

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,
Complainant,

and

Ohio Association of Public School Employees, Local 530,
Intervenor,

v.

Springfield Local School District Board of Education,
Respondent.

**CASE NUMBERS: 93-ULP-07-0397
93-ULP-09-0500**

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman McGee, and Board Member Mason: February 6, 1997.

The Ohio Association of Public School Employees, Local 530 ("OAPSE") filed unfair labor practice charges on July 28, 1993 (Case No. 93-ULP-07-0397) and September 16, 1993 (Case No. 93-ULP-09-0500) against the Springfield Local School District Board of Education ("School Board"), alleging that the School Board had violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1), (A)(2), (A)(3), (A)(5), and (A)(8). In Case No. 93-ULP-07-0397, the State Employment Relations Board ("SERB" or "Complainant") determined there was probable cause to believe the School Board was bargaining in bad faith, in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5), and directed that a complaint be issued. In Case No. 93-ULP-09-0500, SERB determined there was probable cause to believe the School Board's Transportation Supervisor directly contacted certain bargaining unit employees and attempted to coerce them with regard to their exercise of the protected right to strike, in violation of O.R.C. §§ 4117.11(A)(1), (A)(2), (A)(3), and (A)(5). SERB consolidated these cases for hearing, and directed that the hearing in these matters be coordinated with the hearing in *SERB v. Ohio Association of Public School Employees, Local 530*, Case Nos. 93-ULP-08-0411 and 93-ULP-08-0431.

On April 22, 1994, the hearing officer issued an Order to Show Cause as to why the law firm of Johnson, Balazs and Angelo ("JBA law firm") should not be disqualified from representing the School Board in these cases. A Hearing Officer's Proposed Order was issued July 7, 1994. The Board issued an opinion and order disqualifying the JBA law firm on

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October 26, 1994. See *In re Springfield Local School District Bd of Ed*, SERB 94-020 (10-26-94). The Board certified its final order and opinion to the Ohio Ninth District Court of Appeals as a matter of public or great general interest pursuant to Ohio Revised Code § 4117.02(L).

On June 7, 1995, the Ohio Ninth District Court of Appeals issued an opinion affirming SERB's decision to disqualify the JBA law firm in these cases. See *State Employment Relations Board v. Springfield Local School Dist Bd of Ed*, (1995) 104 Ohio App.3d 191, 1995 SERB 4-23. By procedural order dated July 14, 1995, the hearing officer scheduled a hearing on the merits for September 8, 1995, in order to allow the School Board time to arrange for new counsel. A pre-hearing was set for September 1, 1995.

On August 10, 1995, the JBA law firm filed new notices of appearance in these cases. On August 24, 1995, SERB remanded these cases to the hearing officer for a Show Cause Hearing to determine if the JBA law firm could and should now be allowed to appear as counsel. A Show Cause hearing took place on September 8, 1995. On October 27, 1995, the hearing officer issued his proposed order. On December 15, 1995, SERB removed its previous disqualification order of the JBA law firm and remanded these cases back to the hearing officer for an expedited hearing on the merits of the complaint. On January 16, 1996, the School Board filed a motion to recuse the hearing officer. On January 17, 1996, the hearing officer recused himself from these cases, and the cases were reassigned to another hearing officer.

On January 23, 1996, a pre-hearing conference was held. The hearing in this matter was held on February 1 and 5, 1996, and April 4, 1996. Posthearing briefs were filed on May 10, 1996. The Hearing Officer's Proposed Order was issued on June 20, 1996. The Complainant and OAPSE filed exceptions to the proposed order. The School Board filed a response to the exceptions.

OAPSE also filed three motions: (1) a motion for leave to file a reply to the School Board's response to its exceptions, (2) a motion to strike the School Board's response to the exceptions, and (3) a motion to amend the complaint to conform to the evidence and issues presented at the hearing.

OAPSE's motion for leave to file a reply is granted, OAPSE's motion to strike is denied, and OAPSE's motion to amend the complaint is denied.

