

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

206

SEED OPINION 89-03

In the Matter of
International Brotherhood of Firemen and Oilers, Local 100,
Employee Organization,

and
Akron City School District Board of Education,
Employer.

89-031

CASE NUMBER: 89-STK-10-0002

ORDER AND OPINION

Before Chairman Sheehan, Vice Chairman Davis and Board Member Latané;
October 26, 1989.
Davis, Vice Chairman:

I. Procedural Background and Facts

On October 24, 1989, the Akron City School District Board of Education ("Employer") filed a Request for Determination of Unauthorized Strike pursuant to Ohio Revised Code ("O.R.C.") §4117.23. The filing alleged that on October 23, 1989, seven employees who work in a bargaining unit represented by International Brotherhood of Firemen and Oilers, Local 100 ("Union" or "Local #100") without notice and during the term of the applicable collective bargaining agreement engaged in an unlawful strike by the concerted action of calling in sick. The Employer alleges in the Request that the employees' action was an expression of opposition to the selection of a new foreman.

In order to act within the 72-hour deadline imposed by O.R.C. §4117.23, the Board scheduled a hearing to be held at 2:00 p.m., October 26, 1989, at the Board's Columbus office. Prehearing procedures were conducted by the Counsel to the Board, and stipulations were agreed upon by the Union and the Employer. These stipulations are:

1. The Employer is a "public employer" within the meaning of O.R.C. §4117.01(B).
2. Local #100 is an "employee organization" within the meaning of O.R.C. §4117.01(D).
3. Local #100 is the recognized exclusive representative for a unit of approximately 400 maintenance, buildings, grounds, warehouse and transportation department employees who work throughout the Employer's school system.

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4. The Employer and Local #100 have been parties to a series of collective bargaining agreements, the first of which became effective on July 1, 1970. The current collective bargaining agreement between the Employer and Local #100 became effective July 1, 1988, and extends through June 30, 1991. [A copy of the collective bargaining agreement was filed with the stipulations.]
5. The current collective bargaining agreement between the Employer and Local #100 contains a clause entitled "No Strikes Or Work Interruption" (Article XV, page 45) which, among other things, prohibits all strikes as defined in O.R.C. §4117.01 during the term of the parties' collective bargaining agreement. This clause also subjects any employees who participate in proscribed strike activity to disciplinary action provided that the Employer complies with the procedures set forth in O.R.C. §4117.23.
6. The Employer's Maintenance Department is composed of six subdivisions commonly known as the Hardware Department, Audio-Visual Department, Carpentry Department, Electrical Department, Paint Department and Plumbing Department. Each of these subdivisions contains a working foreman and several Local #100 bargaining unit members. The working foremen are not members of the Local #100 bargaining unit, but are separately represented by Local #778 of the Ohio Association of Public School Employees.
7. The present controversy involves only those bargaining unit members who work in the Maintenance Department subdivision known as the Hardware Department. The Hardware Department currently consists of one working foreman and seven Local #100 bargaining unit members who work within the Hardware Repairman job classification. The seven Hardware Repairmen are: Alvin Richards, Mark Gil'rt, Robert Simpson, Jack Simpson, David D. Smith, David W. Smith and Alan Willard. [A copy of the current job description for the Hardware Repairman classification was filed with the stipulations.] These seven Hardware Repairmen, although working out of the Employer's Maintenance Department building, do not work together at a single job site throughout the day, but rather perform work assignments at all of the Employer's 60 buildings throughout the school system.
8. Over the past several months, a controversy has existed between the Employer, Local #100, and

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Hardware Repairmen members working in the Hardware Department over the selection of a new working foreman for the Hardware Department. A vacancy was created in this position in March 1989 due to the retirement of the previous foreman, and this being a Civil Service classified position, the required procedures for filling the vacancy have been in progress for several months. All eight of the Hardware Repairmen in the Hardware Department at that time applied for the foreman's position. Seven of these eight took the promotional examination for this position. The first three individuals initially certified as eligible candidates for this vacancy by the Civil Service Commission were Alvin Richards, Mark Gilbert and Robert Simpson. One of them (Alvin Richards) was later removed from the eligible list by the Commission's Personnel Director. Mr. Richards pursued an unsuccessful appeal of that removal to the Civil Service Commission. A further appeal of Mr. Richards' removal from the eligible list is now pending in the Summit County Court of Common Pleas. With the removal of Mr. Richards from the eligible list, the Civil Service Commission certified an additional eligible candidate for the foreman's position, Mr. Robert Schutte, Jr. Based upon interviews of these three candidates, Mr. Schutte was selected as the new Hardware Department foreman, and he began his duties in this position on Monday, October 23, 1989.

