded before the effective date of R.C. 4117 and, therefore, could not contain a final and binding issue arbitration clause without doing violence to public policy as it was

at that time. In addition the Board claims that the contract is illicit because it was never signed by the parties, although it is conceded by both sides that the parties worked under the contract during the 1984-85 season.

While the substantive validity of the arbitrator's decision may be at issue in common pleas court under R.C. 2711, the propriety of having a pre-April 1, 1984 MAD capped by issue arbitration in the collective bargaining contract as a substitute for the formal R.C. 4117.14 process is a matter within the jurisdiction of the State Employment Relations Board (SERB). Assuming propriety is established, then the question is whether a mutually agreed dispute resolution procedure exists between the parties. If it does, it supersedes the formal impasse provisions of R.C. Section 4117.14.<sup>1</sup> Underlying the MAD issue is the further question whether the unsigned contract between the parties for the 1983-84 school year is legal and, therefore, a legitimate source for a MAD.

For reasons adduced below, it is concluded that the contract was valid; that a valid MAD including arbitration could and did exist; and that it superseded the formal impasse procedures of R.C. 4117.14.

I

The factual pattern from which the instant dispute emerges is sufficiently complex to make a straight textual recital obscure. For clarity, the facts are set down in columnar fashion :

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<sup>1</sup>R.C. 4117.14(E):

"Nothing in this section shall be construed to prohibit the parties, at any time, from voluntarily agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure. An agreement or statutory requirement to arbitrate or to settle a dispute pursuant to a final offer settlement procedure and the award issued in accordance with the agreement or statutory requirement is enforceable in the same manner as specified in division (B) of section 4117.09 of the Revised Code." (Emphasis added.)

- 1) A collective bargaining contract was negotiated by the parties before April 1, 1984 to be in effect during the 1983-84 school year. Neither party signed the agreement. (Stipulation of Fact (SF) No. 4).
- 2) The contract included an impasse procedure which was capped by binding interest arbitration. [SF No. 4.]
- 3) No formal ratification of the contract was made by either side but the employer concedes that the contract was in effect. (employer's exceptions, p. 2)
- 4) The contract expired on June 30, 1984 (employer's exceptions pages 5-6).
- 5) Several bargaining sessions in 1984 failed to result in a new agreement (SF No. 5).
- 6) On November 8, 1984 the Association declared impasse and asked for arbitration. [Finding of Fact (FF) p. 3]
- 7) On November 20, 1984, the Board informed the American Arbitration Association (AAA) that the arbitration clause was unlawful when negotiated and therefore void. (FF p. 3).
- 8) The AAA<sup>2</sup> found the issue of arbitrability to be a matter for determination by the arbitrator. (FF p. 3)
- 9) On January 10, 1985, AAA appointed Arbitrator Richard Siegel to serve in the case. (FF p. 3)
- 10) On January 11, 1985, the Board asked SERB to implement R.C. 4117.14 process and appoint a mediator. (FF p.3)

<sup>2</sup> Article I, H Impasse; Section 5 of the 1983-84 contract provides for arbitration of issues at impasse and that "The arbitor shall be obtained through the American Arbitration Association, utilizing their voluntary rules and regulations."

28

- 11) On January 30, 1985 the AAA noticed the parties for hearing before the arbitrator. (FF p. 3)
- 12) On February 19, 1985, SERB responded by letter to the management request of January 11, 1985 for implementation of R.C. 4117.14 impasse procedure. SERB indicated it would put the procedure into effect. The union objected contending there was a MAD in place superseding the formal process in R.C. 4117.14. (FF p. 3)
- 13) On February 21, 1985, the arbitration hearing was convened. The Board presented the SERB letter of February 19, 1986. Arbitrator Siegel adjourned the hearing for twenty-one days. The parties agreed that the arbitrator should write to SERB for clarification of the impasse procedural displacement issue. He did so. (FF pp. 3-4)
- 14) The AAA informed the parties that SERB would review the case on Wednesday, March 20, 1985. However, nothing was heard from SERB by April 15, 1985. The AAA advised the parties and the matter proceeded to hearing set for May 15, 1985. (FF p. 4) The Board was present at the hearing but did not participate beyond saving its objection to the arbitrator's jurisdiction. (SF No. 6)
- 15) On June 17, 1985, SERB's Bureau of Mediation advised both parties that the R.C. 4117.14 process was operative. (FF p. 4)
- 16) The AAA arbitrator's award came down on June 19, 1985.
- 17) On July 1, 1985, the Association filed a Motion To Stay the R.C. 4117.14 Mediation. (FF p. 4)
- 18) On July 2, 1985, the Board indicated to the Association that it had no intention of implementing the arbitration award. (FF p. 4)