For the reasons in the attached Opinion, incorporated by reference, Finding of Fact No. 16 is amended as follows:

On July 13, 1993, the Employer and OAPSE had a negotiation session. The parties discussed several items without reaching an agreement. The Employer did agree to OAPSE's proposal for putting video cameras in the buses. The parties discussed subcontracting, but did not reach an agreement. Mr. Beallor said that there was no way the union membership would agree to subcontract. In response to a question from Mr. Johnson, Mr. Beallor answered that OAPSE's

position would not change no matter how sweet the Employer could make its offer. In response to Mr. Beallor's question as to what it would take for OAPSE to persuade the Employer, Mr. Johnson indicated that OAPSE would need to propose the same amount of savings with new buses. The bargaining unit members of the OAPSE negotiating team had questions to ask about the subcontracting, but Mr. Beallor refused to allow them to ask those questions. Mrs. Kerns said that they were ready to go to impasse, that they were going to impasse, and they might as well get it over with. Mr. Johnson asked them if that is what they wanted to do. After the OAPSE bargaining team came back after recessing for a caucus, Mr. Johnson indicated that because of their failure to bargain over the subcontracting issue, the Employer declared an impasse in negotiations. Mr. Beallor asked Mr. Johnson if he would contact the mediator, and Mr. Johnson said that he would. (T. 201, 208-209, 298-299, 328-330; S. 21).

Finding of Fact No. 18 is amended as follows:

At the August 11, 1993 mediation session, the mediator met with each team separately and then went back and forth. OAPSE has no counter-offers to the Employer's proposals. There was a face-to-face session that day during which Mr. Johnson indicated that the school district had been in the loan fund for the past ten years and that it was looking at subcontracting transportation. He also indicated that there would not be a need for a successor contract after September 1, 1993, if the Employer subcontracted the transportation services. The parties' collective bargaining agreement expired on August 31, 1993. (T. 300-301, 347-349; S. 7, 23; Jt. Exh. 1).

Conclusion of Law No. 5 is amended as follows: "The actions of Dan Gault, the Employer's Transportation Supervisor, during the strike were in violation of O.R.C. § 4117.11(A)(1), but not (A)(2), (A)(3), or (A)(5)." The Findings of Fact and Conclusions of Law in the Hearing Officer's Proposed Order are adopted as amended.

The School Board is ordered to:

A. Cease and desist from:

Interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Ohio Revised Code Chapter 4117, and by telling union members participating in protected activity under Ohio Revised Code Chapter 4117, *i.e.*, a strike, that if they do not return to work that they would lose their jobs and from otherwise violating Ohio Revised Code § 4117.11(A)(1).

- B. Take the following affirmative action:
- (1) Post for 60 days in all Springfield Local School District Board of Education facilities where bargaining unit employees represented by the Ohio Association of Public School Employees, Local 530 work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Springfield Local School District Board of Education shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative action set forth in Paragraph B.
 - (2) Notify the State Employment Relations Board in writing within 20 calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

POHLER, Chairman; MCGEE, Vice Chairman; and MASON, Board Member, concur.

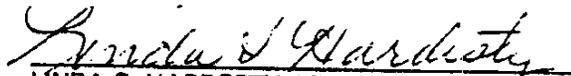


SUE POHLER, CHAIRMAN

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 State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas 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 order.

I certify that this document was filed and a copy served upon each party on this

1st day of May, 1997.



LINDA S. HARDESTY, LEGAL ASSISTANT



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 Ohio Revised Code Chapter 4117, and by telling union members participating in protected activity under Ohio Revised Code Chapter 4117, i.e., a strike, that if they do not return to work that they would lose their jobs and from otherwise violating Ohio Revised Code § 4117.11(A)(1).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for 60 days in all Springfield Local School District Board of Education facilities where bargaining unit employees represented by the Ohio Association of Public School Employees, Local 530 work, the NOTICE TO EMPLOYEES furnished by the State Employment Relations Board stating that the Springfield Local School District Board of Education shall cease and desist from the actions set forth in Paragraph (A) and shall take the affirmative action set forth in Paragraph B.
- (2) Notify the State Employment Relations Board in writing within 20 calendar days from the date the ORDER becomes final of the steps that have been taken to comply therewith.

SPRINGFIELD LOCAL SCHOOL DISTRICT BOARD OF EDUCATION
CASE NOS. 93-ULP-07-0397 and 93-ULP-09-0500

BY _____

DATE _____

TITLE _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

ERB 2012

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this Notice or compliance with its provisions may be directed to the State Employment Relations Board.

