

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Carlisle Teachers Association,
Employee Organization,
and
Carlisle Local Board of Education,
Employer.

CASE NUMBER: 87-MED-07-0735
87-STK-10-0006

DETERMINATION

Before Vice Chairman Sheehan and Board Member Latané; October 29, 1987.

This case comes before the State Employment Relations Board (SERB) upon the Motion for Determination of Unauthorized Strike filed by the Carlisle Local Board of Education (Employer) on October 28, 1987, at 11:56 a.m. SERB is required, pursuant to Ohio Revised Code (O.R.C.) §4117.23, to issue its determination within 72 hours.

Upon consideration of the stipulations and exhibits of both parties and arguments of counsel, SERB concludes that the strike is authorized.

This conclusion is based upon two considerations:

- 1) The fact-finder's report was timely rejected by the Carlisle Teachers Association (Employee Organization).
- 2) The negotiations of the wage reopener were pursuant to the dispute resolution procedures contained in O.R.C. §4117.14 as mandated by the parties' collective bargaining agreement. All the requirements of O.R.C. §4117.14 and specifically O.R.C. §4117.14(D)(2) were met.

Opinion will follow.

It is so directed.

SHEEHAN, Vice Chairman, and LATANE, Board Member, concur.


WILLIAM P. SHEEHAN, VICE CHAIRMAN

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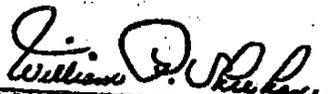
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ISSUANCE OF OPINION

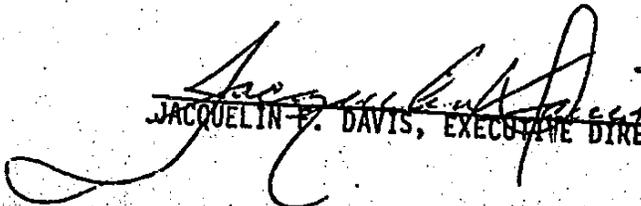
Before Vice Chairman Sheehan and Board Member Latané; October 29, 1987.

On October 30, 1987, pursuant to O.R.C. Section 4117.23, the Board issued its determination in this case. The opinion relating to and referenced in that determination is attached.

SHEEHAN, Vice Chairman, and LATANE, Board Member, concur. Chairman Day, absent.


WILLIAM P. SHEEHAN, VICE CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 10th day of November, 1987.


JACQUELIN E. DAVIS, EXECUTIVE DIRECTOR

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CASE NUMBERS: 87-MED-07-0735
87-STK-11-000C

OPINION

Sheehan, Vice Chairman:

I

This is a motion by the Carlisle Local Board of Education (Employer or Management) for determination whether a strike by the Carlisle Teachers Association (Employee Organization or Union) and the employees it represents is authorized.

The Employer contends that the fact-finder's report and recommendations were not rejected by the Union within seven days of mailing as required by O.R.C. 4117.14(C)(6)¹ and, thus, are deemed accepted and the strike is unauthorized. The employer, further contends that a strike during the

O.R.C. 4117.14(C)(6):

"Not later than seven days after the (fact-finder's) findings and recommendations are sent, the legislative body, by a three-fifths vote of its total membership, and in the case of the public employee organization, the membership, by a three-fifths vote of the total membership, may reject the recommendations; ..."

reopener period is unauthorized and illegal because it occurs during the term of a valid collective bargaining agreement.²

II

The Employer and the Employee Organization are parties to a collective bargaining agreement which by its terms is effective from August 31, 1986, through August 31, 1989.³ Article V of the agreement provides for reopeners with regard to amount of annual salary and insurance-related fringe benefits.⁴ In accordance with Article V, the contract "shall be reopened on May 1, 1987, for implementation on August 1, 1987, and again on May 1, 1988, for implementation on August 1, 1988."⁵ Article V further provides that "negotiations on said items shall be in accordance with the remaining provisions of the contract and all the provisions of 4117.14 O.R.C."⁵

The parties entered into negotiations under the first reopener with respect to salaries and insurance-related fringe benefits for the 1987-88 school year. The dispute resolution procedures contained in O.R.C. 4117.14 were implemented.

20.R.C. 4117.18(C):

"No public employee shall strike during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code."

³Parties' Stipulations of Fact No. 3.

⁴Parties' Stipulations of Fact No. 4.

⁵Exhibit #C, contract between the parties.

⁶Exhibit #C, supra.

Pursuant to O.R.C. 4117.14(C)(3), SERB appointed a fact finder who mailed his findings and recommendations to the parties on September 26, 1987.⁷ The Employer accepted the fact-finder's recommendations on September 28, 1987.⁸ On October 5, 1987, the Employee Organization acted to reject the fact-finder's recommendations.⁹ On October 16, 1987, the Employee Organization served on the employer, by hand, the notice of intent to strike.¹⁰ The employees struck on Tuesday, October 27, 1987.

III

The issues are:

1. Did the Carlisle Teachers Association timely reject the fact-finder's report?
2. Is the strike by the Carlisle Teachers Association and the employees it represents an authorized strike pursuant to O.R.C. 4117?

For reasons adduced below, the proper answer to both issues is yes.

IV

In respect to Issue No. 1, the Employer contends that the Employee Organization had only until October 3, 1987, in order to be timely in their rejection of the fact-finder's report and recommendations. Therefore, the Union's rejection on October 5, 1987, was out of time. Notwithstanding the date of September 28, 1987, which was the date that appeared on the

⁷Parties' Stipulations of Fact No. 6.

⁸Parties' Stipulations of Fact No. 7.

⁹Exhibit #B.

