

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Amalgamated Transit Union, Local 268, AFL-CIO,

Respondent.

CASE NUMBER: 90-ULP-10-0599

ORDER
(Opinion Attached)

Before Chairman Owens, Vice Chairman Pottenger and Board Member Mason:
April 29, 1993.

On October 10, 1990, Leon Rembert (Intervenor) filed an unfair labor practice charge with the State Employment Relations Board (SERB) against Amalgamated Transit Union, Local 268, AFL-CIO (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(B)(1) and (B)(6) by refusing to permit Supervisors Grades 5 and 6 to vote for their Executive Board representative in December of 1990.

The case was heard by a Board hearing officer. The Board has reviewed the record, the Hearing Officer's Proposed Order, exceptions and response. The Complainant in its exceptions moved the Board to amend the complaint. For the reasons stated in the attached Opinion, incorporated by reference, the Board denies the Complainant's post-hearing motion to amend the complaint, adopts the Admissions, Stipulations, Findings of Fact, Conclusions of Law and Recommendations of the hearing officer and hereby issues an Order dismissing the complaint.

Respondent's motions opposing the Complainant's Exceptions and Intervenor's Exceptions are denied as moot, inasmuch as the Complaint has been dismissed, and the Respondent exercised its opportunity to respond to the Complainant's Exceptions.

It is so ordered.

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OWENS, Chairman, POTTENGER, Vice Chairman, and MASON, Board Member, concur.


DONNA OWENS, 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 (15) days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 25th day of June, 1993.


NICHOLAS G. MENEDIS, EXECUTIVE DIRECTOR

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OPINION

MASON, Board Member:

An opinion is warranted in this case to discuss two important issues: (1) the proper filing of motions to amend complaints in unfair labor practice matters, and (2) under what circumstances internal union conduct may constitute a violation of Ohio Revised Code 54117.11(B)(1).

This matter arose on October 10, 1990, when Leon Rembert (Charging Party or Intervenor) filed an unfair labor practice charge against Amalgamated Transit Union, Local 268, AFL-CIO (ATU or Respondent). Upon review, the Board determined that there was probable cause to believe that an unfair labor practice had been committed and on November 15, 1991, SERB issued a Complaint and Notice of Hearing. A hearing was held on March 23, 1992¹ after which the hearing officer assigned to the case concluded that the Respondent had not violated O.R.C. 54117.11 (B)(1) or (B)(6). Based upon our own review of the record, we

¹On November 25, 1991, counsel for the Respondent filed a Motion for Continuance of the evidentiary hearing in the instant case originally scheduled for December 13, 1991. Subsequently, a settlement agreement was reached and the hearing date was cancelled. The settlement, however, was later rejected by the Intervenor. After no agreement was reached at a prehearing conference held on February 13, 1992, the matter was rescheduled for hearing on March 23, 1992.

believe that the proven facts, if properly pleaded, would constitute a (B)(1) violation. We cannot, however, find a (B)(1) violation because the underlying complaint was defective, and the Complainant failed to amend it properly.

ATU and the Greater Cleveland Regional Transit Authority (RTA or Employer) were parties to a collective bargaining agreement for the period August 1, 1988 to July 31, 1991. ATU is the deemed certified representative of a unit of employees in Grades 1 through 6. RTA calls employees in Grades 5 and 6 "Supervisors".² The Charging Party is employed by RTA as a Grade 6 Supervisor and is a member of the ATU bargaining unit.

ATU's Executive Board is comprised of members who represent various divisions of RTA where bargaining unit members work. For example, one member represents the Rail District, one represents Brooklyn Station, another represents Woodhill Station, one represents Supervisors Grades 5 and 6, and so on. Prior to June of 1989, ATU's bylaws prohibited Supervisors from attending regular union meetings³, did not give Supervisors the opportunity to elect a representative to the ATU Executive Board, and did not allow Supervisors to be

²The hearing officer noted the following in her report: "The term "Supervisor" used in this context is a designation given to certain classifications of employees. This is not to be confused with the definition of "Supervisor" set forth in Chapter 4117. There is no indication that these classifications meet the criteria necessary to be excluded from coverage of the Act nor do the parties allege same." See Hearing Officers Proposed Order (hereinafter "HOPO") pg. 5.