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,
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**CASE NUMBERS: 93-ULP-07-0397
93-ULP-09-0500**

OPINION

POHLER, Chairman:

These unfair labor practice cases come before the State Employment Relations Board ("SERB" or "Complainant") on the exceptions and response to exceptions to the Hearing Officer's Proposed Order issued June 20, 1996. For the reasons below, we find that the Springfield Local School District Board of Education ("School Board") did not engage in bad-faith bargaining through its actions to subcontract its transportation services during negotiations with the Ohio Association of Public School Employees, Local 530 ("OAPSE" or "Union") and did not unlawfully change the status of a deemed-certified bargaining unit in violation of Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) or (A)(5). We find, however, that the School Board did violate O.R.C. § 4117.11(A)(1), but not O.R.C. §§ (A)(2), (A)(3), or (A)(5), through the acts and statements of its Transportation Supervisor during the strike.

I. BACKGROUND¹

OAPSE is the deemed-certified exclusive representative of a bargaining unit of the School Board's bus drivers and mechanics. OAPSE and the School Board were parties to a collective bargaining agreement from September 1, 1990 until August 31, 1993. The agreement contained a mutually agreed upon alternative dispute resolution procedure under which either party could declare impasse if a tentative agreement on all items had not been reached after 60 days of negotiations. The 1990-1993 Agreement did not contain a provision specifically prohibiting or permitting the subcontracting of bargaining-unit work.

In late 1992, the School Board's Superintendent, Dr. Tucker Self, asked the Regional Director of Business Development for Settle Service, Inc. ("Settle") about the possibility of the School Board subcontracting its transportation services to Settle. In a letter to Dr. Self dated November 16, 1992, Settle submitted a proposal to provide bus transportation for the School Board. On March 9, 1993, the School Board sent a letter to OAPSE indicating its desire to subcontract its transportation services to a private company and requesting that OAPSE bargain over this issue. On March 15, 1993, the School Board sent a letter to the parents of students in the school district explaining its desire to subcontract the transportation services; the School Board noted in the letter that it had been studying the issue for six months.

On March 15, 1993, the OAPSE Field Representative and the Local 530 President met with Dr. Self in response to the School Board's March 9, 1993 letter. They told him OAPSE was opposed to subcontracting these services. Dr. Self replied that the subcontracting issue was an issue for the upcoming negotiations and requested that negotiations commence sooner than originally scheduled.

On April 2, 1993 and April 20, 1993, Dr. Self sent letters to the parents of students in the school district acknowledging that the School Board was accepting proposals to

¹Finding of Fact ("F.F.") Nos. 3-10 and 12-30.

subcontract its transportation services and attempting to answer parents' questions about the subcontracting process.

The first negotiation session between the School Board and OAPSE for a successor collective bargaining agreement was held on May 3, 1993. The chief spokesperson of each party was designated and the negotiation ground rules were discussed at this session.

The second negotiation session was held on May 11, 1993. The parties exchanged proposals at this session. One of the School Board's proposals dealt with the subcontracting issue: "The Employer shall have the right to subcontract work performed by its employees at its discretion, providing the Employer gives the Union at least thirty (30) days advance written notice of such subcontracting." In addition to the May 3 and May 11 negotiation sessions, the parties also held negotiation sessions on May 27, June 30, and July 13, 1993.

On May 27, 1993, the School Board in a written response rejected all of OAPSE's proposals except for OAPSE's proposal to have video cameras installed on the buses, which the School Board was evaluating. At the May 27, 1993 bargaining session, the School Board indicated that it intended to pursue the subcontracting of transportation services based upon its belief that it would save \$737,000 over the next five years. These savings were primarily attributed to the subcontractor's ability to provide new buses without any added cost to the school district. The parties met again on June 30, 1993, but did not reach agreement on any of the proposals.

On July 13, 1993, the School Board and OAPSE held a negotiation session. The parties discussed several items without reaching an agreement. The School Board did agree to OAPSE's proposal for the installation of video cameras in the buses. The parties discussed subcontracting, but did not reach an agreement. OAPSE's bargaining representatives stated that there was no way the union membership would agree to subcontract, no matter how much the School Board could sweeten its offer. OAPSE inquired as to what it would take to persuade the School Board not to subcontract; the School Board's representative indicated that OAPSE would need to propose the same amount of savings with the addition of new

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buses to the fleet, as would be achieved by Settle's proposal. When the OAPSE bargaining team came back after recessing from its caucus, the School Board declared an impasse in negotiations. Subsequently, a mediator was contacted; he met with the parties on August 11, August 27, and September 9, 1993.

