

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

City of Cleveland,

Employer,

and

Cleveland Police Patrolmen's Association,

Employee Organization.

CASE NUMBER: 2001-STK-04-0001

ISSUANCE OF OPINION

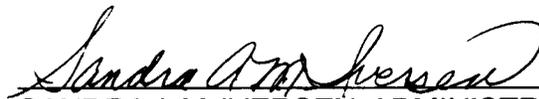
This case came before the State Employment Relations Board ("SERB") upon the filing of a Request for Determination of Unauthorized Strike by the City of Cleveland ("Employer") under the provisions of Ohio Revised Code ("O.R.C.") § 4117.23. On May 2, 2001, SERB issued its Determination that the Cleveland Police Patrolmen's Association ("Employee Organization") is not engaged in an unauthorized strike under O.R.C. § 4117.01(I) and denied the Employee Organization's motion to dismiss as moot. The opinion relating to and referenced in that determination is attached.

POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



SUE POHLER, CHAIRMAN

I certify that this document was filed and a copy served upon each party's representative by certified U. S. Mail, return receipt requested, on this 29th day of May, 2001.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT

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OPINION

GILLMOR, Vice Chairman:

This case comes before the State Employment Relations Board ("SERB") upon the filing of a Request for Determination of Unauthorized Strike by the City of Cleveland ("City") under the provisions of Ohio Revised Code ("O.R.C.") § 4117.23. SERB is required to determine whether the alleged work slowdown by bargaining-unit members represented by the Cleveland Police Patrolmen's Association ("Union") is an "unauthorized strike" as defined by O.R.C. § 4117.01(I). SERB is required to render its determination within seventy-two hours of the filing of the request. The request was filed on April 30, 2001, at 9:57 a.m. On May 2, 2001, SERB conducted a hearing on the request. SERB found that the Union was not engaged in an unauthorized strike under O.R.C. § 4117.01(I) and denied the Union's motion to dismiss as moot. The determination was issued on May 2, 2001, at 12:26 p.m. The reasons for this determination are set forth below.

On April 26, 2001, the City filed a Request for Determination of Unauthorized Strike, seeking a determination that the patrol officers represented by the Union are engaged in an unauthorized strike "by dramatically reducing their issuance of parking tickets during the current contract negotiations with the City[.]" The burden of proof in this type of case rests

with the City as the requesting party. *See, e.g., In re Jefferson County Human Services Dept*, SERB 92-015 (9-25-92).

A “slowdown” is a form of a partial strike, which is achieved through the slowing down of production by employees. For example, the withholding of incentive production and overtime work has been found to be an illegal slowdown under the National Labor Relations Act. *Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 31 L.R.R.M. 1072 (1952). The term “slowdown” was originally part of the definition of a “strike.” The enactment of House Bill 200, in 1995, specifically made partial strikes illegal and amended O.R.C. §§ 4117.01(H) and (I). As a result, a “slowdown” became part of the definition of an “unauthorized strike,” which is now defined in O.R.C. § 4117.01(I):

“Unauthorized strike” includes, but is not limited to, *concerted action* during the term or extended term of a collective bargaining agreement or during the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code 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, influencing, or coercing a change in wages, hours, terms, and other conditions of employment.* “Unauthorized strike” includes any such action, absence, stoppage, *slowdown, or abstinence* when done partially or intermittently, whether during or after the expiration of the term or extended term of a collective bargaining agreement or during or after the pendency of the settlement procedures set forth in section 4117.14 of the Revised Code. (Emphasis added).

Whether concerted action has occurred is a threshold issue in this case. The National Labor Relations Board standard used to define concerted activity is set out in the *Meyers Industries* cases,¹ where it held: “In general, to find an employee's activity to be

¹*Meyers Industries, Inc.*, 268 NLRB 493, 115 L.R.R.M. 1025 (1984), *remanded sub nom., Prill v. NLRB* 755 F. 2d 941, 118 L.R.R.M. 2649 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S.Ct. 313, 88 L.Ed. 294, 120 L.R.R.M. 3392 (1985) (*Meyers I*), *on remand, Meyers Industries, Inc.*, 281 NLRB 882, 123 L.R.R.M. 1137 (1986), *enforced sub nom., Prill v. NLRB*, 835 F. 2d 1481, 127 L.R.R.M. 2415 (D.C. Cir. 1987), *cert denied*, 487 U.S. 1205, 108 S.Ct. 2847, 101 L.Ed. 2d 884, 128 L.R.R.M. 2664 (1988) (*Meyers II*).

'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." (Emphasis added) *Meyers I*, 115 L.R.R.M. at 1029.

In *In re Cincinnati Metropolitan Housing Auth*, SERB 93-002 (4-6-93) ("CMHA"), SERB adopted the *Meyers* standard for future application as the proper measure of concerted activity under the Ohio Public Employees' Collective Bargaining Act and held:

"Concerted" by its very definition, mandates more than one and clearly anticipates group action. The concept of collective activity, under the statute and under this standard, embraces the actions of employees who have joined together in order to achieve common goals. *Id.* at 3-10.

To determine whether the employees are engaged in concerted action, we must begin with the Request to Determine Unauthorized Strike form. Under O.A.C. Rule 4117-13-02(B), when an employer believes that its employees are engaging in an unauthorized strike, it may request from SERB a determination of whether the strike is authorized. The employer's written request is to state:

- (4) The names and addresses, if known and job classifications or functions of the striking employees;
- (5) The date the strike commenced;
- (6) The approximate number of employees on strike and the nature of the strike activity involved[.]