³Section 3(b) of the bylaws provides:

Supervisory Personnel in the operating department shall elect a Steward to represent this group in contract, grievances, etc. He shall be empowered to call a meeting of this group at any time with the consent of the Officers of the Division and the Supervisory Personnel shall not attend the Regular Meetings of the Division. (Emphasis added.)

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candidates for any elected office. In order to elect a board member, 150 employees are required to be in that particular segment.⁴ For groups with fewer than 150 employees, the local president appoints a union steward to serve their needs.

In 1986, ATU's international bylaws were amended to allow "Supervisors" to attend union meetings and to run for elected office. The local bylaws, however, were not amended until June of 1989. In October or November of that year, ATU Local President Ronald W. Jackson, Jr. appointed Edward Butler, a Supervisor, to the Executive Board as Interim Representative for the Grades 5 and 6 Supervisors. At the time of his appointment, Butler was serving as the appointed steward.⁵

In December of 1990, ATU scheduled a general election which included an election for the Executive Board members. ATU's bylaws provide that all candidates for office, board member or delegate positions be in continuous good standing for two years before an election and attend six regular meetings each year for a two-year period before the election.⁶ Attendance at one meeting per year, in either August or September, is excused by the international president and members are given credit for attending the meeting. Thus,

⁴Joint Exhibit 2.

⁵F.F. #7. It should be noted that Jackson had also appointed Rembert to the steward position.

⁶ Section (4)(A) of the 1981 and 1990 ATU bylaws provides:

All candidates shall have been in continuous good standing for two years in this local Division prior to the nomination. They must also have attended (6) meetings in each year in a two year period prior to the election unless excused for good and sufficient reasons by the President of the Local Division or because of illness, in which case proper proof must be submitted to the Division.

candidates for Executive Board member positions in 1990 were required to have attended at least six regular meetings in 1989 and six regular meetings in 1990 to be eligible to run. The parties stipulated that no Supervisor, except Edward Butler, attended at least six regular meetings in 1989. Leon Rembert was credited with attending one meeting for 1989 in August or September, which was excused by the international president. He attended seven regular meetings in 1990. The parties further stipulated that no Supervisor, except Edward Butler, attended the required six meetings in either 1989 or 1990 and that no Supervisor, including Leon Rembert, was eligible to run for Executive Board in December, 1990.⁷

Before the election date, Rembert contacted Jackson and requested that the meetings requirement be waived in order to allow him to run for union office. Jackson refused to exercise his authority in this situation even though the ATU bylaws permit the local president to waive the meetings requirement under certain circumstances.⁸ Jackson testified that it was his opinion that it is good and sufficient reason to excuse a member from attending a meeting if a person was out of town or his wife was ill but not to "just qualify him to run for office." Jackson went on to say that the fact that Supervisors were prohibited from attending meetings in 1989 was not good and sufficient reason to waive the meetings requirement for the Supervisors desiring to run for office.⁹ Butler was elected in December of 1990 to the ATU Executive Board to represent Supervisors Grades 5 and 6.

The issue before the hearing officer in this case was whether ATU refused to permit

⁷ The hearing officer's footnote to this stipulation stated "Although the stipulations in the record are as stated, it is clear that one supervisor, Edward Butler, was eligible to run for Executive Board in December, 1990. The second portion of this stipulation appears to be an oversight." See HOPO, pg. 4, fn 1.

⁸See footnote 6, supra.

⁹F.F. #9, 10.

Supervisors Grades 5 and 6 to vote for their Executive Board representative in December of 1990 and/or otherwise denied Supervisors Grades 5 and 6 the opportunity to elect their Executive Board representative in violation of O.R.C. 54117.11(B)(1) and (B)(6).

