

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

207

SERB OPINION 89-032

In the Matter of
State Employment Relations Board,
Complainant,

v.

Central Ohio Transit Authority,
Respondent.

CASE NUMBERS: 87-U'P-04-0166
87-U'P-04-0167

ORDER
(Opinions attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
June 22, 1989.

On April 15, 1987, Local No. 208, Transport Workers Union of America (Charging Party) filed an unfair labor practice charge against Central Ohio Transit Authority (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), (A)(3), (A)(5) and (A)(7) by coercing employees, discriminating in regard to tenure of employment, refusing to bargain and threatening to lock out employees. The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions, response and cross-exceptions. Motions for extension to file pleadings filed by the Complainant, Intervenor and Respondent and the motion to file exceptions in excess of forty pages filed by the Complainant, all of which are unchallenged, are granted.

Vice Chairman Davis recused herself from the deliberation and decision making in the instant cases pursuant to SERB Opinion, In re Central Ohio Transit Auth., SERB 89-005 (2-15-89).

For the reasons stated in the attached opinions, incorporated by reference, the Board adopts the hearing officer's Admissions and Stipulations; adopts Findings of Fact Nos. 1, 2 and 3 and deletes Nos. 4 and 5; adopts Conclusions of Law Nos. 1 and 2, deletes Nos. 3 and 4, replaces No. 3 with the hearing officer's No. 8 which is amended to read: "COTA's April 9, 1987, letter to its employees summarizing its bargaining position and outlining its latest offer violates §4117.11(A)(1) and (A)(5).", deletes the words, "rather than its April 11, 1987, offer" from the hearing officer's No. 5 and has it become Conclusion of Law No. 4, deletes Conclusions of Law Nos. 6 and 7; adopts Conclusion of Law No. 9 and has it become No. 5.

The Conclusions of Law, as amended and adopted, are:

1. The Central Ohio Transit Authority is a "public employer" as defined by §4117.01(B).
2. Transport Workers Union No. 208 is an "employee organization" as defined by §4117.01(D).
3. COTA's April 9, 1987, letter to its employees summarizing its bargaining position and outlining its latest offer violates §4117.11(A)(1) and (A)(5).
4. By implementing its April 9, 1987, offer, Respondent has (a) interfered with, restrained, or coerced employees in the exercise of their rights guaranteed in Chapter 4117 in violation of §4117.11(A)(1) and (b) refused to bargain collectively with the representative of its employees recognized as the exclusive representative or certified pursuant to Chapter 4117 of the Revised Code in violation of §4117.11(A)(5).
5. SERB's investigation and adjudication process does not violate Respondent's due process rights.

The Board adopts the hearing officer's Recommendation No. 1, amends Recommendation No. 2(A) in the fifth line to read: "by dealing directly with its employees and by implementing its April 9, 1987, offer;" amends Recommendation 2(B)(2) to read "Immediately comply with all the terms of the expired collective bargaining agreement with the union, stop implementing the terms and conditions of the employer's April 9, 1987, offer and bargain in good faith with the union;" and adopts the Recommendations as amended.

The Respondent is ordered to:

- A. Cease and desist from interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and from refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code by dealing directly with its employees and by implementing its April 9, 1987, offer, and from otherwise violating §4117.11(A)(1) and (A)(5).
- B. Take the following affirmative action:
 1. Post for sixty (60) days in the usual and normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Central Ohio Transit Authority shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative actions set forth in Paragraph B.

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2. Immediately comply with all the terms of the expired collective bargaining agreement with the union, stop implementing the terms and conditions of the employer's April 9, 1987, offer and bargain in good faith with the union.
3. Notify the State Employment Relations Board in writing within twenty (20) calendar days from the issuance of the Order of the steps that have been taken to comply therewith.

It is so ordered.

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



WILLIAM P. SHEEHAN, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D), by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and common pleas court in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 29th day of November, 1989.



CYNTHIA L. SPANSKI, CLERK

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NOTICE TO EMPLOYEES

FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE
STATE EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Chapter 4117 of the Revised Code, and from refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code by dealing directly with its employees and by implementing its April 9, 1987, offer, and from otherwise violating §4117.11(A)(1) and (A)(5).

