

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
State Employment Relations Board,
Complainant,

v.

City of Barberton,
Respondent.

CASE NUMBER: 85-UR-10-4420

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
May 19, 1988 and June 16, 1988.

On October 10, 1985, the Fraternal Order of Police, Lodge No. 13 (Charging Party) filed an unfair labor practice charge against the City of Barberton (Respondent). Pursuant to Ohio Revised Code (O.R.C.) §4117.12, the Board conducted an investigation and found probable cause to believe that an unfair labor practice had been committed. Subsequently, a complaint was issued alleging that the Respondent had violated O.R.C. §§4117.11(A)(1) and (A)(5) by entering into a "me too" agreement with another union during its negotiations with the Charging Party and later asserting the "me too" agreement at the conciliation hearing with the Charging Party, by presenting a new proposal during the pendency of the conciliation proceedings and by tentatively agreeing to make increases in wages and benefits retroactive and later repudiating the agreement. The case was heard by a Board hearing officer.

The Board has reviewed the hearing officer's proposed order, exceptions and responses. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Admissions, Findings of Fact, Conclusions of Law Nos. 1, 2, 4 and 5, reverses Conclusion of Law No. 3 to read: "The unfair labor practice charge relating to the "me too" agreement between the Respondent and AFSCME was timely filed," and adds Conclusion of Law No. 6 to read: "The Respondent did not commit an unfair labor practice by entering into a "me too" agreement with AFSCME and by later asserting the "me too" agreement at the conciliation hearing."

The complaint and the unfair labor practice charge are dismissed.

It is so ordered.

ORDER
Case 85-UR-10-4420
May 19, 1988 and June 16, 1988
Page 2 of 2

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

William P. Sheehan
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 5th day of July, 1988.

Cynthia L. Spanski
CYNTHIA L. SPANSKI, CLERK

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OPINION

Sheehan, Chairman:

I

With one exception, the Board affirms the hearing officer's findings of fact, conclusions of law, and recommendations in the instant case. The single exception is to Conclusion of Law No. 3, in which the hearing officer found that "the unfair labor practice charge was not timely filed as it relates to the "me too" agreement. The Board does not concur and finds the charge was filed timely in respect to the "me too" agreement and amends Conclusion of Law No. 3 to so reflect the change for the reasons set forth below.

II

The hearing officer based her decision on a July 5, 1985, meeting between Mr. Harry Bauschlinger, Chairman of the City Council's Finance Committee, representing the City of Barberton (Respondent), and some members of the Fraternal Order of Police, Lodge No. 13's (Intervenor) negotiating

team. It was Mr. Bauschlinger's un rebutted testimony that the Respondent's "me too" agreement with AFSCME was discussed at this meeting.

The hearing officer determined, inasmuch as the existence of the "me too" agreement was revealed on July 5th to some members of the negotiating team, any charge arising as a result of this agreement would have to have been filed on/or before October 5, 1985, to be in time with the ninety day requirement.¹ Hence, the filing on October 10th was out of time. The arithmetic is correct, but part of the equation is missing. Neither Messrs. Charles Crangle nor Paul Cox, chief negotiators and spokesmen for the union, were present at the July 5th meeting. This was not a scheduled bargaining session. The meeting perhaps could be more accurately described as an impromptu get-together brought about by conversations between some members of the union and a city council person.² Both Mr. Crangle and Mr. Cox contend they were unaware of the agreement until a copy was provided them at the conciliation hearing on August 23, 1985. There is no evidence or testimony that the members of the negotiating team attending the July 5th meeting ever made known to them the existence of the "me too" agreement. Whatever prompted the get-together, it is safe to assume it was held for reasons other than to discuss the AFSCME agreement. How the union members reacted to the news of the "me too" agreement was not disclosed, but apparently they attached little significance to it. Other matters, particularly those for which the meeting was held, doubtlessly commanded their attention. It is, therefore, entirely believable that this information was never transmitted to the two chief spokespersons.

¹Ohio Revised Code (O.R.C.) §4117.12(B).

²Finding of Fact (F.F.) No. 5.

This all too clearly illustrates the hazards of informal discussions occurring away from the bargaining table, especially in the absence of chief negotiators. To be sure, many settlements are precipitated in this fashion, but the inherent risks of faulty communications are ever present.

Moreover, the "me too" agreement was not produced, or in hand, until the August 23, 1988, conciliator's meeting. This was the first physical evidence of its existence.

To begin tolling of the ninety-day period, two conditions must be present. The first is the acquired knowledge, or constructive knowledge, by the Charging Party of the alleged unfair labor practice which is the subject of the charge. The second is the occurrence of actual damage to the Charging Party resulting from the alleged unfair labor practice.

Therefore, when a certain conduct, which is alleged to be an unfair labor practice, is not presently injurious, the ninety-day period will start tolling for consequential injuries resulting from such conduct only from the time that actual damage ensues and the Charging Party had knowledge of that conduct.³

If harm were suffered by the union, it was at this point which then placed the filing date well within the ninety-day time frame.

Finally, assuming arguendo that a "me too" agreement constitutes a per se violation of R.C. §4117.11(A)(5),⁴ the impact and effect of such an agreement would have continuing and on-going implications, thus preserving

³See Bd. of Edn. of Lordstown v. OCRC, 66 Ohio St. 2d, 252 (1981).

⁴R.C. 4117.11(A)(5): Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code;

the timeliness of the charge. Therefore, for the reasons stated above, the Board finds the unfair labor practice charge was timely filed.

III

Having found that the charge was timely filed, the Board must now determine the charge's merits as it relates to the "me too" agreement. The Intervenor in its exceptions to the hearing officer's recommendations contends it is not now complaining about the existence of the "me too" agreement - but about the Respondent's use of that agreement during negotiations.

The union claims the Respondent's introduction of this agreement at the conciliator's meeting placed it in the untenable position of bargaining for city employees who were not its members.

The thrust of the charge is that the Respondent, because of the AFSCME "me too" agreement, was unnaturally constrained in its bargaining posture with the FOP and, thus, guilty of failing to bargain in good faith. If one were to adopt this premise, in all practicality, a like charge could be leveled against any multi-unit employer by any dominant union during any negotiations; and, often, even against a single unit employer. For it is the force of the dominant union, the one with the clout, that normally sets the standard of pay and working conditions for the employer's other employees, both union and non-union, even without the presence of a "me too" agreement. Not to accept the practical implication of such negotiations ignores the dynamics of the collective bargaining process. Every employer must carefully calculate the impact his bargaining table concessions will have when dealing with his other employees who are not part of the subject bargaining unit.

OPINION
Case 85-UR-10-4420
Page -5-

In the instant case, there is no evidence that the union suffered from the existence of the "me too" agreement or that the conciliator was in anyway swayed by it. The union's position prevailed at conciliation and was made part of the final collective bargaining agreement.⁵ If the union, in light of the agreement, reduced or lessened its final offer proposal to the conciliator then it must assume full responsibility and bear the loss of any gains it might have surrendered.

There is no evidence that the Respondent's assertion of the "me too" agreement before the conciliator in any way damaged or distorted the bargaining process.

Further, the Board holds that "me too" agreements do not constitute per se violations of R.C. §4117.11(A)(5). It is, of course, highly conceivable that with the existence of a "me too" agreement violence could be committed to the bargaining process sufficient to sustain a charge but, to do so, other elements must be at work. The mere existence of a "me too" agreement will not carry the charge.

We find the instant charge, as it relates to the "me too" agreement, is without merit and, therefore, dismissed.

Davis, Vice Chairman, and Latané, Board Member, concur.

⁵F.F. No. 8.