Proper Filing of Motions

The Complainant's principal argument was that ATU's refusal to waive the meetings requirement for the year 1989 resulted in the failure of any Supervisor except Butler being qualified to run for the Executive Board seat in 1990 and therefore constituted a violation of the duty of fair representation. Specifically, in its exceptions to the Hearing Officers Proposed Order, the Complainant argued the following:

"ATU prohibited supervisors from attending regular meetings from January 1, 1989 to June 13, 1989. As a result, no supervisor, except Interim Executive Board Member Edward Butler, was eligible to run for the Executive Board in December 1990 because no supervisor but Butler satisfied the meetings requirement. ATU President Ronald Jackson could have waived the meetings requirement but refused to do so, thus allowing Butler to be elected unopposed and denying the supervisors a fair, free, and contested election with a choice for their representative to the Executive Board...."

In essence, it was the Complainant's contention that Butler was not appointed but elected unopposed in December, 1990 because ATU set rules prohibiting supervisors from opposing him.¹⁰

The hearing officer addressed this argument in her report and although concluding that

¹⁰See Complainant's Exceptions to HOPO, pg. 3.

the allegation was beyond the bounds of the Complaint issued in this matter noted the following: "....This allegation is true. And indeed, after hearing all evidence put forth by ATU and the Complainant, the refusal to waive an internal bylaw under these circumstances certainly seems to this Hearing Officer to be unjustified. However, this allegation is beyond the bounds of the Complaint issued in this case."¹¹

After the hearing officer's report was issued, the Complainant filed Exceptions to the findings which included a request that the Board amend the Complaint to conform to the evidence presented at the hearing. The Complainant argued that it had proven the allegations set forth in the complaint, but "Assuming, arguendo, that the Complaint had not been proven because the facts alleged differ slightly from the facts proven, the Complainant moves that the Complaint be amended to conform to the evidence presented at hearing."

Ohio Administrative Code Rule (O.A.C.) 4117-7-03(A) mandates that a complaint that an unfair labor practice has been or is being committed contain "a clear and concise description of the acts which were claimed to constitute unfair labor practices, including the approximate dates, times, and places of such acts and the names of the persons by whom committed." The Complaint issued in this matter failed to meet any of these requirements. With respect to amending a complaint, O.R.C. 54117.12 (B)(1) provides the following:

.....The board may amend a complaint, upon receipt of a notice from the charging party, at any time prior to the close of hearing, and the charged party shall within ten days from receipt of the complaint or amendment to the complaint, file an answer to the complaint or amendment to the complaint. The charged party may file an answer to an original or amended complaint..... (Emphasis added.)

¹¹HOPO, pg. 10.

In pertinent part, the Complaint issued in this matter contained the following allegations:

8. In December 1990, all of the bargaining unit members working in the various divisions of RTA were afforded the opportunity to elect their ATU Executive Board representatives, except the supervisors, grades 5 and 6.

9. In December 1990, ATU appointed Edward Butler to the Executive Board as representative for supervisors, grades 5 and 6 for a three-year term to end in December, 1993. ATU refused to permit supervisors, grades 5 and 6, to vote for their representative in December 1990 but permitted all of the other bargaining unit members to vote for their representative.

10. By the acts and conduct described above, ATU is restraining or coercing employees in the exercise of rights guaranteed by O.R.C. Chapter 4117., in violation of O.R.C. §4117.11 (B)(1).

11. By the acts and conduct described above, ATU has failed to fairly represent all public employees in a bargaining unit, in violation of O.R.C. §4117.11 (B)(6).

As correctly pointed out by the hearing officer, the Complaint issued in this matter contained no allegations regarding the failure to waive the meetings requirement. Further, the Complaint contained false facts, i.e., that the Supervisors had not been permitted to vote when in fact voting had occurred but the field of candidates had been narrowed through a failure to waive meeting attendance requirements. In addition, at no time prior to the close of hearing did the Complainant move to amend the Complaint to include the facts proven at hearing. It was not until the Complainant filed exceptions to the hearing officer's report that a request to amend the Complaint to conform to the evidence presented at the hearing was made. This request also failed to state with specificity what evidence was presented at the hearing that should be pleaded as unlawful conduct in the complaint.

