

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 93 -17

In the Matter of

Shelby Association of School Support/OEA,

Employee Organization,

and

Shelby City Board of Education,

Employer.

CASE NUMBER: 93-STK-09-0004

OPINION

OWENS, Chairman:

I. Procedural Background and Facts

On September 27, 1993, at 4:42 p.m. the Shelby City Board of Education ("Employer" or "Board") filed a Request for Determination of Unauthorized Strike pursuant to Ohio Revised Code (O.R.C.) Section 4117.23. The Employer maintained that the employees' concerted activity of declining extracurricular runs as a group constituted a strike, and since it occurred mid-term in the parties' contract the action was unlawful.

In order to act within the 72-hour deadline imposed by O.R.C. Section 4117.23, SERB scheduled a hearing to be held on September 29 at the Board's offices. Pre-hearing procedures were conducted by SERB's General Counsel, and stipulations were agreed upon by the Shelby Association of School Support/OEA ("Employee Organization" or "Union") and the Employer. The stipulations are:

1. Shelby City Board of Education ("Board") is a "public employer" within the meaning of O.R.C. Sec. 4117.01(B).
2. Shelby Association of School Support/OEA ("Union") is an employee organization within the meaning of O.R.C. Sec. 4117.01(D).
3. The Union is the SERB-certified representative for the following unit of employees:

EO

Included: All bus drivers, cafeteria workers, custodial-maintenance, sweepers, drivers, secretaries, aides.

Excluded: Supervisors, confidential employees at central office of the Board of Education as defined in O.R.C. 4117.01.

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 are parties to a collective bargaining agreement ("contract"), which is effective by its terms from July 1, 1991 to June 30, 1994. A copy of this agreement is incorporated as part of these stipulations and marked as "Attachment to Joint Exhibit 1."

5. The contract contains the following provision, titled "Article XXII - Extra Curricular Driving":

22.01 For extracurricular driving: athletic events, band trips, field trips, etc., driver employees will be paid \$10.00 an hour for actual driving time calculated to the nearest 1/4 hour. 1/4 hour will be allowed for preparation of the bus and 1/4 hour for cleaning the bus. Buses must be cleaned after extracurricular runs. A minimum of two (2) hours driving and clean up time will be paid per trip. Layover time will be at the prevailing minimum wage. Extracurricular trips which are not scheduled during a regular bus run will be offered to the most senior regular driver employees before being offered to substitute drivers according to the procedure below.

All extracurricular driving shall be offered on a rotation basis, beginning with the most senior driver employee. Driver employees refusing an extracurricular driving assignment during the rotation shall not be offered another extracurricular driving assignment until their next turn in the rotation.

6. No disciplinary action can be taken against any unit member bus driver who declines on

an individual basis to drive an extracurricular run. The only consequence of an individual refusal of an extracurricular driving assignment is, as outlined in Article XXII, that the driver is not offered another extracurricular driving assignment until the driver's next turn in the rotation. Extracurricular driving is normally performed by unit employees and (non-unit) substitute bus drivers.

7. The contract contains the following provision, titled "Article XXXIII - No Strike or Lock Out Clause":

33.01 The Union hereby agrees that it will not directly or indirectly encourage or assist in any way, nor shall any employee initiate or participate, either directly or indirectly, in any strike, slowdown, walk out, work stoppage, or other concerted interference with or withholding of services from the Board or any type of activity which results in a reduction of the regular professional duties or employment obligations of any district employees, during the term of this contract.

In addition, the Union shall cooperate at all times with the Board in the continuation of its operation and services and shall actively discourage and attempt to prevent any violation of this Article. If any violation of this Article occurs, the Union shall immediately notify all employees that the strike, slowdown, work stoppage, or other concerted interference with or the withholding of services from the Board is prohibited, not sanctioned by the Union and order all employees to return to work immediately.

The Board agrees not to lock out or otherwise prevent employees from performing their regularly assigned duties where the object thereof is to bring pressure on the employees or the Union to compromise or capitulate to the Board's terms regarding a labor relations dispute involving the Union.

