

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

City of Cleveland,

Respondent.

Case No. 2003-ULP-06-0322

ORDER
(OPINION ATTACHED)

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
August 5, 2004.

On June 17, 2003, the Municipal Construction Equipment Operators' Labor Council ("Intervenor") filed an unfair labor practice charge with the State Employment Relations Board ("Board" or "Complainant") alleging that the City of Cleveland ("Respondent") had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On October 1, 2003, the Board found probable cause to believe an unfair labor practice had been committed and directed the unfair labor practice case to hearing.

On February 26, 2004, an expedited hearing was held. Subsequently, the parties filed briefs setting forth their positions. On April 15, 2004, a Proposed Order was issued by the Administrative Law Judge, recommending that the Board find that the Respondent violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) when it engaged in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items. On May 10, 2004, the Respondent filed exceptions to the Proposed Order. On May 24, 2004, the Complainant filed a response to the Respondent's exceptions.

After reviewing the record, the Proposed Order, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, and Conclusions of Law in the Proposed Order, incorporated by reference. The Board also issues this Order, with a Notice to Employees, to the City of Cleveland to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and from refusing to bargain collectively with the exclusive representative of its employees, by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items during

the parties' negotiations for their initial collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

The City of Cleveland is hereby ordered to:

- (1) Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished by the Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the Board in writing within twenty calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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



CAROL NOLAN DRAKE, 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 days after the mailing of the State Employment Relations Board's order.

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 9th day of August, 2004.



DONNA J. GLANTON, ADMINISTRATIVE 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 to abide by the following:

A. CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and from refusing to bargain collectively with the exclusive representative of its employees, by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items during the parties' negotiations for their initial collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished to the State Employment Relations Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
3. Notify the State Employment Relations Board in writing twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

***SERB v. City of Cleveland*, Case No. 2003-ULP-06-0322**

BY

DATE

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This Notice must remain posted for sixty 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
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

STATE EMPLOYMENT RELATIONS BOARD, :
 : CASE NO. 03-U LP-06-0322
Complainant, :
 :
 :
 v. : **BETH C. SHILLINGTON**
 : Administrative Law Judge
CITY OF CLEVELAND, :
 : PROPOSED ORDER
Respondent. :

I. INTRODUCTION

On June 17, 2003, the Municipal Construction Equipment Operators' Labor Council filed an unfair labor practice charge against the City of Cleveland (the "City"), alleging that the City violated §§ 4117.11(A)(1) and (A)(5).¹ On October 1, 2003, the State Employment Relations Board ("SERB or "Complainant") found probable cause to believe that the City violated §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith.

On February 17, 2004, a complaint was issued. An expedited hearing was held on February 26, 2004, wherein the parties presented testimonial and documentary evidence. Subsequently, both parties filed post-hearing briefs.

II. ISSUE

Whether the City violated §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith?

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

III. FINDINGS OF FACT²

1. The City of Cleveland is a "public employer" as defined by § 4117.01(B). (S. 1)
2. The Municipal Construction Equipment Operators' Local Council (the "Union") is an "employee organization" as defined by § 4117.01(D) and is the exclusive representative for a bargaining unit of the City's employees. (S. 2)
3. The Union was certified as the exclusive representative on January 30, 2003, replacing the International Union of Operating Engineers, Local 18. (S. 3)
4. Before the parties' initial collective bargaining session, as its initial proposal, the City mailed the Union a copy of a collective bargaining agreement it had recently reached with the Cleveland Building and Construction Trades Council ("CBCTC"). On May 14, 2003, the Union mailed the City a counterproposal. (S. 5, 6; C. Exhs. 3, 4, 5, 6, 7)
5. The City and the Union met for their first collective bargaining session on June 13, 2003. (S. 4)
6. The June 13, 2003 meeting began at 10 a.m. in Cleveland City Hall and was attended by five negotiating-team members from each side. (T. 20; Jt. Exh. 2)
7. Assistant Law Director William Sweeney spoke first. He outlined the City's position and explained how the City's proposal came about from extensive negotiations between the City and the CBCTC. Mr. Sweeney explained that the City did not want to enter into a collective bargaining agreement with the Union that differed substantially from the City's collective bargaining agreement with the CBCTC because this situation would cause "labor chaos" and disrupt the relationships the City had established with other unions. The City also stated that it could not offer different benefits to the Union. (T. 21-23, 26, 95-96, 97)
8. The City demanded that the Union move off its wage counterproposal of 100 percent of the prevailing wage rate contained in a contract known as the "Building Agreement" between the International Union of Operating Engineers,

² References in the record to the Joint Stipulations of Fact filed by the parties are indicated parenthetically by "S.," followed by the stipulation number. References to the transcript of hearing are indicated parenthetically by "T.," followed by the page number(s). References to the Joint Exhibits in the record are indicated parenthetically by "Jt. Exh.," followed by the exhibit number(s). References to the Complainant's exhibits in the record are indicated parenthetically by "C. Exh.," followed by the exhibit number(s). References to the City's exhibits in the record are indicated parenthetically by "R. Exh.," followed by the exhibit number(s). References to the stipulations, transcript, and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the related Finding of Fact.