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Post for sixty (60) days in the usual and normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Central Ohio Transit Authority shall cease and desist from the actions set forth in Paragraph A and shall take the affirmative actions set forth in Paragraph B.
2. Immediately comply with all the terms of the expired collective bargaining agreement with the union, stop implementing the terms and conditions of the employer's April 9, 1987, offer and bargain in good faith with the union.
3. Notify the State Employment Relations Board in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

CENTRAL OHIO TRANSIT AUTHORITY
87-UPL-04-0166
87-UPL-04-0167

DATE _____ BY _____ TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

notice must remain posted for sixty (60) consecutive days from the date and must not be altered, defaced, or covered by any other actions concerning this notice or compliance with its the Board.

SEED OPINION 89-032

STATE OF OHIO
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OPINION

Sheehan, Chairman:

1
The issues in this case arose during contract negotiations over a successor collective bargaining agreement between Transport Workers Union Local 208 (Union), which represents a unit of bus drivers, mechanics and service employees, and Central Ohio Transit Authority (COTA or Employer).

Prior to the start of negotiations, the parties agreed to an alternative dispute resolution procedure pursuant to O.R.C. §4117.14(E).¹ Negotiations began in October 1986. There were 47 bargaining sessions in

O.R.C. §4117.14(E) provides:

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.

all, the last being held on April 14.² There were no negotiations after April 14, the date the hearing officer determined impasse had occurred.

From the very beginning of negotiations, the parties could find no ground on which settlement could be reached on the Employer's proposal calling for a limited right to hire part time employees and increasing the Employer's ability to use sub-contractors. The Employer insisted on the proposal and the Union consistently and steadfastly held its position against it. The issue remained unresolved up to the standstill in negotiations on April 14, 1987.³

Upon the expiration of the previous contract, the union struck on November 14, 1986. The strike was called off after the State Employment Relations Board (SERB or Board) in Case No. 86-HED-11-1164 ruled it was an illegal strike because the Union failed to serve upon the Employer a notice of intent to strike ten days prior to the initiation of the strike action.⁴ The Union then appropriately provided a ten-day strike notice and on December 9 commenced a second strike action.

On February 6, 1987, COTA petitioned the Franklin County Court of Common Pleas to enjoin the strike pursuant to §4117.16(A) of the Ohio Revised Code. An injunction was issued on February 9 ordering the employees back to work and directing the parties to bargain through April 13, 1987.⁵

²Stipulation (Stip.) #6.

³Finding of Fact (F.F.) #2.

⁴Stip. #13.

⁵Stip. #15.

Complying with the injunction, the parties continued bargaining but were unable to reach settlement when the injunction expired.

On or about April 2, 1987, the Employer was notified of the Union's intent to renew the strike if no agreement was reached by April 14. On April 9, at a bargaining session, the Employer responded by proposing a contract offer and also informed the Union that it intended to send a letter to each unit employee calling for the acceptance of the offer. Over the Union's objection, the letter dated April 9 was sent.

Bargaining continued, and the Employer made another contract offer on April 11. The Union rejected this offer and, on the following day, April 12, proposed to submit the unresolved issues to binding arbitration. The Employer declined and the parties continued to exchange proposals until April 14. On that date, the Union struck and the Employer unilaterally imposed the terms of its April 9 offer.⁶ The following day, April 15, at 12:01 a.m., the Union ended the strike and all bargaining unit employees returned to work. The same day, the Union filed unfair labor practice charges against the Employer alleging violations of O.R.C. §4117.11(A)(1), (A)(3), (A)(5) and (A)(7).

The Complaint, more specifically, alleged that the Employer dealt directly with bargaining unit members represented by the Union when it sent each member a letter regarding its intended implementation of the contract offer of April 9, 1987; and that on or about April 13, 1987, the Employer unilaterally changed the wages, hours, terms and conditions of employment of bargaining unit members by implementing its April 9, 1987, contract offer.

⁶Stip. #23-32.

Additionally, the Complaint alleged that on April 13, 1987, the Employer sent each employee on the bargaining unit a letter notifying each employee that if employees did not report to work beginning April 17, 1987, the Employer would hire permanent replacements for all striking employees in violation of O.R.C. §4117.11(A)(1), (A)(3) and (A)(7).

On September 18, October 6, October 9, and October 30, 1987, an evidentiary hearing was held before SERB Hearing Officer Chester C. Christie.

The issue to be resolved is whether the Employer, by sending the letter on April 9th, dealt directly with unit members and, thus, bargained in bad faith in violation of O.R.C. §4117.11(A)(1) and (A)(5).

For reasons adduced below, the Board finds the answer to the question to be yes and, consequently, rejects the portions of the Hearing Officer's Conclusions of Law found in conflict.