8. Citing severe financial constraints, the Board has implemented a number of cost-reduction

measures for the 1993-94 school year, including certain reductions in force and the elimination of high school busing. The elimination of high school busing has not caused the layoff of bus drivers, but has caused their hours to be reduced. The Association has filed a grievance asserting that this reduction in hours violates the contract. The grievance is currently pending and will be submitted to binding arbitration. The Association has also filed an unfair labor practice charge with SERB over this issue (Case No. 93-ULP-08-0546).

9. On September 22, 1993, of six drivers scheduled to drive extracurricular runs on September 24, three crossed their names from the driving list. The Assistant Superintendent personally asked all of the remaining drivers (except one sick driver and four others who never drove extracurricular runs) whether they would drive, and all refused. No unit drivers reported on September 24 to transport students to an away football game. Neither did unit drivers transport students for other athletic events on September 25. The service was instead provided by a chartered bus and substitute drivers. However, the unit drivers continued to perform their normal assigned work.

10. At no time did the Union notify the Board of any intent to take the action described above in Paragraph 9 by serving a Notice of Intent to Strike or Picket upon the Board.

11. The parties agree to the following exhibits: Joint Exhibit 2 (bus driver job description); Joint Exhibit 3 (letter from Union dated September 23, 1993); and Joint Exhibit 4 (letter from Union dated September 28, 1993).

FINDINGS OF FACT¹

1. On September 1, 1993, approximately 10 bus drivers, including Lois Hartman (the bus drivers' representative to the Union) attended a breakfast meeting where a secret ballot vote

¹All references to the transcript of the hearing are indicated parenthetically by "Tr." followed by the page number(s). All references to exhibits are indicated parenthetically by "Jt. Ex.," followed by the number. References to the transcript and/or exhibits in this Opinion are intended for convenience only and are not intended to suggest that such references are the sole support in the record for any particular Finding of Fact.

was conducted. The result of the vote, which was announced to drivers present, was that all but one bus driver declined to drive extracurricular runs in order to protest certain cost-reduction measures (described above in Stipulation No. 8), which affected themselves and other drivers. (Tr. 87-89, 91-93, 95-98).

2. On September 3, 1993, two bus drivers informed Dr. Richard Frost, superintendent and Steven Bell, assistant superintendent, that they did not want to answer directly the question whether they would drive to a football game that evening because all drivers were in agreement as to a particular action. They asked Bell and Frost to meet with all the drivers. A meeting was arranged for that afternoon at the bus garage. (Tr. 29).

3. On September 3, 1993, at 1:30 p.m. 11 or 12 drivers, including Hartman, met with Bell and Dr. Frost at the bus garage over concerns about how state minimum busing would affect them economically. During the meeting, drivers stated they would not drive extracurricular runs if the Board did not at least schedule a meeting to discuss the issue. (Tr. 29-30, 56-57).

4. On September 9, 1993, the Board, Bell and Dr. Frost met with Union president Mike Miller, drivers' representative Hartman, and drivers Batty Notaker and Ken Burr to address the concerns raised at the September 3 meeting. The drivers made certain economic demands and stated that if these were not met, they would not drive extracurricular runs. Hartman indicated that the refusal to drive would be on an ongoing basis. The Board authorized Bell and Frost to have further meetings with the drivers on their concerns. (Tr. 30-32, 66-67).

5. About 8:30 a.m. on September 20, Mike Martin and OEA Labor Relations Consultant Karen Gee met with the drivers in the bus garage. The consensus of the drivers at this meeting was to stand firm and decline extracurricular runs. (Tr. 67, 72-73).

6. On September 20, after the drivers' meeting, and again on September 22, 1993, Bell and Frost met with Gee, Martin, and Hartman, to discuss the drivers' economic concerns related to busing. Burr was also present on September 20. Larry Termin attended in Burr's place on September 22. During these meetings, the Board made offers of compromise, which

were rejected by the Union. (Tr. 32, 70-72)

7. It was after the September 22, meeting described above in Finding of Fact No. 6 that three of six drivers who had signed up to drive extracurricular runs for September 24 (Stipulation No.9) crossed their names off the list. (Tr. 61).

