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STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Central Ohio Transit Authority,

Employer,

and

Local No. 208, Transport Workers' Union of America,

Employee Organization.

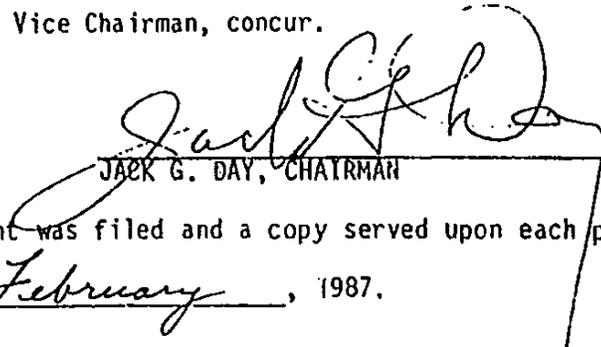
CASE NUMBER: 87-STK-2-0001

ISSUANCE OF OPINION

As stated in the Board's determination issued on February 12, 1987, the attached opinion sets forth the reasons for the determination. The opinion is incorporated by reference in the Board's determination that was issued on February 12, 1987.

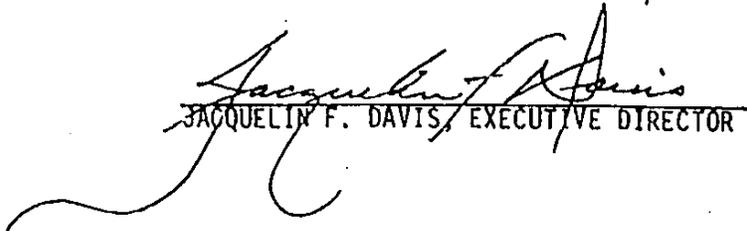
It is so directed.

DAY, Chairman, and SHEEHAN, Vice Chairman, concur.



JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 19th day of February, 1987.



JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

271B:j1b

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Central Ohio Transit Authority,

Plaintiff,

and

Local No. 208, Transport Workers' Union of America,

Respondent.

CASE NUMBER: 87-STK-2-0001

Determination

Before Chairman Day and Vice Chairman Sheehan; February 11, 1987.

This case comes here under the auspices of Section 4117.16(A), Ohio Revised Code. The responsibility of the State Employment Relations Board is to decide whether the legal job action by the employees of the Central Ohio Transit Authority (COTA) creates a clear and present danger to the health or safety of the public. If the answer is "Yes" the statute authorizes the extension of the temporary restraining order (TRO) now in place for an additional sixty (60) days. If the answer is "No" the restraining order ends at midnight, February 12, 1987.

The answer is "No." The statute contemplates "clear" (i.e., plain or obvious) or "present" (i.e. here and now, or imminent) danger to the health and safety of the public. The danger in the light of the health and safety qualifications must be to life or property, and it must pose a broad threat to be "public."

The hundreds of pages of record and hours of testimony reviewed establish clear proof of individual hardship and broad inconvenience. These conditions manifest injury of the kind addressed (or which should be addressed) in large measure at all seasons by community resources other than COTA. The evidence does not establish clear and present danger to health or safety of the public at large.

The statutory determination necessary to authorize an extension of the restraining order is denied. Opinion to follow.

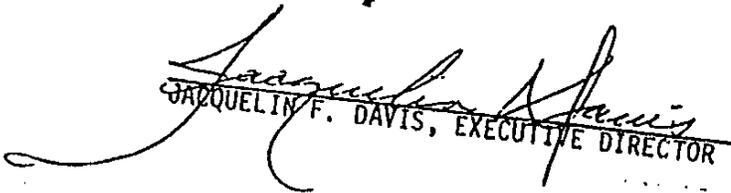
DAY, Chairman, and SHEEHAN, Vice Chairman, concur.



JACK B. DAY, CHAIRMAN

DETERMINATION
CASE NO. 87-STK-2-0001
FEBRUARY 12, 1987
Page 2 of 2

I certify that this document was filed and a copy served upon each party
on this 12th day of February, 1987.


JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

JGD:j1b/02688:2/12/87

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Central Ohio Transit Authority,
Employer,
and

Local No. 208, Transport Workers' Union of America,
Employee Organization.

CASE NUMBER: 87-STK-2-0001

OPINION
[Authorization Determination Under R.C. 4117.16(A)]

Day, Chairman:

The present case came here on request of the Central Ohio Transit Authority (COTA). The request sought authorization¹ for COTA to petition the Court of Common Pleas of Franklin County, Ohio, (Court) for an order extending the period of constraint previously imposed on striking employees by a temporary restraining order (TRO), effective February 8, 1987.