I.

Having provided public employees with the right to exclusive representation and to bargain collectively with their employer,¹⁰ and obligating the public employer to bargain collectively with the exclusive representative,¹¹ the framers of the Act made clear their intentions that public employers must refrain from dealing directly with their employees during the course of collective bargaining.

In two recent cases, the Board enlarged upon the reasons for the prohibition against direct dealing, Findlay City Sch. Dist. Bd. of Educ., SERB 88-006 (5-31-88) and Mentor Exempted Village Sch. Dist. Bd. of Educ.,

¹⁰O.R.C. §4117.03(A)(3) and (A)(4).

¹¹O.R.C. §4117.04(B).

SERB 88-011 (12-1-88). In Findlay, the Board reasoned:

By dealing directly with the employees and circumventing the representative, (an employer) undercut(s) the status of the exclusive representative, potentially impairing (the union's) relationship and effectiveness with the employees it represents.

The Board stated in Mentor:

A union's bargaining strategies and techniques can be effectively blunted if an employer, using its unique position, elects to undercut the union's exclusive representative status by going directly to the union's membership.

These statements are expressive of the basic conviction that direct dealing during the course of collective bargaining is coercive in nature and, consequently, will have a compromising effect on the bargaining process.

In the instant case, the April 9th letter was sent to unit members on the same day the Employer presented a final offer to the Union. This timing provided little or no opportunity for the Union to first respond to the offer, and the record produces no evidence that the offer was rejected before the letter was sent. Rather, it may be presumed that the letter was designed and sent by the Employer as a negotiating tactic in order to induce acceptance of the April 9th offer.

Even more conclusively, there is sufficient indication in the Stipulations,¹² agreed to by the parties, and in the Findings of Fact¹³ that negotiations had not reached a standstill by April 9 when the letter was sent. Because two days later, the Employer presented the Union with another offer. In fact, the parties continued to exchange proposals until

¹²Adm. and Stip. Nos. 23-27.

¹³F.F. No. 3.

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April 14th, when the injunctions expired¹⁴ and the Union continued its strike. All of which leads to the ineluctable conclusion that bargaining did not end until April 14th.¹⁵

Moreover, the letter appealed to unit members in such language as, "We strongly urge you ... to accept the proposal," and stressing the costs of a strike while acclaiming the benefits of the Employer's offer. Nowhere in the letter does it acknowledge the Union's right to exclusive representative status. It also inferred that the Union might deprive the membership of the opportunity to ballot secretly on the offer when it urged the employees "to do everything in your power to bring about a secret ballot vote ... to accept the proposal." This was a direct appeal to employees to accept the Employer's offer and suggests that the letter was not sent in response to a state of impasse or the end of negotiations. Thus, the letter does more than merely inform the unit members of the Employer's position or provide a summary of negotiations. This letter constitutes an attempt to persuade the employees to put pressure on their exclusive representative to give in to the will of the Employer, and to create the impression that the Employer, rather than the exclusive representative, has the interests of the employees at heart. This is clearly prohibited conduct of direct dealing by the Employer.

Even in a case where an Employer's letter to unit members during negotiations expressly acknowledged the Union's right to bargain as the

¹⁴It should be noted here that the injunction carried the instructions for the parties to continue bargaining through April 13, and the record indicates they were in compliance.

¹⁵Adm. and Stip. No. 6.

exclusive representative, made no offer of benefit to employees, and purported to be an informational memo intended as a factual summary of negotiations rather than an attempt to bargain, the Board found that direct dealing occurred. Mentor, supra. The Employer's letter in that case had the effect of damaging the Union's relationship with the unit members it represented and placed it in a defensive bargaining position. Although it was not found that the Employer in Mentor intended to deal directly with its employees or to damage the collective bargaining relationship, the content of the memo possessed coercive elements that had such effects and, therefore, amounted to an attempt to bargain directly regardless of the Employer's stated intentions.¹⁶

The prohibition of direct dealing prevents an Employer from undermining Union strategy and unit members' support. Direct appeals to individual unit members during the course of bargaining have such potential effects. Even a communication that purports to be purely informational and acknowledges the exclusive representative may contain language that could unfairly compromise the bargaining process.

The letter in the instant case cannot pass as a benign communication having no potentially harmful effects: rather it represents an attempt to bypass the Union by dealing directly with unit members and forces the conclusion that the letter was designed and sent by the Employer as a negotiation tactic in order to induce acceptance of the April 9th offer.