At the August 11, 1993 mediation session, the School Board indicated that there would be no need for a successor contract after September 1, 1993, if the School Board contracted out the transportation services. No agreement was reached. On August 30, 1993, OAPSE filed a Notice of Intent to Strike with SERB. The parties' collective bargaining agreement expired on August 31, 1993.

On September 13, 1993, the School Board passed a resolution authorizing Dr. Self to enter into a contract with Settle to provide transportation services to the school district once there was a successful completion of the negotiations between OAPSE and the School Board regarding this issue, or after the School Board had satisfactorily met all its obligations under O.R.C. Chapter 4117 and any other legal requirements. On September 14, 1993, Settle sent letters to the Transportation Supervisor and all bargaining unit members represented by OAPSE offering them jobs with Settle. Also on September 14, 1994, the bargaining unit members represented by OAPSE went on strike. The strike lasted for 4 days.

On September 23, 1993, the School Board sent a letter informing OAPSE that all bargaining unit members and the Transportation Supervisor would be laid off effective October 8, 1993. Also on September 23, 1993, the School Board submitted a contract proposal to OAPSE. On October 1, 1993, the School Board submitted its final and last offer to OAPSE. On October 8, 1993, OAPSE submitted a letter to the School Board rejecting the School Board's final offer. On October 11, 1993, Dr. Self, on behalf of the School Board, entered into a contract with Settle to provide bus transportation services. The School Board then abolished the bus driver and mechanic positions.

Da. Gault was employed by the School Board as the Transportation Supervisor. He was also laid off with the OAPSE bargaining-unit employees. During the strike, Mr. Gault met

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Beverly Brannon, one of the striking drivers, at the garage when she came to pick up an insurance form. She was visibly upset at the time. Mr. Gault and Ms. Brannon had a conversation regarding the strike and the bus drivers coming back to work. He told her that, according to Dr. Self, if the drivers did not return to work, replacement drivers would be hired. Mr. Gault knew that Ms. Brannon's husband had a chronic illness and that the family's health insurance was provided solely through her job. He told her to let the courts decide the issues and come back to work so as not to jeopardize her family's health insurance coverage. Ms. Brannon told Mr. Gault she would not come back to work, but she had to stay out with the other drivers. She then went to OAPSE's strike headquarters. Ms. Brannon was upset about the whole situation, not just Mr. Gault's remarks. Ms. Brannon considered the entire subcontracting situation threatening, including the letter sent to her by Settle offering her employment as a bus driver.

On the same day, Mr. Gault talked with bus driver Gail Pillo. When the conversation occurred, he was in his car, stopped at a stop sign, and she was on the strike line. He told her that she should come back to work and that she should not want to lose her job over the subcontracting issue. He explained to her that he had been told by Dr. Self that if the bus drivers wanted to come back to work they would first have to sign the acceptance letter sent to them by Settle. According to Mr. Gault, his conversations with Ms. Brannon and Ms. Pillo were out of his concern for the drivers and his own uncertainty about his and the bus drivers' future employment status.

II. ANALYSIS AND DISCUSSION

The School Board is charged with violating O.R.C. §§ 4117.11(A)(1), (A)(2), (A)(3), and (A)(5), which provide in pertinent part:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code or an employee organization in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances;

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(2) Initiate, create, dominate, or interfere with the formation or administration of any employee organization[;]

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code[;]

* * *

(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code[.]

A. *The School Board Did Not Violate O.R.C. §§ 4117.11(A)(1) Or (A)(5) When It Bargained The Subcontracting Issue With QAPSE*

The School Board concedes it was obligated to bargain about the subcontracting of bargaining-unit work.² At issue in this case is whether the School Board engaged in bad-faith bargaining during the negotiation sessions. Based upon the record herein, we find that the School Board did not bargain in bad faith in violation of O.R.C. §§ 4117.11(A)(1) or (A)(5).

