

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

United Electrical, Radio and Machine Workers of America,

Respondent.

CASE NUMBER: 93-ULP-05-0273

OPINION

POTTENGER, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board upon exceptions filed to the Hearing Officer's Recommended Determination issued on June 30, 1995. For the reasons below, we find that the United Electrical, Radio and Machine Workers of America violated Ohio Revised Code ("O.R.C.") § 4117.11(B)(7) and (8) by inducing or encouraging individuals in connection with a labor dispute to picket the residence of the Executive Director of the Ohio Turnpike Commission and by engaging in picketing without having given notice of at least ten (10) days to the Commission and to SERB.

I. BACKGROUND

On May 24, 1993, the Ohio Turnpike Commission ("Intervenor" or "Commission") filed two unfair labor practice charges with SERB that were assigned Case Nos. 93-ULP-05-0273 and 93-ULP-05-0276 and that alleged the United Electrical, Radio and Machine Workers of America ("Respondent" or "UE") and UE Local 791, respectively, violated O.R.C. § 4117.11(B)(1), (7) and (8). On August 19, 1993, subsequent to an investigation, SERB found probable cause to believe that an unfair labor practice had been committed by the Respondent and UE Local 791 in violation of O.R.C. § 4117.11(B)(7) and (8), but not (1); consolidated the cases for hearing; and directed that a Complaint be issued. (The charge filed

against UE Local 791 was ultimately dismissed on March 31, 1994, for lack of probable cause to believe that it had committed an unfair labor practice.)

The parties agreed upon and submitted signed Stipulations of Fact at an evidentiary hearing before a SERB Hearing Officer on October 17, 1994. The Hearing Officer's Recommended Determination was issued on June 30, 1995. The Respondent filed exceptions and a brief in support on July 14, 1995. The Complainant and the Intervenor filed responses to the exceptions on July 26 and July 31, 1995, respectively.

II. DISCUSSION

This case presents three issues for resolution: (1) whether O.R.C. § 4117.11(B)(7) and (8) are unconstitutional; (2) whether Respondent committed an unfair labor practice in violation of O.R.C. § 4117.11(B)(7) by inducing or encouraging individuals in connection with a labor dispute to picket the residence of the Commission's Executive Director; and (3) whether Respondent committed an unfair labor practice in violation of O.R.C. § 4117.11(B)(8) by engaging in picketing without the statutory notice to the Commission and SERB.

A. Whether O.R.C. § 4117.11(B)(7) and (8) Are Unconstitutional.

The UE does not deny that its May 10, 1993 actions fell within the prohibitions of O.R.C. § 4117.11(B)(7), nor does it deny that it did not give the ten-day notice required under O.R.C. § 4117.11(B)(8). Instead, the UE contends that both of these provisions violate the First Amendment of the United States Constitution. Essentially, the UE argues that the First Amendment generally prevents the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. It contends that for the state to enforce a content-based exclusion, it must show regulation is necessary to serve a compelling state interest that is narrowly drawn to achieve that result. Pointing out that the only type of picketing which Ohio has singled out for prohibition is that which is in connection with a labor relations dispute, the UE contends that O.R.C. § 4117.11(B)(7) is neither content-neutral nor

narrowly tailored and that it is simply unconstitutional on its face and raises a question of prior restraint.¹

As an administrative agency, SERB is without authority to declare any portion of its enabling statute as unconstitutional. *In re City of Dayton*, SERB 84-009 (11-21-84). We previously dealt with picketing in *In re Liberty Local School Dist Bd of Ed*, SERB 85-063, p. 206 (12-6-85), where we held the following:

The issue concerns an application of the statute in terms which limit expression. It is SERB's duty to interpret, but it is not within SERB's competence to declare any portion of its statutory charter unconstitutional. Therefore, the interpretive program must be to try in this case to apply the statutory requirements in a way which will meet constitutional standards. This approach attempts to conform SERB conduct to the statutory mandate establishing a presumption of legislative intent to legislate constitutionality.

Since SERB lacks authority to make a determination that O.R.C. § 4117.11(B)(7) and (8) is unconstitutional and since SERB must interpret and apply these provisions in a constitutional manner, we must presume that these provisions are constitutional.

B. *Whether Inducing or Encouraging Individuals In Connection With A Labor Dispute To Picket The Commission's Executive Director's Residence Occurred In Violation Of O.R.C. § 4117.11(B)(7)*

O.R.C. § 4117.11(B)(7) provides:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * *

(7) Induce or encourage any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer[.]