- 19) On July 17, 1985, SERB stayed the statutory impasse procedure and directed the issue of the validity of the impasse procedure to hearing. (FF p. 4)
- 20) On July 22, 1985, the Association filed suit in the Common Pleas Court of Putnam County to enforce the arbitration award. Coupled with the suit was a Motion To Confirm The Award. The Board countered with a motion to vacate the arbitration award. (FF p. 4)
- 21) On August 27, 1985 the SERB ordered hearing was held. Both parties filed post-hearing briefs by September 27, 1985. (Hearing Officer's Statement of the Case, Hearing Officer's Recommended Determination, p. 2).

It is apparent that communications between SERB and the parties were not operating at peak efficiency. Despite this lapse in communication, whether the contract containing the impasse was a valid contract and whether the issue arbitration provision in the impasse procedure of the contract was valid and retained vitality after the contract expired are issues which still remain. These issues are within the jurisdiction of SERB and are ready for disposition.

### III

The contract for 1984-85 was valid although unsigned. R.C. 4117.09 ordains that a collective bargaining agreement must be reduced to writing and executed by the parties. But failure to sign does not void the agreement.<sup>3</sup> In this case the contract between the parties was in place and ratified by their respective courses of conduct. This implicit ratification gains substance from the Board's concessions that the contract

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<sup>3</sup> A failure to execute may found a charge of unfair labor practice for a refusal to bargain [R.C. 4117.11(A) (5) and R.C. 4117 (B) (3)]. However, in the instant case neither party has filed a charge based upon the failure to sign.

was in effect and expired on June 30, 1985.<sup>4</sup>

Arguably public policy on the issue changed long before the effective date of the Act (assuming a change was needed to legalize the arbitration clause) because the policy of the state with respect to collective bargaining and arbitration became apparent when the statute was enacted. This was well before April 1, 1984. However, whether the issue arbitration cap on the impasse procedure in the contract was contrary to public policy and invalid at the time it was signed need not be decided. It became valid with the effective date of the Ohio public employee collective bargaining Act on April 1, 1984.<sup>5</sup>

<sup>4</sup>See Items 3 and 4 in the factual recital, supra at p.3.

<sup>5</sup>Temporary Law:

SECTION 5. Any written contract, agreement, or memorandum of understanding in effect on April 1, 1983 or entered into between January 1, 1983 and March 31, 1984 between a public employer and an employee organization shall be deemed valid for its term, except as provided in division (D) of Section 4 of this act. Division (D) of Section 4 has no pertinence to the issues in the instant case. And cf. McNair v. Knott (1937), 3 02 U.S. 369, 372-373:

"There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as 'remedial,' 'curative,' or 'enabling' merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds, and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made."

This being so, resort to the impasse procedure was proper here. For employees who are permitted to strike (those involved here are clearly in that category) may fashion an impasse procedure with their employers which totally displaces the statutory impasse process.\* Moreover, the parties' MAD did not expire with the contract which created it. It is a common, if not universal, purpose of a MAD to anticipate the expiration of the collective bargaining agreement without a successor and to provide the means for reaching a new settlement when bargaining has failed to achieve one. Thus, an impasse procedure, because of its reason for being, usually has a life of its own which extends beyond the expiration date of the contract which creates it. 7 Of course, the parties may specifically provide the contrary. They did not in this case.

It follows that the arbitration process in the impasse procedure was appropriate and was validly invoked. At this point, the competence of SERB ceases. The validity of the substance of the arbitrator's award under R.C. 2711 is for the Court of Common Pleas where the case now pends. Sheehan, Vice Chairman, and Fix, Board Member, concur.

\*See fn. 1, supra and Ohio Association of Public School Employees and Vandalia-Butler City School District (1986) Case No. 85-MF-05-3600, p. 3-4.

7This rationale is buttressed by the obvious fact that a superseding MAD displaces the statutory process in R.C. 4117.14 which is explicitly designed to be operative beyond the expiration dates in contracts in order to assist the accomplishment of successor agreements.