Our concern in this matter is both with the timing of the request and the manner in which it was made. Pursuant to O.R.C. 4117.12 (B)(1), cited above, a motion to amend a

complaint can be entertained only before the close of hearing. Since the request for amendment in this case was made after the close of hearing, it is untimely and therefore denied. Even if the Complainant had sought a timely amendment, it failed to set forth the specific facts sought to be pleaded in an amended complaint with the requisite particularity.¹² Accordingly, the Complaint, even if it had been timely "amended" would not have met the pleading requirements set forth in O.A.C. 4117-7-03 (A). The importance of following these rules is to ensure due process and to maintain fairness in proceedings before this agency. Therefore, strict adherence is of the utmost importance and any motions to amend complaints filed with SERB must be timely filed and must include the clear and concise description required by the rule governing complaints themselves.

II

Union Obligation to Membership

From the outset, we should state that it has not been the practice of this Board, past or present, to unnecessarily interfere in internal union affairs.¹³ It should be made perfectly clear, however, that this practice does not, and has never, absolved employee organizations

¹²O.A.C. 4117-1-04 provides:

(A) Motions shall be in writing, except motions made at a hearing and shall briefly describe the order, ruling, or action sought, setting forth with particularity the grounds.

¹³See In re Adkins, SERB 85-064 (12-31-85) (dealing with contract ratification procedures) and In re Mad River-Green Local Bd of Ed, SERB 86-029 (7-31-86) (re. affiliation votes). Further, O.R.C. §4117.11(B)(1) provides, in pertinent part: "This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein...."

from their statutory obligations to their membership. Internal union policies or practices that violate rights protected under Chapter 4117 are not immune from scrutiny as violations of O.R.C. §4117.11(B)(1) simply because they arise in the course of internal union affairs. Rather, union practices which coerce employees in the exercise of their statutory rights will be as closely scrutinized as employer practices alleged to violate O.R.C. §4117.11(A)(1).¹⁴ However, before SERB considers the merits of an alleged O.R.C. §4117.11(B)(1) violation, internal union remedies must be exhausted.¹⁵

Reviewing the record, we are persuaded that the facts proven, if properly pleaded, would have established a violation of O.R.C. §4117.11(B)(1). The parties stipulated that prior to 1989, ATU's bylaws prohibited Supervisors from attending regular ATU meetings, did not give them the opportunity to elect a representative to the ATU Executive Board, and did not allow them to be candidates for any elected office.¹⁶ Clearly, these acts and union policy violated the protected rights of this particular group of employees to participate in the affairs of the employee organization and thus were the genesis of the underlying circumstances which lead to the filing of the present unfair labor practice charge.

To its credit, ATU recognized the inequity in its bylaws as they pertained to the Supervisors and amended the rules to allow them to attend union meetings and to run for

¹⁴However, every O.R.C. §4117.11(B) section violation does not carry with it a derivative violation of O.R.C. §4117.11(B)(1). Whereas violations of other 4117.11(A) sections do constitute a violation of O.R.C. §4117.11(A)(1).

¹⁵At the same time, we recognize that there is a 90-day statute of limitations for filing charges. A matter may not be resolved through internal union means within this period. Accordingly, charging parties are advised to file such charges in a timely manner, with the understanding that they may be held in abeyance pending exhaustion of internal union remedies.

¹⁶Stipulation No. 11, Hearing Officer's Proposed Order.

elected office. Despite this self-rectification, we are still of the opinion that an O.R.C. §4117.11(B)(1) finding would be appropriate if the facts presented had been properly amended in the Complaint. O.R.C. §4117.11 (B)(1) states in pertinent part:

It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to: restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Ohio Revised Code....