Good-faith bargaining is determined by the totality of the circumstances.³ The duty to bargain does not compel either party to agree to a proposal or require either party to make a concession.⁴ A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful.⁵ Hard bargaining, however, is not bad-faith bargaining.

In the private sector, when a party is found to have used negotiation techniques to frustrate or avoid mutual agreement, that party is said to have engaged in "surface bargaining." A party is alleged to have engaged in surface bargaining based upon the totality

²The Ohio Supreme Court has held already that the reassignment of bargaining-unit work outside of the unit is a mandatory subject of collective bargaining under O.R.C. §§ 4117.08(A) and (C). *Lorain City School District Bd. of Ed. v. SERB* (1988), 40 Ohio St.3d 257, 1989 SERB 4-2 (hereinafter "*Lorain*").

³*In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004 (4-8-96).

⁴O.R.C. § 4117.01(G).

⁵*In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89); *NLRB v. Katz*, 369 U.S. 736 (1962).

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of its conduct at or away from the bargaining table, since an intent to frustrate an agreement is rarely articulated.⁶ "More than in most areas of labor law, distinguishing hard bargaining from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous."⁷ "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations."⁸ Although an employer may be willing to meet at length and confer with the union, the employer has refused to bargain in good faith if it merely goes through the "motions" of bargaining, such as where an employer offers a proposal that cannot be accepted, along with an inflexible attitude on major issues and no proposal of reasonable alternatives.⁹ We adopt the foregoing treatment of "surface bargaining" as persuasive authority under O.R.C. Chapter 4117.

Under the "totality of circumstances" test, the record does not support a finding that the School Board bargained in bad faith. Before negotiations officially opened, Dr. Self sent a letter to OAPSE asking it to begin bargaining immediately over the proposed decision to subcontract the services and the effects of that decision. Dr. Self met with OAPSE officials as a result of this letter and again requested that negotiations commence sooner than originally scheduled. At least five negotiation sessions were held in which proposals were exchanged and in which the parties discussed subcontracting. During these negotiation sessions, the School Board submitted financial data to OAPSE indicating the financial savings the School District would accrue by subcontracting its transportation services. The School Board also invited proposals from OAPSE that would result in similar savings without subcontracting. Most significantly, at the July 13, 1993 negotiation session, in response to

⁶*Virginia Holding Corp., dba Hotel Roanoke*, 293 NLRB 182, 132 L.R.R.M. 1229 (1989).

⁷*Eastern Main Medical Center v. NLRB*, 658 F.2d 1, 108 L.R.R.M. 2234, 2241 (1st Cir. 1981). See also *NLRB v. General Electric Co.*, 418 F.2d 736, 72 L.R.R.M. 2530 (2d Cir. 1969).

⁸*NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 32 L.R.R.M. 2225 (1st Cir. 1953), cert. denied, 346 U.S. 887, 33 L.R.R.M. 2133 (1953).

⁹*NLRB v. Wright Motors*, 603 F.2d 604, 102 L.R.R.M. 2021 (7th Cir. 1979).

the OAPSE Field Representative's question as to what it would take for OAPSE to persuade the School Board not to subcontract the work, the School Board's representative expressly stated that OAPSE would need to propose an alternative with a similar amount of savings along with the new buses being offered by the subcontractor. OAPSE never gave the School Board a written proposal on the subcontracting issue.¹⁰

The parties were unable to resolve any issues on subcontracting due to their respective positions. The School Board declared impasse on July 13, 1993, and the parties called in a mediator pursuant to their mutually agreed upon dispute resolution procedure. The sessions with the mediator also did not produce an agreement. The School Board's position at the August 11, 1993 session was that after the current contract's expiration on August 31, 1993, subcontracting would occur. OAPSE's stance regarding subcontracting was evident from its representatives' earlier statements that it would never agree to subcontract the work; it failed to offer *any* alternative. On August 30, 1993, OAPSE filed with SERB a Notice of Intent to Strike; OAPSE's members subsequently engaged in a four-day strike. The day before the strike, the School Board authorized Dr. Self to enter into a contract with Settle. The School Board then submitted its final offer to OAPSE; OAPSE rejected this offer. On September 23, 1993, Dan Gault and all of the bargaining-unit members received their layoff notices, to be effective October 8, 1993.¹¹ On October 11, 1993, Dr. Self signed the contract with Settle and the School Board abolished the bargaining unit positions.