In the City's request, when asked to identify the names, addresses, and job classifications or functions of the employees who are on strike, the City answered: "Numerous patrol officers, whose names are undeterminable at this time." When asked the date on which the alleged strike commenced, the City answered: "On or about 2/15/01." When asked the number of employees on strike, the City answered: "undetermined." At the May 2, 2001 hearing, the City was still unable to provide this information.

The actual comments made by Union President Bob Beck are innocuous and do not rise to the level of encouraging a slowdown by the patrol officers. The anecdotal observations by the news broadcasters presented disagreement over whether a slowdown was occurring. Thus, the City's statistics comprise the only evidence on which to base a finding of concerted action.

At the May 2, 2001 hearing, the parties stipulated that the first negotiation session occurred on March 2, 2001, and that the City presented its initial wage proposal at this session. Consequently, this date became the focus as to when the alleged unauthorized strike began. To support its allegation of a slowdown, the City provided statistical information occurring at the level of the six police districts. But the City's own statistics did not support its claim of a slowdown. These statistics showed fluctuations in the number of tickets issued occurring on a week-to-week basis even before the parties' negotiations began on March 2, 2001. These fluctuations were as great or greater than those in the weeks following the beginning of negotiations. In addition, the Cleveland Division of Police UTT/PIN [Uniform Traffic Tickets and Parking Infraction Notices] Accountability Report for 1990 to 2001 (through 04/30/2001)² demonstrated wide variations in the number of tickets issued for each year.

According to Police Chief Martin Flask, the patrol officers do not have quotas for the number of tickets they are to issue each week or each year. "Goals" have been established for the Division of Police in several areas. The 2001 goals for total Uniform Traffic Tickets and Parking Infraction Notices are 5.9% and 7.7% higher, respectively, than the number of tickets issued during 2000. Police Chief Flask testified that 2000 was a record year for the City in these areas, which it now claims are the subject of a slowdown. The year-to-date numbers meet or exceed the same categories for 1999 when projected over the whole year. In addition, during 2001, the Division has never fielded 100% of the cars that it planned; the total number of cars fielded by the districts ranges from 85.3% to

²Union Exhibit 11.

95.5%. It could be argued that the reason the goals are not being reached is because the Division is not sending out the number of cars in its plan needed to reach these goals.

It is extremely difficult to establish concerted action based entirely on statistical evidence. In *United Air Lines v. Machinists*, 166 L.R.R.M. 2769 (7th Cir., 3-14-2001), in addition to statistical evidence of a slowdown, the employer presented testimony by its managers describing their personal observations of slowdown activities by mechanics, letters and bulletins issued by the union during the time period that the employer claimed constituted a deliberate slowdown campaign directed by the union, and letters and flyers posted by individual mechanics during the same period that encouraged work slowdowns and other job actions.

In *Pan American World Airways, Inc. v. Independent Union of Flight Attendants*, 93 Lab. Cas. (CCH) ¶ 13,307, 20,036 (S.D. N.Y. July 20, 1981), the court relied upon statistical evidence that revealed a “dramatic increase” in sick leave absences. Relying in part on this evidence, the court issued an injunction against the “sickout”; the court concluded that a serious question existed regarding whether the union had violated its obligations under the Railway Labor Act “by encouraging, or at least making no reasonable efforts to discourage[,]” abuse of sick leave by union members. *Id.* at 20,039. Even in that case, the record indicated the union’s involvement in the sickout was shown by statistical evidence along with reports in the media and a notice posted on the union bulletin board.

It is possible, though, to establish concerted action based entirely on statistical evidence. In *In re City of Youngstown*, SERB 87-002 (1-30-87), the Board was presented with a question as to concerted action. In that case, the evidence before the Board showed that sixteen out of seventeen police officers on the “C” turn of the Youngstown Police Department (“YPD”) and twelve out of sixteen police officers on the “B” turn reported in sick or injured on the same day. The next day, the YPD received three call-off reports for the “C” turn and two call-off reports for the “B” turn. Various reasons were given by the

employees. In the Determination of Unauthorized Strike, the Board found that these facts “rebut coincidence and demonstrate concerted unauthorized job action.” *Id.* at 3-5. The Board found that an unauthorized strike was being conducted and held:

Whoever or whatever triggered the traumatic and/or viral epidemic which engulfed the YPD, only the naive would attribute it to coincidence. Even a modicum of street sense will recognize the events in this case for what they are. They are symptom's (sic) of blue-flu--a euphemism for a badly camouflaged job action. [The Board] will not characterize as aleatory the conjunction of group trauma and collective contagion which has settled so selectively on the officers of the YPD.

When all of the statistical information is reviewed and compared, we are presented in this case with a stark contrast to the situation in the *Youngstown* case, where we were presented with overwhelming statistical evidence. In the present case, the number of tickets fluctuates on a weekly basis, and the patrol officers do not have established quotas. The fluctuations in numbers of tickets have been present for as long as these statistics have been reported. Therefore, we must find that the City did not demonstrate, by a preponderance of the evidence, that the employees are engaged in concerted action in the form of a slowdown. Thus, we do not find that the employees are engaged in an unauthorized strike as defined by O.R.C. § 4117.01(I).

For the reasons above, we find that the City of Cleveland has not shown that the employees were engaged in “concerted action.” The City’s statistics show fluctuations within the year that do not prove its allegations. Consequently, we find that the Cleveland Police Patrolmen’s Association is not engaged in an “unauthorized strike” under O.R.C. § 4117.01(I).

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