

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Springfield Local Classroom Teachers Association,
Employee Organizations,
and
Springfield Local Board of Education,
Employer

CASE NUMBER: 92-STK-09-0003

OPINION

OWENS, Chairman:

I. Procedural Background and Facts

On September 9, 1992, the Springfield Local Board of Education filed a Request for Determination of Unauthorized Strike pursuant to Ohio Revised Code (O.R.C.) §4117.23. The filing alleged that on September 9, 1992, at 12:01 a.m., 78 members of the Springfield Local Classroom Teacher's Association went on strike in violation of the parties' most recent collective bargaining agreement, which contained a mutually agreed upon alternate dispute resolution procedure (MAD). The filing alleged that the MAD in the contract was to replace all settlement procedures set forth in O.R.C. §4117.14, and that there was no finality to the MAD since mediation was to continue until the parties reached agreement, whenever, if ever.

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 1:00 p.m.,

September 10, 1992, at the Board's Office. Prehearing procedures were conducted by the Board's General Counsel, and stipulations were agreed upon by the Union and the Employer. These stipulations are:

1. Springfield Local Board of Education ("Board") is a "public employer" within the meaning of O.R.C. §4117.01(B).
2. Springfield Local Classroom Teachers Association ("Union") is an "employee organization" within the meaning of O.R.C. §4117.01(D).
3. The Union is the deemed-certified representative for a unit of all professional certificated full-time and part-time personnel employed by the Board, including certified teachers ("the Unit"). The employees so represented are in a category for whom strikes are permitted under Chapter 4117 of the Ohio Revised Code.
4. The Board and the Union have been parties to a series of collective bargaining agreements, the first of which became effective sometime before 1984, the exact date being unknown. The most recent agreement was effective by its terms from August 1, 1989 through July 31, 1991, and extended by mutual agreement of the parties to July 31, 1992. A copy of the most recent agreement is incorporated as part of these stipulations.

Opinion

Case No. 92-STK-09-0003

Page 3 of 13

5. On June 25, 1992, the Board and the Union began negotiations pursuant to Article II of the collective bargaining agreement described above in Paragraph 4 (herein, "contract").
6. On August 28, 1992, after 13 negotiating sessions, the Union declared impasse pursuant to Article II, Paragraph 2.041 of the contract and delivered to the Board a notice of intent to strike pursuant to Chapter 4117 and advised that the Union would be requesting the services of a federal mediator.
7. The parties met with the federal mediator on September 1, 1992. The parties negotiated again, but without the assistance of a federal mediator, from the evening of September 8, 1992 until 7:30 a.m. on September 9, 1992. Another bargaining session is scheduled for the evening of September 10, 1992.
8. At 6:30 a.m. on September 9, 1992, certified teachers in the Unit who are assigned to the Board's elementary school, middle school and high school went on strike. The strike continues to date.
9. The parties' contract contains a mutually agreed upon alternate dispute resolution procedure (MAD).
10. Article II, paragraph 2.041 of the contract states:

2.041 Impasse

If agreement is not reached within thirty (30) days of the initial meeting, either party may request that the Federal Mediation and Conciliation Service (hereinafter "FMCS") provide a mediator to assist the parties. The negotiating procedure set forth in this Article supersedes and takes precedence over any inconsistent time limits or procedure set forth in Section 4117.14 of the Ohio Revised Code, which statutory time limits and procedure are hereby mutually waived. Mediation constitutes the parties' mutually agreed upon final and exclusive dispute settlement procedure and shall operate in lieu of any and all of the settlement procedures set forth in Section 4114.14 of the Ohio Revised Code.

11. Article II, paragraph 2.042 of the contract states:

2.042 Mediation

The mediation process will be conducted at the times and places determined by the mediator after consultation with the parties and shall continue until the parties arrive at an agreement.

12. The parties' contract also contains a "No Strike Provision" at Article 7.06, which states, in part: "During the period that this Agreement is in full force and effect there shall be no withholding of services or strike."

13. The parties' contract further contains a "Legal Rights" provision at Article 7.03, which states: "Nothing in this Agreement shall deny any employee rights or privileges that are granted to said employees by the Ohio Revised Code or any other statute or law."

II. Issue

Whether the strike at issue was unauthorized pursuant to O.R.C. §4117.23.