The record demonstrated that the parties were involved in a very critical negotiation issue. Both parties were steadfast in their respective positions. What occurred in this case was in the nature of hard bargaining, rather than a refusal to bargain. Although the School Board maintained its position, it was willing to consider proposals from OAPSE that would match the savings from subcontracting; but OAPSE did not respond. The bargaining process did not result in a solution on which the parties could agree. More importantly, neither the

¹⁰F.F. Nos. 7, 9, 12-16, and 25.

¹¹F.F. Nos. 18-24, 27.

Complainant nor OAPSE produced any evidence that the School Board would not have considered an alternative to subcontracting, since OAPSE never offered an alternative which would save the School Board a similar sum of money. Consequently, there is no evidence at the time of bargaining that the subcontracting decision was a *fait accompli*. "Requiring [an employer] to bargain does not require that an agreement be reached. It does, however, provide a process whereby employees will be consulted about decisions which have a profound impact on them and, thus, industrial peace will be preserved and promoted."¹² Accordingly, the Complainant and OAPSE did not prove by a preponderance of the evidence that the School Board's actions in bargaining with OAPSE (over the decision to subcontract its transportation services and the effects of that decision) violated O.R.C. § 4117.11(A)(1) or (A)(5).

B. The School Board Did Not Violate O.R.C. §§ 4117.11(A)(1) And (A)(5) By Unlawfully Changing The Status Of A Deemed-Certified Bargaining Unit

The School Board is charged with altering or changing the deemed-certified status of the bargaining unit by subcontracting its transportation services in violation of § 4(A) of Am.Sub.S.B. No. 133, 140 Ohio Laws, Part I, 336, 367, which provides in pertinent part:

Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code. Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative.

OAPSE relies upon two decisions of the Ohio Supreme Court, *Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO v. City of Cincinnati* (1994),

¹²*Lorain, supra* at 263, 1989 SERB at 4-2.

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69 Ohio St.3d 677, 1994 SERB 4-37 (hereinafter "*Cincinnati*") and *State ex rel Brecksville Edn. Assn. OEA/NEA v. SERB* (1996), 74 Ohio St.3d 665, 1996 SERB 4-1 (hereinafter "*Brecksville*"), in support of its position that the School Board violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it subcontracted the bargaining unit's work and altered the unit's composition. *Cincinnati* stands for the proposition that SERB lacks jurisdiction to entertain a petition to adjust or alter a deemed-certified bargaining unit except upon challenge by a rival employee organization. *Brecksville* allows the alteration of a deemed-certified unit if a joint petition for amendment of certification is filed with SERB.

OAPSE's reliance on these cases is misplaced. *Cincinnati* and *Brecksville* deal with petitions to amend a deemed-certified bargaining unit. In the present case, a petition to change the composition of the bargaining unit has not been filed by the School Board, either unilaterally or jointly with OAPSE. At issue is the School Board's attempt to subcontract bargaining-unit work. There is no indication in either *Cincinnati* or *Brecksville* that the deemed-certified status of a bargaining unit precludes the subcontracting of bargaining-unit work. The deemed-certified protection applies to the status of the bargaining unit's exclusive representative.¹³ Therefore, these cases are not applicable to the present case. In fact, *Lorain* explicitly allows for the subcontracting of bargaining-unit work after the employer bargains with the employee organization. Consequently, we find that the School Board did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5).

C. *The Transportation Supervisor's Actions During The Strike Did Not Violate O.R.C. §§ (A)(2), (A)(3), or (A)(5)*

1. *O.R.C. § 4117.11(A)(2):*

A public employer commits an unfair labor practice under O.R.C. § 4117.11(A)(2) when it dominates or interferes with the formation or administration of an employee organization. In this case, there is no allegation about the formation of an employee organization. The record is devoid of evidence in support of a finding that Mr. Gault's actions

¹³See *Cincinnati*, as modified by *Brecksville*, *supra* at 670, 1996 SERB at 4-3.

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unlawfully interfered with OAPSE's administration. Mr. Gault's actions did not prevent OAPSE from performing any of its administrative duties. Mr. Gault's comments were never directed at OAPSE. The continued existence of the employee organization was not influenced in any way by Mr. Gault's comments to two employees. In addition, the School Board's contract with Settle provided for the continued recognition of OAPSE as the exclusive representative of the bargaining unit. Thus, Mr. Gault's actions did not violate O.R.C. § 4117.11(A)(2).