Local 18 and a number of private employers of construction equipment operators. The City demanded that the Union accept the City's wage proposal of 80 percent of a different prevailing wage rate contained in a contract known at the "Heavy Highway" contract. (T. 26-30)

9. The City reviewed with the Union a list of 31 items in the Union's counterproposal that the City viewed as unacceptable. Some of these items were unacceptable to the City because they differed from the City's current practices. The City also stated that it believed that the Union's proposals on management rights, overtime, and hiring were "illegal." The Union responded to the City's concern regarding management rights by offering to include a management rights clause in the collective bargaining agreement. (T. 31-32, 35, 61-62, 75-76, 79; C. Exh. 8)
10. The Union asked the City to set aside the wage issue and move forward to negotiate the remaining items of concern that the City had reviewed with the Union. The City refused, stating only that the Union's counterproposal was unacceptable. The City took the position that it would not discuss anything further until the Union moved off its wage proposal. The City asked the Union to caucus for the purpose of preparing a different counterproposal on the wage issue and on the other issues. (T. 32, 33-34, 99, 105-106, 126-128, 154-155; R. Exh. 2)
11. The Union refused to withdraw its counterproposal and submit new counterproposals. The City would not discuss anything further. The City left the bargaining session. The session lasted 52 minutes. (T. 33-35, 126-128)

IV. ANALYSIS AND DISCUSSION

Section 4117.11 provides in relevant part as follows:

- (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***;
* * *
 - (5) Refuse to bargain collectively with the representative of its employees recognized as the exclusive representative *** pursuant to Chapter 4117. of the Revised Code[.]

Section 4117.01(G) provides as follows:

"To bargain collectively" means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms, and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. "To bargain collectively" includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

At issue in this case is whether the City engaged in bad-faith bargaining during the June 13, 2003 negotiation session. Based upon the record herein, the City bargained in bad faith in violation of §§ 4117.11(A)(1) and (A)(5).³ In In re Springfield Local School Dist Bd of Ed, SERB 97-007 (5-1-97), at 3-46, SERB stated as follows:

Good-faith bargaining is determined by the totality of the circumstances. The duty to bargain does not compel either party to agree to a proposal or require either party to make a concession. A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. 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 of its conduct at or away from the bargaining table, since an intent to frustrate an agreement is rarely articulated. "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." "[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." 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. We adopt the foregoing treatment of "surface bargaining" as persuasive authority under O.R.C. Chapter 4117.

³ Section 4117.11(A)(1) represents an alleged derivative violation of § 4117.11(A)(5) in this instance. In re Amalaamated Transit Union, Local 268, SERB 93-013 (6-25-93) at n.14.

In In re Toledo City School Dist Bd of Ed, SERB 2001-006 (10-1-01) ("Toledo"), the Board found that "hard bargaining" had occurred. In that case, the union was not required to back down from its position, nor was the employer required to give in to the union's demands. But in that case, the parties exchanged proposals and counter-proposals on several occasions. Through negotiations, the parties were able to resolve many issues before reaching ultimate impasse on the remaining issue.

Despite its protestations that it was not refusing to bargain, the City's conduct at the June 13, 2003 meeting can only be described as "surface bargaining." The City refused to engage with the Union in any give-and-take whatsoever. The City expressed a desire to obtain the Union's consent to the terms set forth in the CBCTC agreement. The City's expressed desire for uniformity evidenced an inflexible attitude on major issues. The City's refusal to make any counterproposals to the Union's opening counterproposal indicates that while the City was willing to "meet and confer" with the Union on June 13, 2003, the City was not willing to propose any reasonable alternatives on the 31 items at issue. Thus, the City, unlike the employer in the Toledo case, engaged in "surface bargaining," not hard bargaining.

The City rejected the Union's suggestion that the parties table the wage issue for the moment and move on to negotiate other items. When the Union refused to submit another counterproposal despite the lack of movement by the City, the City terminated the negotiation session. The City's inflexible attitude on June 13, 2003, constituted bad-faith "surface bargaining" in violation of §§ 4117.11(A)(1) and (A)(5).

V. CONCLUSIONS OF LAW

Based upon the entire record herein, this Administrative Law Judge recommends the following Conclusions of Law:

1. The City of Cleveland is a "public employer" as defined by § 4117.01(B).
2. The Municipal Construction Equipment Operators' Local Council is an "employee organization" as defined by § 4117.01(D).
3. The City of Cleveland violated §§ 4117.11(A)(1) and (A)(5) by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board issue an **ORDER**, pursuant § 4117.12(B), requiring the City of Cleveland to do the following:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by engaging in bad-faith "surface bargaining" when it refused to propose any reasonable alternatives to the 31 pending bargaining items, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Bargain in good faith with the Municipal Construction Equipment Operators' Local Council toward an initial collective bargaining agreement;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Municipal Construction Equipment Operators' Local Council work, the Notice to Employees furnished by the State Employment Relations Board stating that the City of Cleveland shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.