O.R.C. §4117.03 (A)(1) guarantees public employees the right of participation in an employee organization of their choosing. When ATU policies and practices prevented Supervisors Grades 5 and 6 from attending union meetings, electing a representative to the ATU Executive Board, and seeking any type of elected office, ATU restrained the employees in the exercise of this right and therefore committed an unfair labor practice pursuant to O.R.C. §4117.11 (B)(1). Even though ATU amended its bylaws to allow Supervisors full participation in organizational activities, their failure to go further and waive the meetings requirement, which from the record it appears Local President Jackson had the authority to do,¹⁷ continued the past unlawful union policy and thus failed to eliminate all vestiges of prior

¹⁷ Having reviewed the record of this case in its entirety, we find merit in the Complainant's argument that ATU President Jackson had the requisite authority to waive the meetings requirement. Specifically, the following excerpt from the Complainant's Exceptions is very persuasive:

"Jackson testified that he did not waive the meetings requirement because ATU International President Jim LaSala sent Jackson a letter telling him that Jackson had no authority to waive the meetings requirement. (T. 65-67; Resp. Ex. A).....Jackson's stated reason for failing to waive the meetings requirement is not credible. Notwithstanding LaSala's letter, Section 4.a. of the 1990 By-Laws is clear: the President of the Local has the authority to waive the meetings requirement for 'good and sufficient reasons ..or because of illness...' Jackson had a good and sufficient reason to waive the meetings requirement: no supervisor but Butler was eligible to run for Executive Board Member because supervisors were barred from attending regular meetings from January 1, 1989 to June 13, 1989. But Jackson chose not to exercise

discriminatory practices. Through this failure, where employees were actually impaired in their exercise of a statutory right, i.e., participation in an employee organization, it must be concluded that they were restrained in the exercise of their statutory rights in violation of O.R.C. §4117.11(B)(1).¹⁸

Significantly, the right of participation denied in this case, i.e., to seek office, is one which the statute requires that employee organizations guarantee in their constitution and

his authority to waive the meetings requirement because he wanted Edward Butler to remain on the Executive Board. After all, he appointed Butler to the Executive Board in 1989 but never scheduled an election for Butler's position—even though Section 13 of the By-Laws required an election. At the hearing, Jackson all but conceded the real reason he did not waive the meetings requirement.

Q. If you had waived the meetings requirement for supervisors in 1990, there would have been several candidates for Executive Board Member for supervisors; isn't that correct, sir?

A. That's correct.

Q. And because you didn't waive the meetings requirement for the general election for supervisors in 1990, only one person could run for Executive Board Member, Mr Butler; isn't that correct, sir?

A. That's correct. (T. 69.) "

(See Complainant's Exceptions, pgs. 3-5.)

¹⁸Recently, we announced that an objective standard would be applied in assessing, on a case-by-case basis, whether particular conduct violates O.R.C. §4117.11(A)(1). In re Pickaway County Human Services Dept., SERB 93-001 (3-24-93). Inasmuch as O.R.C. §4117.11(B)(1) is analogous to O.R.C. §4117.11(A)(1) in that it prohibits restraining or coercing employees in the exercise of rights guaranteed in Chapter 4117, we find it appropriate to assess O.R.C. §4117.11(B)(1) allegations in the same manner. That is, we shall determine whether, under all the facts and circumstances, one could reasonably conclude that employees were restrained or coerced, or that their rights under O.R.C. 4117.03 had been interfered with. In the instant case, where a statutory right was actually impaired, such a conclusion is inescapable.

bylaws. O.R.C. §4117.19 requires that every employee organization file with this Agency a registration report accompanied by copies of the organization's constitution and bylaws. Section (C) (4) provides the following:

The constitution or bylaws of every employee organization shall require periodic elections of officers by secret ballot subject to recognized safeguards concerning the equal right of all members to nominate, seek office, and vote in the elections, the right of individual members to participate in the affairs of the organization, and fair and equitable procedures in disciplinary actions. (Emphasis added.)