9. On Monday, October 23, 1989, all seven Hardware Repairmen failed to report to work as scheduled. All seven called in to indicate that they would not be at work due to various types of illnesses. On Tuesday, October 24, 1989, five of the seven Hardware Repairmen reported for work as scheduled, the other two remaining off work for a second day. On Wednesday and Thursday, October 25 and 26, 1989, all seven Hardware Repairmen reported to work.
10. During the morning hours of Monday, October 23, 1989, one of the Employer's Assistant Superintendents, Mr. Brian Williams, received a telephone call from a television reporter [Mr. Kelly] employed by a local television station, TV-23, WAKR. Mr. Kelly indicated that his television station had received an anonymous telephone call that morning indicating that some sort of "protest" was in progress at the Employer's Maintenance Department over the selection of a new foreman. Mr. Kelly called Mr. Williams again later in the day to inquire further about the anonymously reported "protest."

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11. There are a total of 58 other Local #100 bargaining unit members in the five other subdivisions of the Maintenance Department. Of these 58, three were absent from work due to illness on October 23, 1989, and a fourth was absent for one-half of the day on October 23, 1989. Two of the three full-day absences on this date were individuals who have been off work due to long term personal illnesses.
12. At no time relevant hereto was a Notice of Intent to Strike provided to the Employer by any individual or employee organization as required by O.R.C. §4117.14(D)(2).
13. Following the failure of the Hardware Repairmen to report for work on Monday, October 23, 1989, the Employer contacted and secured the agreement and cooperation of the President and Business Agent of Local #100 to assist in seeking the return to work of the Hardware Repairmen. The officials of Local #100 had no prior knowledge of, nor did they encourage the seven Hardware Repairmen to report off work sick on October 23, 1989.

In an effort to streamline the hearing procedure to meet the pressing deadline for Board action, the parties' representatives were permitted at hearing to proffer facts that would be proven, if necessary, through full evidential proceedings.

II. Issue

The alleged job action had ceased by October 25, 1989, one day prior to hearing and 48 hours prior to the deadline for decision under O.R.C. §4117.23. Thus, before determining whether the conduct in question constituted a strike within the meaning of O.R.C. §4117.01(H), we must first resolve the question of whether the 72-hour procedures of O.R.C. §4117.23 apply to alleged strike activity when the conduct at issue has ceased.

III. Analysis

For the reasons that follow, we determine that the extraordinary procedures and relief available under O.R.C. §4117.23 apply only to live, continuing conduct. Once the employees have returned to work, the urgency for action is lost, and adequate redress and remedy for such action are then available through unfair labor practice proceedings. Accordingly, we are not condoning allegedly improper strike activity simply because it ceases prior to the Board hearing; the Board will determine the lawfulness of such employee actions but will do so through the more thorough, less frantic, and procedurally more complete unfair labor practice process provided for in O.R.C. §4117.12.

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The central values of O.R.C. §4117.23 rest in the obligation of employees to return to work after notice that their action is unlawful and in the penalties applicable if they do not. The penalties are severe-- termination, deduction from wages of two days' pay for each day the employee remains on strike, and freezing of wages for one year--and loom as strong persuasion for employees engaged in illegal strikes to resume their duties. These penalties become available to be imposed by the employer only after: the Board determines the strike to be unlawful; the Employer so notifies the striking employees; and the employees fail to return to work one day after notification. Thus, the only remedy provided under O.R.C. §4117.23 is contingent upon a failure to return to work; if the employees already have returned to their jobs, the remedy of §4117.23 is irrelevant and, thus, the procedure futile.