¹Complainant points out that the constitutional questions raised by the UE in SERB's proceedings are also the subject matter of a case pending before the federal district court. No decision has been issued yet in *United Electrical, Radio & Machine Workers of America v. Voinovich, et al.*, Case No. 1:93CV2286 (N.D., E. Div., Oh.).

Through the stipulations and the admissions in its Answer to the Second Amended Complaint, the UE admits that on May 10, 1993, at its encouragement and/or inducement, ten (10) to fifteen (15) individuals picketed at the residence of the Commission's Executive Director. The picketing was an attempt to influence the Commission's Executive Director with respect to an ongoing labor dispute, Case No. 92-REP-09-0194, pending before SERB.²

The UE does not contest that the Executive Director position of the Ohio Turnpike Commission falls within the description of a "representative of the public employer" in O.R.C. § 4117.11(B)(7). Therefore, based upon these facts, the conduct engaged in by Respondent on May 10, 1993, was in violation of O.R.C. § 4117.11(B)(7).

C. Whether Picketing Without Giving Written Notice Of At Least Ten (10) Days To SERB And The Commission Occurred In Violation Of O.R.C. § 4117.11(B)(8)

O.R.C. § 4117.11 (B)(8) provides:

(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * *

(8) Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both.

The UE does not deny that it violated O.R.C. § 4117.11(B)(8) by failing to give to SERB and the Commission the required ten-day notice. It reiterates that this provision, like O.R.C. § 4117.11(B)(7), is unconstitutional.

The key purpose of the notice requirement is to put management in a position to know that a job action is contemplated and when it may occur, and to take whatever responsive action would be appropriate or necessary. *In re Summit County Dept. of Human Services*,

²Finding of Fact No. 7.

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SERB 85-013 (4-5-85). Due to the significance of such notice, the requirement has also been extended to nonstriking employees. Specifically, SERB has held that picketing by nonstriking employees in sympathy with striking workers is an unfair labor practice if the picketers did not give advance written notice to the employer under O.R.C. § 4117.11(B)(8). *In re Liberty Local School Dist Bd of Ed, supra*.

More recently, SERB addressed the notice requirement in *In re Ohio Civil Service Employees Assn., Local 11, AFSCME*, SERB 94-009 (5-26-94), where approximately ninety (90) bargaining unit members engaged in informational picketing on non-work time near their place of employment without giving the required ten-day notice of intent to picket. SERB upheld the statutory requirement that an employee organization must give both the employer and SERB written notice of at least ten (10) days prior to picketing. Despite the employee organization's claim that no notice was required under circumstances where there was no concerted refusal to work or interference with the employer's ability to conduct business, the Board held, among other things, even strictly informational picketing is subject to the ten-day notice requirement if the picketing is related to a labor relations dispute.

The statutory requirement that notice be given to the public employer and SERB at least ten (10) days prior to striking, picketing or engaging in any other concerted activities is both clear and straightforward, as is the statute regarding the fact that failure to do so constitutes an unfair labor practice. In the present matter, the UE admits that it failed to comply with O.R.C. § 4117.11(B)(8) by not giving the required ten-day notice to the Commission and SERB. The UE argues instead that the issue is not whether notice may properly be required prior to strikes or other concerted work stoppages, but whether the ten-day advance notice requirement constitutes an unlawful prior restraint on First Amendment rights of speech and association and the right to petition for the redress of grievances.

As stated above, SERB's duty is to interpret and apply the statutory requirements in a way which will meet constitutional standards. This approach attempts to conform SERB conduct to the statutory mandate establishing a presumption of legislative intent to legislate constitutionally.

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The facts warrant a finding that O.R.C. § 4117.11(B)(8) was violated inasmuch as the UE engaged in picketing activities without first giving the Commission and SERB the requisite statutory notice of at least ten (10) days specifying the date and time of the job action.

III. CONCLUSION

For the reasons above, we find the United Electrical, Radio and Machine Workers of America violated O.R.C. § 4117.11(B)(7) and (8) by inducing or encouraging individuals in connection with a labor dispute to picket the residence of the Executive Director of the Ohio Turnpike Commission and by engaging in picketing without having given prior notice of at least ten (10) days to the Commission and to SERB. Further, since SERB lacks authority to make a determination that O.R.C. § 4117.11(B)(7) and (8) are unconstitutional and since SERB must interpret and apply these provisions in a constitutional manner, we must presume that these provisions are constitutional.

Pohler, Chairman, and Mason, Board Member, concur.

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