8. As of the time of hearing, the extracurricular runs declined by regular drivers, which are the subject of this request for unauthorized strike, were performed by substitute drivers and a charter service secured by the Board. (Tr. 24-25, 63).

II. Analysis

It is undisputed that the drivers' refusal to accept extracurricular runs occurred mid-term in a contract. On that basis, it is clear that if the action complained of is a strike and is continuing, we must declare it unauthorized.²

R.C. 4117.01(H) defines a "strike" as "concerted action in failing to report to duty; willful absence from one's position; stoppage of work; slowdown, or abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influence, or coercing a change in wages, hours, terms and other conditions of employment." (Emphasis added).

²R.C. 4117.11(B)(3) states: "The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lock-out, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, or for a period of ninety days where applicable." (Emphasis added).

R.C. 4117.18(C) states, in pertinent part: "No public employee shall strike during the term or extended term of a collective bargaining agreement...." Likewise, R.C. 4117.15 (A) authorizes public employers to seek injunctive relief for, among other things, strikes occurring during the term or extended term of a collective bargaining agreement.

See also Jefferson Department of Human Services, SERB 92-015 (9-25-92), reaffirming In re Akron City School Dist Bd of Ed. SERB 89-031 (10-27-89) for the principle that the unauthorized strike procedures of R.C. 4117.23 are reserved for those job actions which are of a live, continuing nature or which one can reasonably conclude may recur.

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There is no question that the drivers' action was "concerted." We recently stated that activity would be considered "concerted" under Chapter 4117 if it was engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. In re Cincinnati Metropolitan Housing Authority, SERB 93-002 (4-6-93). Although we rejected the notion that an individual action becomes "concerted" because it may affect more than one employee, we noted that an individual acting alone might engage in concerted activity simply by attempting to induce other employees to act in concert.

In this case, the decision to refuse extracurricular runs had its genesis in collective action. Drivers, unhappy with the way their employer's cost-reduction plan could affect their wages and benefits, got together over breakfast and formulated a plan to protest the reductions. After a secret ballot vote, it was announced that all but one agreed to start refusing extracurricular runs.³ Within days, drivers got the word to school managers that unless discussions on the problem were scheduled, runs would be refused.⁴ The strategy worked. Within a week, school officials were meeting with Union representatives to discuss the issue, now under threat that if a satisfactory solution was not reached, the runs would be refused.⁵ On September 20, Union officials, newly assured that drivers would stand firm in their resolve to refuse the runs, went into two more meetings with school officials.⁶ After rejecting offers of compromise from the Board, the drivers began refusing the extracurricular runs.⁷

Here, we need not analyze whether an individual acted simply for himself or took action with or on the authority of co-workers. The action grew out of group consultation and is the sort of concerted action contemplated by the statute. Although the Union took pains to state

³FF #2

⁴FF #3

⁵ FF #4

⁶FF #5,6

⁷FF #5,6

that the decision of whether to accept the runs was a voluntary, individual one⁶, the activity is no less concerted because some driver might individually decide to accept an extracurricular run. To conclude otherwise would lead to ludicrous results. A picket line, for example, could lose its concerted character because one union member decided to cross it.

The second question is whether accepting extracurricular runs amounted to a "duty" of employment within the meaning of R.C. 4117.01(H). In In re Western Reserve Transit Auth., SERB 90-007 (5-23-90), SERB found that the refusal of overtime did not constitute a strike where the collective bargaining agreement stated that overtime was voluntary. SERB reasoned that voluntary overtime was not a duty of employment for purposes of R.C. 4117.01(H) because refraining from overtime complied with the duties of employment as agreed by the parties in their contract.

Here, a different contract compels a different result. The parties' no-strike or lockout clause is strong and specific in imposing a duty on the Union and individual employees not to interfere with Board services and operations through concerted action.