III. Analysis

The underlying issue before the Board is whether the parties' MAD, contained in their recent collective bargaining agreement, is faulty and inoperative. If so, then the union was not privileged to strike before exhausting the statutory dispute resolution procedures, and the work stoppage at issue is unauthorized.

If, however, the MAD was operative and was exhausted before the strike began, we must find that the strike is authorized.

For the reasons set forth below, we find that the strike is authorized.

O.R.C. §4117.18(C) prohibits strikes during the pendency of the settlement procedures outlined O.R.C. §4117.14, including the mutually agreed upon dispute settlement procedures (MADs) permitted by O.R.C. §4117.14(C).

At issue here is whether the strike occurred during the pendency of the parties' MAD, or after it was exhausted. As long as the MAD was exhausted, it was permissible for the employees to strike.

Like many MADs, this one simply called for mediation. It also went a step further, specifically waiving the statutory dispute resolution procedures outlined in O.R.C. §4117.14.

Relying on a contract provision stating that mediation "shall continue until the parties arrive at an agreement," the Employer argues in effect that because the parties had not reached agreement at the time of the strike they had not exhausted and could not ever exhaust their MAD. Attempting to fit this situation within the framework of two earlier SERB decisions, In re Mad River-Green Local Bd of Ed, SERB 88-016 (9-29-88), and In re Weathersfield Local Bd of Ed, SERB 91-009 (11-8-91), the Employer urged that the MAD was not only not exhausted in fact but intrinsically inexhaustible and faulty. Accordingly, went the argument, the parties should be placed in the very statutory dispute resolution process which they had waived.

We disagree. The MAD called for mediation. Here, the contract had expired, and the parties, having negotiated on their own for sixty days without success utilized the services of a federal mediator before striking following a proper strike notice. These actions were sufficient to exhaust their MAD, as it was contemplated by the parties during negotiations. The Employer argues that a waiver of the right to strike can be implied from the language of the MAD requiring mediation until agreement is reached. We do not agree. A waiver of a statutory right must be clear and unmistakable. In re Pickaway/Ross Joint Vocational School Dist. Bd. of Ed. SERB 87-027 (11-19-87). It cannot be implied. If anything, the presence of a no-strike clause in the collective bargaining agreement (Stipulation 12) suggests that the parties intended to prohibit strikes only during the contract term, not after its expiration.

The "Legal Rights" provision at Article 7.06 (Stipulation 13) points in the same direction, i.e., that the parties intended to reserve all the statutory rights, specifically the right to strike. Further, Local Union representative Norman Young testified¹

¹ The Employer objected to admitting testimony on the history of the collective bargaining and the intent of the parties. In support of its objections the Employer cited City of Springfield v. SERB 1984-86 SERB 440 (CP, Clark 1-29-86). While it is true that the Court found that no extraneous evidence was called for because the language of the contract was plain and not ambiguous, we cannot see the implication to the case at issue where the Employer itself argued that the language of the MAD is

without contradiction that when the Employer proposed the MAD language, the Employer's then-representative had assured union representatives during negotiations that the MAD would not interfere with the union's right to strike. Thus, the history of the negotiations as well as the reading of the contract as a whole, show that neither party intended to eliminate the right to strike, and that no waiver, in any shape or form, occurred. Where the right to strike is not independently waived, the language in the contract requiring mediation until agreement is reached can be interpreted to express the parties' commitment to the process in an effort to reach an agreement, whether or not a strike is in progress. We find such an expression of commitment commendable. We do not find it, however, an obstacle to accepting the MAD as operative.

The thrust of the Employer's argument that the strike is unauthorized is that the MAD has no termination point and hence is inexhaustible. Citing prior Board strike decisions, specifically Weathersfield and Mad-River Green, the Employer argues that where a MAD is inexhaustible the strike is unauthorized and the parties should be placed under the statutory dispute resolution procedure, specifically into the fact-finding phase.

ambiguous to such an extent that it needed be set aside.

While it is true that under the circumstances of the cited cases it was appropriate to declare the strikes unauthorized and place the employees under the statutory procedures, such action is not warranted here.