The processes of O.R.C. §4117.23 can be compared to equitable injunctive actions in judicial proceedings. Injunctive relief is an extraordinary remedy available only when certain conditions are met, including the threat of irreparable harm and the absence of an adequate remedy at law.¹ While these factors are not part of the proof of a case under O.R.C. §4117.23, the comparison is useful when one considers that the purpose of O.R.C. §4117.23 is similar in concept to that of injunctive action.

¹See, e.g., Section 7 of the Norris-LaGuardia Act, 29 U.S.C §107, which permits injunctive relief in labor disputes only if these facts are shown:

- (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained....
- (b) That substantial and irreparable injury to complainant's property will follow;
- (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
- (d) That complainant has not adequate remedy at law; and
- (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Section 8 of Norris-LaGuardia, 29 U.S.C. §108, imposes the additional conditions that the party seeking the injunction (usually an employer) must have complied with legal obligations involved in the labor dispute and must have made "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

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In the case of an on-going strike, there are no other Board processes that promptly and adequately address the harm of the continuing strike; rapid action under O.R.C. §4117.23 is available and essential. This is similar to the availability of injunctive relief only when there is no adequate remedy at law. Moreover, the need to have striking employees return to work is a pressing matter which, when a strike is unauthorized, is worthy of swift action. Again, this is comparable to the requirement that there be a risk of irreparable harm before injunctive relief is granted. Under this comparison, it is clear that, for alleged strike activity that has ceased, the urgent procedures of O.R.C. §4117.23 are no more applicable than would be injunctive restraint of actions that have been discontinued with no threat of resumption. See Antol v. Dayton Malleable Iron Co., 38 N.E. 2d 100, 34 Ohio L. Abs. 495 (Ct. App., Montgomery 1941).

The Employer argues that it continues to seek a determination pursuant to O.R.C. §4117.23 for two reasons: to secure a statement that the employees' action was unlawful and to prevent future similar occurrences. Although such a determination and deterrent effect would be available were the employer to prevail in an unfair labor practice proceeding, the Employer contends that the immediacy offered by O.R.C. §4117.23 would enhance the impact of the message to employees that such job actions are not appropriate means of opposing employment decisions and that proper channels should be used. While, certainly, an immediate determination as to the legality of any conduct is desirable, our adjudicatory systems--both at SERB and in the courts--operate with great expedience only when the need for extraordinarily rapid action is apparent. Our holding today does not mean that O.R.C. §4117.23 procedures may be avoided whenever any strike activity is terminated before the Board acts. In instances where it is apparent that there is a risk of re-occurrence, repeated action, or continuing harassment through alleged strike activity, the processes of O.R.C. §4117.23 may, as with judicial injunctive relief, remain available.

As to redress available for the allegedly unlawful strike activity, the remedies possible under O.R.C. §4117.12 are significant and may be fashioned in a way to achieve the deterrent effect sought by the Employer, if the unfair labor practice is proven.

An additional point as to the preferability of the unfair labor practice avenue is apparent from the discussions of fact presented during the hearing. The Union argued that there was nothing to indicate that the employees in question actually had not been ill. The Employer responded that the presence of illegal strike activity is clear from the improbability that all seven repairmen would be ill on the same day after having recently expressed dissatisfaction with the selection of the foreman. The parties agreed at hearing, however, that at least one and possibly two individuals actually were ill. Thus, substantial questions as to the circumstances and the presence of concerted action must be addressed if the Board is to properly determine the legality of the instant conduct. An unfair labor practice proceeding, unencumbered by a 72-hour time limit, provides the forum for a more expansive examination of the facts and more extensive briefing and argument of the legal issues. When true urgency is a

critical factor, the 72-hour process and its concomitant short-cuts are essential. When the need for urgency is lost by cessation of the action, the balance weighs more heavily in favor of full, unhampered adjudicatory procedures.

III. Conclusion

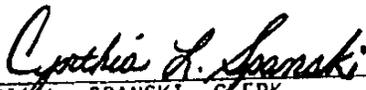
The Request for Determination of Unauthorized Strike is dismissed on the procedural grounds stated above. The Board does not reach the merits of the action.

It is so ordered.

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


WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 27th day of October, 1989.


CYNTHIA L. SPANSKI, CLERK

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