The hearing officer found that there was nothing in the present case to distinguish it from Board precedent in In re Sycks, SERB 87-008 (5-15-87). We disagree.¹⁹ In Sycks, the charge alleged that the Charged Party had violated O.R.C. §4117.11 (B)(1) by restraining the Charging Party in the exercise of his right to seek union office as guaranteed by O.R.C. §4117.19 (C)(4); by permitting the election of union officers by delegates rather than total union membership; and by generally failing to comply with the requirements of O.R.C. §4117.19 (C)(4). The Charging Party also filed a complaint pursuant to O.R.C. §4117.19(E). There, the Board dismissed the unfair labor practice charge for procedural reasons and ordered an investigative hearing pursuant to the O.R.C. §4117.19(E) petition. The Board noted in Sycks that while an O.R.C. §4117.11(B)(1) violation was "arguable," only the special remedies of O.R.C. §4117.19(E) applied.

Although we agree with the Board's disposition of Sycks on the facts of that case, we disagree with the hearing officer's conclusion that the Sycks case is indistinguishable from

¹⁹Both the Respondent and Complainant disagreed with the hearing officer's comparison of the Sycks case to the present matter arguing essentially that the charge did not allege an O.R.C. §4117.19 (C)(4) violation, the complaint was not filed under this provision; and the charging party would not be provided with the relief sought. (Complainant's Post-Hearing Brief, p. 8; Respondent's Post-Hearing Brief, pgs. 4, 5, 11).

the one before us. In the case before us, unlike Sycks, there was no O.R.C. 4117.19 claim pending, and an O.R.C. 4117.19 claim would not have been appropriate.²⁰ As to the issue before us, O.R.C. 4117.19 simply specifies, among other things, what must be contained in the constitution or bylaws for an employee organization. Here, ATU had already corrected the constitution and bylaws insofar as they prohibited Supervisors from fully participating in its affairs. The vice instead was the union's subsequent practice, i.e., its failure to waive the meetings attendance requirement, which is properly addressed not under O.R.C. 4117.19 but under O.R.C. §4117.11(B)(1), which addresses coercive and restraining practices that deprive employees of O.R.C. 4117.03 rights.

The unfair labor practice charge against ATU also alleged an O.R.C. §4117.11(B)(6) violation. Pursuant to this provision:

It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to fail to fairly represent all public employees in a bargaining unit.

The statutory language of O.R.C. §4117.11(B)(6) clearly anticipates union misconduct which affects employment terms, as opposed to conduct restricted to internal union affairs. As noted in prior Board decisions,²¹ duty of fair representation violations typically arise in the

²⁰We agree with the hearing officer that it would be inappropriate for her to have made a O.R.C. 4117.19 finding in this case. (HOPO, pg. 11). However, to the extent that the Proposed Order might suggest that a 4117.19 violation may be found simply based upon facts pleaded in an unfair labor practice complaint, we note that O.R.C. §4117.19 (E) requires that a specific complaint be filed with the Board. It would be insufficient to seek O.R.C. §4117.19 (E) relief simply by filing an unfair labor practice charge alleging facts upon which an O.R.C. §4117.19 violation could also be based.

²¹See In re AFSCME Local 2312, SERB 89-029 (10-16-89) (grievance-processing); In re Nicolacaj, SERB 89-030 (10-16-89) (collective bargaining).

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context of grievance processing or during the course of collective bargaining. Here, there is no evidence that employment terms of any unit employees were affected by restrictions on voting in an internal union election. Therefore, the hearing officer properly concluded that no O.R.C. §4117.11 (B)(6) violation had been committed.

In conclusion, although the facts proven at hearing, if properly pleaded, would have established a violation of O.R.C. §4117.11 (B)(1), we dismiss the charge because the complaint does not properly set forth the allegations relied upon. This opinion, however, should serve future notice that the Board will require strict adherence to the procedural rules of pleading and that while employee organizations enjoy latitude in the conduct of internal union affairs, they may not, through their internal practices, interfere with the statutorily protected rights of employees.

OWENS, Chairman and POTTENGER, Vice Chairman, concur.