Mad River-Green involved a reopener negotiation and had an either/or mediation clause stating that mediation shall continue until agreement is reached, "or the expiration of this agreement" (emphasis added). Thus, the MAD in Mad River-Green had a very definite termination point (the expiration of the agreement), which left no room to interpret the contractual language differently. However, such a termination point eliminated for all intents and purposes the ability to strike on reopener negotiations. Since no clear and unequivocal waiver of a strike was stated in the MAD, the Board could not interpret the MAD to forbid strikes. Thus, caught between the existing right to strike on one hand, and a definite termination point which effectively eliminated the ability to strike on the reopener on the other hand, the MAD had to be found inoperative. This is clearly different from the case at issue.

In Weathersfield the parties' MAD called for a fact-finding panel. The MAD was silent on what happened where there is no mutual agreement on extending the deadline for the panel's conclusions, and the parties had irreconcilable interpretations on this point. Under those circumstances, The Board's direction of

the parties to fact-finding under O.R.C. §4117.14 was the most expedient action possible to break the contractual stalemate consistent with the parties' contract, which envisioned a fact-finding process.

By contrast, in the MAD at issue here, the parties did not include fact finding in their MAD, and in addition specifically waived the statutory dispute resolution procedure. (Stipulation of Fact No. 10, citing Article II, paragraph 2.041 of the collective bargaining agreement). It could not have been made clearer that these parties intended to avoid the dispute resolution procedures in §4117.14 and specifically to avoid fact-finding. Directing the parties to fact finding under §4117.14, which was consistent with the parties' contractual intent in Weathersfield, would blatantly fly in the face of the parties' intent in the case at issue. Sound contract interpretation requires that considerable weight be given to the parties' intent. Thus, if, as here, there is a way to interpret the contract consistent with the clear intent of the parties, the Weathersfield solution should not apply to the case before us.²

² The Employer's reliance on In re City of Columbus SERB 85-004 (2-6-85) (Capital City Lodge) is misplaced. In City of Columbus the Board ruled that a MAD which includes only mediation is inappropriate. However, the context was safety forces, which are strike-prohibited employees. A MAD for such employees must provide for final and binding resolution of disputed issues by a neutral third party. O.A.C. Rule 4117-9-03(C). All this is irrelevant to the case at issue, which does not involve strike-

Likewise, it would appear to violate the parties' intent to interpret the MAD as supplanting the union's right to strike. Thus, unlike in Mad River, in the case at issue it is possible to interpret the contract consistent with the parties' intention, with the statutory mandate, and without nullifying a contract clause.

We find that the MAD calls for 60 days of negotiations until the expiration of the contract and for mediation through the auspices of the federal mediation services. Both were accomplished. We find that the strike took place only after the contract had expired and a 10-day notice was given. We also find that the commitment of the parties to continue mediation until agreement is reached has been kept and regardless of the ongoing strike both parties are ready to continue with mediation. In these circumstances we find that the MAD is operative, was sufficiently exhausted and the strike authorized.

Our willingness to accept the MAD language as sufficiently exhaustible and operative under the circumstances of this case should not be taken as an endorsement of its language. We do not mean to imply that the MAD language is well drafted or a model for others to follow. On the contrary, it is not. Parties who forego the statutory dispute resolution procedures for their own

prohibited employees, but rather teachers who are permitted to strike.

alternatives are well-advised to draft language which is clear and self-explanatory. Clear language avoids disputes such as the one before us here.

It is only because we are able to ascertain intent from the contract read as a whole, and from some knowledge of bargaining history, that we can interpret it as operative and exhaustible. We are also mindful that as a matter of policy, this Board and prior Boards have emphasized repeatedly that the clear legislative intent is to sustain the parties' alternative dispute mechanism absent some compelling public policy against it. The Board's policy is to intervene as little as possible in the contractual provisions of the alternate dispute resolution procedure and, whenever possible, to interpret the contract language in such a way as to hold the MAD operative.

Likewise, although the MAD was not drafted clearly and unambiguously, public policy as well as sound labor policy support sustaining the MAD and the finding that its procedures were complied with. The record shows that extensive negotiation took place between the parties, as the MAD dictated, the federal mediation services were utilized, the contract expired and a timely notice of intent to strike was filed by the Employee Organization.

The parties in this case exhausted the terms of their alternate dispute resolution procedure as envisioned during their contract