I

This is the first occasion that the State Employment Relations Board (SERB) has had to reach a determination required under R.C. 4117.16(A). That section declares:

"Whenever the public employer believes that a lawful strike creates clear and present danger to the health or safety of the public, the public employer may petition the court of common pleas having jurisdiction over the parties to issue a temporary restraining order enjoining the strike. If the court finds probable cause to believe that the strike may be a clear and present danger to the public health or safety, it has jurisdiction to issue a temporary restraining order, not to exceed seventy-two hours, enjoining the strike.

¹See R.C. 4117.16(A).

"Should a court issue a temporary restraining order, the public employer shall immediately request authorization of the State Employment Relations Board to enjoin the strike beyond the effective period of the temporary restraining order. The board shall determine within the effective period of the temporary restraining order whether the strike creates a clear and present danger to the health or safety of the public.

"If the board finds that a clear and present danger exists, the common pleas court which issued the temporary restraining order has jurisdiction to issue orders to further enjoin the strike. However, the court shall make provisions in any injunction or other order issued beyond the temporary restraining order for the automatic termination of the injunction or other order at the end of sixty days following the end of the temporary restraining order or when an agreement is reached, whichever occurs first. Thereafter, no court has jurisdiction to issue any further injunction or other orders pursuant to this section. The order of the court is appealable as provided in the Appellate Rules."

II

Process guides are sparse under the statute. They are non-existent under SERB rules. However, a few basic procedures are clear. First, when an employer believes the statutory conditions are present, it may petition Common Pleas Court for a TRO. Second, if the Court finds "probable cause" to believe that the strike "may be" a clear and present danger to the public "health or safety," it has jurisdiction to issue a TRO, effective for no longer than seventy-two (72) hours. Third, when a TRO issues the employer "shall" immediately request SERB for "authorization" to seek to enlarge the period of restraint under the TRO. Fourth, SERB must act within the period of restraint and, if it "finds" that a clear and present danger actually exists, the petitioner is permitted to request the Court which issued the TRO to order an extension of the time of the original constraint. The Court acts under the auspices of R.C. 4117.16(A), and the order is subject to statutorily-imposed restrictions.

This capsulation indicates the singular and narrow role of SERB under R.C. 4117.16(A). SERB's responsibility is to answer one question: Does the strike create a clear and present danger to the health or safety of the public? The effect of an affirmative answer is to trigger a statutory right in the public employer (COTA) to seek enlargement of the time of constraint put in place by the TRO.

The answer to the question requires an assessment of the evidence.² For reasons adduced below the evidence will not support an affirmative answer.

The question is answered, "No."

III

There is a significant difference between the initial responsibility of the Court of Common Pleas and that of SERB. The Common Pleas decision to issue a TRO depends only on a finding of probable cause. SERB is required to "find" not just "probable cause" but to determine whether a clear and present danger actually "exists." The difference is the difference between "probability" and "fact." In the usual case "probable cause" findings are ex parte and do not require evidential weight sufficient to determine the ultimate issues. On the other hand, factual determinations in the present context must be supported by the greater weight of the evidence³ developed

²An arabic numeral preceded by TRO will indicate a page number in the transcript of the proceedings in the hearing for the temporary restraining order. If the prefix to the arabic number is D, the reference is to the transcript of the evidence in the SERB determination hearing.

³SERB has determined that the proper standard of proof in clear and present danger determinations is by a preponderance of the evidence. "Greater weight" is but another way of stating the same standard.

according to due process norms. Nevertheless, the record from the "probable cause" hearing was made a part of the record in the present determination. This was accomplished by the agreement of the parties.⁴ The usefulness of the transcript of the proceedings from the TRO hearing is enhanced by the fact that the transcript was not made ex parte. Rather it was based on a full-blown hearing in the sense that the parties had the opportunity to test the evidence by the usual techniques including cross-examination.

The stipulation also avoids, at least for now, the necessity for an official determination of the formal method for the transference of a TRO record from the Court of Commor. Pleas to SERB for the R.C. 4117.16(A) hearing.

IV

The meaning of the operative words in a statutory standard, in this case "clear and present danger to the health or safety of the public" receives some illumination from a comparison of synonyms. Thus "danger," an emotion invoking word, may suggest body or property invading conditions consonant with "peril," "hazard," or "jeopardy" in their most powerful implications; or it may imply, especially in colloquial usage, various kinds of non-physical vulnerability such as legal liability, or debt responsibility. "Clear" implies perceptions which are "manifest," "obvious," "plain," or "evident." The adjective is not particularly evocative. "Present," also not evocative, suggests "immediacy," "something in being," "imminent," or "likely."