2. O.R.C. § 4117.11(A)(3):

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.* (1993), 66 Ohio St.3d 485, Syllabus 2, 1993 SERB 4-43, the Ohio Supreme Court articulated the test to be applied by SERB in determining whether an employer has discriminated against a public employee on the basis of protected activity under O.R.C. § 4117.11(A)(3):

Under the "in part" test to determine the actual motivation of an employer charged with an unfair labor practice, the proponent of the charge has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where the proponent meets this burden, a prima facie case is created which raises a presumption of antiunion animus. The employer is then given an opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. The State Employment Relations Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

Acknowledging that the new standard mandates that SERB focus on the public employer's motive, SERB applied the *Adena* standard in *In re Ft. Frye Local School Dist Bd of Ed*, SERB 94-016 (10-14-94), and held that a prima facie case of discrimination under O.R.C. § 4117.11(A)(3) requires that the Complainant establish the following elements: (1) that the employee at issue is a public employee and was employed at relevant times by the employer; (2) that he or she engaged in concerted, protected activity under O.R.C. Chapter 4117, which fact was either known to the employer or suspected by the employer; and (3) that the employer took adverse action against the employee under circumstances that, if left un rebutted by other evidence, could lead to a reasonable inference that the employer's actions

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were related to the employee's exercise of concerted, protected activity under O.R.C. Chapter 4117.

The first two elements were proven. At all relevant times, Ms. Brannon and Ms. Pillo were public employees who were engaged in a protected activity under O.R.C. Chapter 4117, *i.e.*, a strike. Both facts were known to Mr. Gault. But the third element was not proven because the School Board took no adverse action against these employees related to their exercise of O.R.C. Chapter 4117 rights. The strike was due to the subcontracting decision. The pending layoffs were due to the subcontracting decision, not the strike. Mr. Gault told both employees they would not have jobs to go back to if they did not return soon because replacement drivers would be hired. Threats alone cannot constitute an O.R.C. § 4117.11(A)(3) violation where no adverse action is taken. Therefore, a *prima facie* case was not proven, and O.R.C. § 4117.11(A)(3) was not violated.

3. O.R.C. § 4117.11(A)(5):

O.R.C. § 4117.11(A)(5) addresses an unfair labor practice due to an employer's refusal to bargain. "Direct dealing occurs when there is an attempt 'to deal with the union through the employees, rather than the employees through the union.'"¹⁴ In *In re Mentor Exempted Village School Dist. Bd. of Ed.*, SERB 89-011 (5-16-89), SERB determined that an employer's accurate, non-coercive communication of its bargaining proposals, sent to its employees during collective bargaining negotiations, constituted direct dealing in violation of O.R.C. § 4117.11(A)(5). SERB also noted that there might be circumstances where those same acts would not constitute an unfair labor practice. In this case, the Transportation Supervisor's statements were neither communications of bargaining proposals nor attempts to deal with the union through these employees. Consequently, O.R.C. § 4117.11(A)(5) was not violated.

¹⁴*In re Vandalia-Butler City School Dist. Bd. of Ed.*, SERB 90-003 at p. 3-8 (2-9-90) citing with approval *General Electric*, 150 N.L.R.B. 192, 57 L.R.R.M. 1491 (1964).

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in the exercise of their O.R.C. Chapter 4117 rights by the supervisor's conduct. Thus, the School Board violated O.R.C. § 4117.11(A)(1) when its Transportation Supervisor interfered with, restrained, or coerced these employees in the exercise of their O.R.C. Chapter 4117 rights.

III. CONCLUSION

For the reasons above, we find that the Springfield Local School District Board of Education did not violate O.R.C. §§ 4117.11(A)(1) or (A)(5) by bargaining in bad faith through its actions to subcontract its transportation services during negotiations with the Ohio Association of Public School Employees, Local 530 or by unlawfully changing the status of a deemed-certified bargaining unit. Nevertheless, we find that the acts and statements of the School Board's Transportation Supervisor's during the strike did violate O.R.C. § 4117.11(A)(1), but not O.R.C. §§ 4117.11(A)(2), (A)(3), or (A)(5).

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