Article XXXIII states:

33.01 The Union hereby agrees that it will not directly or indirectly encourage or assist in any way, nor shall any employee initiate or participate, either directly or indirectly, in any strike, slowdown, walk out, work stoppage, or other concerted interference with or withholding of services from the Board or any type of activity which results in a reduction of the regular professional duties or employment obligations of any district employees, during the term of this contract.

In addition, the Union shall cooperate at all times with the Board in the continuation of its operation and services and shall actively discourage and attempt to prevent any violation of this Article. If any violation of this Article occurs, the Union shall

⁶Jt. Ex. 4

immediately notify all employees that the strike, slowdown, work stoppage, or other concerted interference with or the withholding of services from the Board is prohibited, not sanctioned by the Union and order all employees to return to work immediately.

Although individuals cannot be disciplined for refusing extracurricular runs on an individual basis,⁹ the contract imposes an affirmative duty not to interfere with the Board's operations through concerted action. By concertedly refusing runs in order to coerce a change in their employment terms, the Union and its drivers failed to fulfill this contractual duty to abstain from concerted interference with operations, and thereby abstained from the proper performance of the duties of employment. Further, those individuals who had committed to take runs, then reneged in order to join the concerted action¹⁰, failed to perform a specific driving duty they had assumed. Certainly, these actions constitute a strike within the meaning of R.C. 4117.01(H).

Still at issue is whether there is an apparent risk that the job action will recur. As we noted in In re Jefferson Department of Human Services and In re Akron City School Dist Bd of Ed.¹¹ R.C. 4117.23 procedures are appropriate where the immediate job action has ended but there is a risk of recurrence. Otherwise, if a strike is ended when the Request for Unauthorized Strike Determination is filed, unfair labor practice procedures are adequate.¹²

Here, the nature of the strike itself complicates a decision on whether it has terminated. Drivers are offered extracurricular runs for special events, often on weekends. An employer under these circumstances could file an unauthorized strike request on a Monday, following a weekend of concerted refusals, and not know for certain until the following

⁹Stipulation No. 6

¹⁰Stipulation No. 9

¹¹See fn 2, supra

¹²R.C. 4117.11(B)(8) makes it an unfair labor practice for a union to engage in any picketing, striking, or other concerted refusal to work without providing a 10-day notice.

weekend or special event whether drivers would agree to take the runs. Disputed actions such as this, capable of repetition yet evading review, have been found ripe for determination, and not moot, by Ohio courts.¹³

While Hartman suggested at the hearing that she personally would accept runs,¹⁴ the parties offered undisputed evidence that the job action might continue. A letter dated September 28, 1993, from Gee to Frost advised that no services would be withheld by member bus drivers until the Union had given the Board a 10-day notice.¹⁵ One can reasonably conclude that the Union might give notice at any time and proceed to strike, though mid-term in a contract. Under these circumstances, it is clear that R.C. 4117.23 proceedings are appropriate,¹⁶ that the refusal to take extracurricular runs is a strike, and that the strike is unauthorized.

Pottenger, Vice Chairman and Mason, Board Member, concur.

¹³See, e.g., In re Appeal of Suspension of Huffer, 47 OS 3d 12 (1988); State ex. rel. The Repository v. Unger, 28 OS 3d 418. (1986); Foster v. Cuyahoga County Board of Elections, 53 Ohio App. 2d 213 (Ct. App. Cuyahoga, 1977).

¹⁴ At the hearing, bus driver Lois Hartman confirmed a representation by Union counsel that she would now accept extracurricular runs but could not speak for the other drivers. This was the first time she had conveyed this information to the Board. (Assistant Supt. Bell was present at the hearing). (Tr. 52-53)

¹⁵ Jt. Ex. 4

¹⁶In Jefferson, we reserved the right to dismiss an employer's request for unauthorized strike determination in strikes which had ceased if the employer did not submit affidavit evidence establishing facts upon which we could reasonably conclude the strike might recur. No such affidavit was submitted in this case and none was required. Here, due to the nature of the strike, it did not appear from the request that the strike had ceased. At hearing, the parties' stipulated evidence (Jt. Ex. 4) was sufficient to show it might recur.