⁴See D. 6. This is not to suggest an analogy between an appeal from common pleas court in the court system and a SERB hearing on clear and present danger after TRO. However, there are aspects to the problem of developing a record which are similar in both processes.

Considering the implications of "clear and present danger" in conjunction with the gravity of the statutory objective - the protection of the "health or safety of the public" in the face of a strike that is legal - there is a compelling conclusion. That is, that the statutory "clear and present danger" contemplates a powerful life, body or property threatening condition both obvious and imminent. And the threat must imperil a broad and substantial range of persons in the community. The phrase "of the public" does not imply that only catastrophic threats to safety or health warrant conclusions expanding the injunctive power. However, if the "public" aspect of the threat to health or safety is to have any nexus with logic, it must involve a magnitude that is more than random individual hardship and more than mere inconvenience. Thus, the words of R.C. 4117.16 clearly express a concern for more than routine effects, but the statutory language does not declare a condition per se hazardous by providing special treatment for "clear and present danger" strikes. For when the General Assembly addressed per se public dangers, it proscribed job actions altogether. The prohibition of strikes by safety forces demonstrates the point.⁵

V

While the phrase "clear and present danger" may have some status as a term of art, it does not deliver a precise instruction. Indeed, the concept was introduced to constitutional law with a caveat against mechanistic application:

⁵See R.C. 4117.14(D)(1).

"The question in every case is whether ... [the action occurs] in such circumstances and [the actions] are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (Emphasis added.)⁶

That admonition was delivered in a free speech context but its emphasis on the protean quality of applications of the "clear and present danger" standard, necessarily dependent upon varying factual conditions, emphasizes what should be obvious. The facts are crucial in every decision.

VI

The evidence in this case was principally of two kinds. One variety consisted of informal compilations of hearsay evidence indicating that the poor, the ill, the handicapped and aged are, in one way or another, inconvenienced by the COTA strike in getting to work, to doctors, to drug stores, to groceries or to hospitals (See, for example, TRO 15-20, 29-34, 56-58, 60-61, 71-73, 75, 77, 81-83, 153-163, 167-174, 201, 204, 206, 210-211; D 18-25, 32-36, 38, 43, 57-63, 86, 88-89, 93-95, 118-125, 129, 131). The second variety was composed of individual testaments to the same kinds of difficulties.

No doubt many individual instances of hardship or inconvenience exist that are regularly alleviated by public transportation. It is also clear that many individual cases exemplified in the record could be, and should be, addressed by special, emergency community services. For example, some witnesses described potential health episodes so hazardous that ambulance service with medical auxiliary help (not available from COTA) would be required whether COTA was in service or not. There was also evidence that

⁶Justice Holmes for the Court in Schenck v. United States (1919) 274 U.S. 47, 52.

some of the witnesses failed to take advantage of community accommodations. These omissions may be due in part to a lack of effort. However, they seemed, from testimony, to be attributable to failure of knowledge. The existence of community resources of various kinds had not come to the attention of those who need the services. D 200-202, 248-249. Whatever the cause, the petitioners adduced little or no evidence that service alternatives to COTA had been tried and exhausted. And there were no scientific surveys to support the proposition that large areas of the needs of the poor, jobless, homeless, handicapped, sick or aged went seriously unaddressed because of the lack of bus service. Nor was there any evidence that the broad-based social problems inherent in being poor, jobless, homeless, handicapped, sick or senior would evaporate upon the cessation of the job action at COTA.

There was no evidence that COTA delivered any health services directly to the public as part of COTA's standard provision or office. It is clear, for example, that alternate transportation (not COTA) is summoned in medical emergencies. And there was no evidence that COTA and its employees provide security against fire or civil disturbances, nor even supplement the health or safety personnel, in any of the communities COTA serves.

Although the necessary proof to establish clear and present danger may be very difficult, difficulty does not cure lack of proof. The cessation of COTA's services may clearly inconvenience the public. However, the case was not made that the public health or safety was currently in jeopardy or likely to be. Thus, the record does not meet the preponderance standard required to entitle the petitioner to the authorization it seeks.

VII

The record does not support a conclusion by a preponderance of the evidence that the strike under consideration creates a clear and present danger to the health or safety of the public.

Authorization to COTA under R.C. 4117.16(A) is denied.

Sheehan, Vice Chairman, concurs.

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