¹⁶General Electric Co., 180 NLRB 192, 194; 57 LARM 1491 (1964) enforced, 418 F.2d 736; 72 LARM 2530 (2d Cir. 1969), cert. denied, 397 U.S.

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Therefore, the Employer's letter of April 9th dealt directly with unit members, circumventing the exclusive representative, in violation of O.R.C. §4117.11(A)(1) and (A)(5) and breached the duty to bargain in good faith.

An employer's implementation of its last best offer is concomitant upon a condition of impasse existing in the bargaining process. In re Cuyahoga County Commrs., SERB 89-006 (3-15-89). That condition is not attainable if the duty to bargain in good faith is defied. In the instant case, the breach of the duty to bargain in good faith occurred prior to the declaration of impasse.¹⁷ Therefore, a condition of impasse could not have existed which renders the Employer's implementation of its last best offer violative of the Act.

The final issue is whether the Employer's letter of April 13, 1987, notifying each bargaining unit employee of its intent to hire permanent replacements for all striking employees if they did not return to work constitutes a violation.

The Board will not make a determination on this issue. One Board member felt obliged to recuse herself¹⁸ thus leaving the Board short of its full complement. The issue is a novel one with implications of such import that it demands nothing less than the participation of the total Board. Moreover, although the strikers did return to work immediately after the letter stating the Employer's intent to hire permanent replacements, the case does not stand or fall on this single issue.

¹⁷April 14, 1987.

¹⁸In re Central Ohio Transit Auth., SERB 89-005 (2-15-89).

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CONCURRING OPINION

Latané, Board Member:

I concur with the results in the Opinion of the Chairman, but not the rationale. I agree that the April 9, 1987, letter sent by COTA management to employees was coercive in that it was sent to bargaining unit members on the same day that the Employer presented a final offer to the union, it failed to acknowledge that bargaining must be done through the exclusive representative, and it interfered with the union's ability to conduct an election freely in that the letter lobbied the union membership to insist on a secret ballot vote.¹ Because it went beyond a simple, factual statement of the Employer's last offer, it was coercive in that it interfered with the exercise of rights guaranteed in Chapter 4117, and constituted a violation of Ohio Revised Code (O.R.C.) §4117.11(A)(1).

However, I do not agree that the letter rises to the level of bad faith bargaining. In my concurring opinion in In re Mentor Exempted Village School Dist. Bd. of Ed., SERB 89-011, (5-16-89), I concluded that direct communications from an employer to bargaining unit employees, even if factual, are prohibited prior to completion of dispute resolution procedures because under O.R.C. §4117.21, collective bargaining negotiations must be conducted privately.

The parties in the two cases under consideration were operating under an alternative dispute resolution agreement which agreed on the employees' right to strike as the dispute settlement procedure upon the expiration of the Memorandum of Agreement between C.O.T.A. management and Transit Workers Union, Local No. 208. This agreement specified that it superceded the statutory dispute resolution procedures contained in O.R.C. §4117.14.²

¹Joint Exhibit 14.

²Finding of Fact (F.F.) 1.

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Guidelines to determine that a direct communication from an employer to employees is permissible under an alternative dispute resolution mechanism include that the parties have reached a stage comparable to the completion of factfinding, and that a strike is imminent.

That such a stage was reached in the cases at hand is evident from the fact that the parties did engage in extensive mediation, by joint request, between November 17, 1986, and January 30, 1987. After six meetings conducted by two F.M.C.S. mediators the parties remained deadlocked over the key issues.³

Although O.R.C. 4117 allows public employees the right to strike under certain circumstances, the whole purpose of this chapter is to promote harmonious labor relations. If a strike is imminent, a letter from the employer outlining the provisions of the proposed contract that is factual and noncoercive, and that is an attempt to encourage settlement and avert a strike is not, in my opinion, in violation of the letter or the spirit of Chapter 4117.

I will not address the question of whether the parties were at impasse when the April 9 letter was sent as that Conclusion of Law was deleted from the Proposed Order in these cases because there was not agreement by the two voting Board Members on whether impasse existed. However, the filing of a third Notice to Strike is a clear indication that the parties were past the stage of negotiating where privacy is mandated under O.R.C. 54117.21. Therefore, I find the letter sent from COTA management on April 9, 1987, to be a violation, but only because of the reasons stated in the first paragraph of this opinion.

³F.F. 2.