¹⁰Parties' Stipulations of Fact No. 9.

fact-finder's report, the parties have stipulated that the fact finder mailed his report on September 26, 1987. The Employer bases his contention on the language contained in O.R.C. 4117.14(C)(6), supra. However, Ohio Administrative Code Rule 4117-1-03 provides:

"(A) In computing any time period prescribed by or allowed by Chapter 4117 of the Revised Code and Chapters 4117-1 to 4117-25 of the Administrative Code, or by order or directive of the board or individual conducting a proceeding, such period shall begin to run on the day following the day of the act, event, or occurrence. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or a day or part of a day on which the board office is closed, which event the period shall run until the end of the next day, is not a Saturday, Sunday, legal holiday, or a day or part of a day on which the board office in Columbus is closed.

"(B) When a document is served upon a party by mail and that party has the right or is required to do some act or take some proceeding within a prescribed period after service of a document, three days shall be added to the time prescribed for doing such act or taking such proceeding." (Emphasis added.)

Computing in accordance with Rule 4117-1-03(A) and counting forward from September 26, the date of the fact-finder's mailing, the first day of the count would be September 27 and the final seventh day is October 3, 1987. October 3, 1987, is a Saturday. Saturdays and Sundays are not counted when it is the final day to act or to take some proceeding. Monday, October 5, 1987, then becomes the final day.

In the instant case, the fact finder mailed his report and recommendations. Computing time pursuant to 4117-1-03(B) by factoring in three days and counting forward from September 30, 1987, the seventh and final day falls on Tuesday, October 6, 1987.

The Carlisle Teachers Association rejected the fact-finder's report on October 5, 1987. Therefore, by applying either computation, paragraph (A)

or (B) of the Ohio Administrative Code Rule 4117-1-03, the rejection was timely. The Employer's challenge to SERB's rule making authority and the reliance on same to advance his contention is misplaced.

V

Issue No. 2 does not lend itself to a simple arithmetical procedure as in the first issue. It also is an issue of first impression. The fundamental question is whether a union has the right to strike pursuant to O.R.C. 4117 during a reopener period mid term of a collective bargaining agreement.

O.R.C. 4117.18 (C) provides:

"No public employee shall strike during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code."

If the above section were segregated from the rest of the Act, then the answer to Issue 2 would indeed be simple and easy. However, the dispute resolution procedure set forth in O.R.C. 4117.14 presents a seeming ambiguity with O.R.C. 4117.18. The conflicting divisions are:

O.R.C. 4117.14:

"(D) If the parties are unable to reach agreement within seven days after the publication of findings and recommendations from the fact-finding panel or the collective bargaining agreement, if one exists, has expired, then the:

* * *

"(D)(2) Public employees other than those listed in division (D)(1) of this section have the right to strike under Chapter 4117. of the Revised Code provided that the employee organization representing the employees has given a ten-day prior written notice of an intent to strike to the public employer and to the board;

however, the board, at its discretion, may attempt mediation at any time."

Are employees who find themselves at impasse during contract reopeners prohibited from striking, or is the right to strike secured by the language contained in 4117.14(D) and (D)(2)?

Obviously, we must look at the total Act and perhaps even beyond to practices in the private sector as well as to legislative intent.

The parties pursued negotiations in accordance with the procedures set forth under 4117.14. Not only did the Act compel compliance absent any mutually agreed to alternate dispute resolution procedure, but the terms of their collective bargaining agreement dictated it. Article V, entitled

"Reopener Provision", provided in paragraph 5.02:

"The issues of amount of annual salary (ies) and insurance-related fringe benefits shall be reopened May 1, 1987 for implementation on August 1, 1987, and again on May 1, 1988 for implementation on August 1, 1988. The initial request must be made in accordance with Article III of this contract and the remaining provisions of this contract shall be in accordance with the O.R.C." (Emphasis added.)

The unequivocal language expressed by "all provisions of 4117.14 O.R.C." would clearly indicate an acquiescence by the parties to the employees' right to strike.

Contract reopener provisions to negotiate mid-term changes have been a useful and productive means of reaching multi-year settlements when economics and other conditions cannot be adequately forecast over extended periods to the satisfaction of the parties. The employment of reopener provisions have made exceedingly important contributions to the stability of labor relations throughout the history of collective bargaining. The

private sector has long recognized the employees' right to strike during reopener periods. N.L.R.B. v. Lion Oil Co., 352 US 282 (1957), the United States Supreme Court stated that the term "expiration date" had a twofold meaning: "it connotes not only the terminal date of a bargaining contract but also an agreed date in the course of its existence when the parties can effect changes in its provisions."

In the same case, the Court went on to say:

"Unions would be wary of entering into long term contracts with machinery for reopening them for modification from time to time, if they thought the right to strike would be denied them the entire term of such a contract, though they imposed no such limitations on themselves."

We find this argument persuasive. To foreclose on the employees' right to strike when impasse is reached during contract reopening periods is to foreclose on reopener provisions and, consequently, to eliminate an effective and efficient instrument for reaching settlement.

The legislature provided certain public employees the right to strike. Included in that group are those whose issue is at hand. Other public employees were accorded final and binding award procedures. If the latter group were at impasse during a reopener period, they would find resolution through binding conciliation. It makes no sense that the Legislature would leave this group, to whom they accorded strike privileges, with no recourse but to secede to the Employer's demands. Indeed, under these circumstances, the right of the union to bargain under the contractual reopener provision without the right to strike would be an empty one. We, therefore, must conclude that the legislature foresaw in R.C. 4117.18(C) no more than a means of preventing "wild-cat" strikes and that impasse resolutions would be guided by R.C. 4117.14.

42

For these reasons, we find the strike to be an authorized strike pursuant to O.R.C. 4117.

Board Member Latané concurs.

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