

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
UNEMPLOYMENT COMPENSATION PROGRAM SERVICES
145 South Front Street
P.O. Box 182830
Columbus, Ohio 43218-2830
Telephone: (614) 752-8418
Web Page: www.state.oh.us/odjfs/labordisputes

In The Matter Of A Labor Dispute
Between:

International Association Of	:	Docket No. LD-002-004
Machinists & Aerospace Workers	:	
Local 55 District 28 Region 2	:	
(Local 55)	:	
Bakery, Confectionery, Tobacco	:	
Workers & Grain Millers	:	
Local Union No. 57	:	
(Local 57)	:	
	:	
Unions/Claimants	:	Hearing Officer:
	:	Jim Bubutiev
and	:	
	:	
The Kroger Company	:	Date of Hearing:
Baked Foods Division	:	September 06, 2002
(Kroger)	:	
	:	
	:	Date of Issuance:
Employer	:	September 12, 2002

Appearances

Guy A. Devito, Jr., Business Representative for District 28 of the International Association of Machinists & Aerospace Workers, represented and was a witness for Local 55.

Local 57 and Kroger, although duly notified, did not appear and were not represented at this hearing.

This matter was heard by Jim Bubutiev, Hearing Officer for the Director of the Ohio Department of Job and Family Services, pursuant to Section 4141.283 of the Ohio Revised Code. The purpose of this hearing

is to determine the reason for the unemployment of certain individuals who have filed claims for unemployment compensation benefits. Division (A) of Section 4141.283 of the Ohio Revised Code provides that the Director is to schedule a hearing when there is reason to believe that the unemployment of twenty-five or more individuals relates to a labor dispute. The Ohio Department of Job and Family Services has received 154 claims for unemployment benefits that relate to a labor dispute between Local 55 and Kroger.

All interested parties were duly notified of the hearing pursuant to Ohio law. This hearing was held on September 06, 2002, at the Columbus Metropolitan Library, Whetstone Branch, in Columbus, Ohio.

FINDINGS OF FACT:

The claimants in this matter are members of Local 55, and Local 57, and are employed by Kroger at the Kroger Columbus Bakery located on Cleveland Avenue in Columbus, Ohio.

Kroger is a supermarket chain with locations throughout the United States of America.

Kroger employs an estimated 750 individuals at the Kroger Columbus Bakery located on Cleveland Avenue in Columbus, Ohio. Approximately 420 of those individuals are members of Local 57, and another 61 or 62 individuals are members of Local 55 (Transcript Pages 9-11).

Local 55 had a three (3) year collective bargaining labor agreement with Kroger that was effective from August of 1999 through August 17, 2002. Local 55 proposed a twenty-four (24) hour extension of the agreement through August 18, 2002, and Kroger agreed to the extension. Neither party proposed any other extension of the exact terms and conditions of the expired agreement while negotiations continued for a new agreement (Transcript Pages 11-14,18-19).

The only issue between the parties dealt with health care coverage and, specifically, the insurance co-pays (Transcript Pages 16-17).

Five negotiation sessions were held between Local 55 and Kroger prior to the expiration of the then existing collective bargaining labor agreement, and the twenty-four (24) hour extension, in an effort to reach a new agreement. The last of the five sessions was held on August 17, 2002, and the health care coverage issue was not resolved. Consequently, on August 18, 2002, the members of Local 55 voted for a work stoppage which was to begin on August 19, 2002. (Transcript Pages 13-16).

The work stoppage began on August 19, 2002, and the members of Local 55 set up pickets at the Kroger Columbus Bakery located on Cleveland Avenue in Columbus, Ohio (Transcript Pages 15-16,19-20).

The members of Local 57 honored the picket lines set up by the members of Local 55 by not crossing the picket lines and by not going to work at the Kroger Columbus Bakery located on Cleveland Avenue in Columbus, Ohio (Transcript Page 16).

There was one negotiation session held by Local 55 and Kroger after the work stoppage began. The session was held on August 22, 2002, and the health care coverage issue was resolved. As a result of that session the members of Local 55 voted to accept a new collective bargaining labor agreement in a vote taken the morning of August 23, 2002, and to end their work stoppage. Accordingly, the members of Local 55, and the members of Local 57, returned to work at the Kroger Columbus Bakery during the afternoon of August 23, 2002 (Transcript Pages 17-18).

Kroger used salaried non union employees to continue operations at the Kroger Columbus Bakery during the work stoppage and did not hire any

replacement workers during that time (Transcript Pages 18-19).

ISSUES:

Pursuant to Section 4141.283 of the Ohio Revised Code, this Hearing Officer is required to make a determination as to whether the claimants are disqualified from receiving benefits under the unemployment compensation laws of the State of Ohio. The central issues to address can be stated thus:

1. What is the reason for the claimants' unemployment from Kroger?
2. Are the claimants disqualified from receiving unemployment compensation benefits?
3. What is the duration of the labor dispute?

The applicable law is Section 4141.29(D)(1)(a) of the Ohio Revised Code, which provides as follows:

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the director finds that:

(a) The individual's unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which the individual is or was last employed; and for so long as the individual's unemployment is due to such labor dispute . . .

REASONING:

Section 4141.29(D)(1)(a) of the Ohio Revised Code provides that no individual is entitled to benefits for any week during which their unemployment is due to a labor dispute other than a lockout. Thus, in order to come to a conclusion regarding the reason for the unemployment of the claimants, it is necessary to determine whether the labor dispute was a lockout within the meaning of the Ohio unemployment compensation law. The claimants would not be disqualified from eligibility for unemployment compensation benefits if the labor dispute is found to be a lockout.

The key issue to be resolved is whether the reason for the claimants' unemployment from Kroger was due to a lockout or a labor dispute other than a lockout.

In *Cornell v. Bailey*, (1955), 163 Ohio St. 50, the claimants were not members of the striking union and were not concerned in the dispute between the employer and its drivers and helpers. Additionally, the claimants did not participate in the labor dispute or the resulting strike and continued working after the strike began. However, the employer operated a wholesale grocery business and the lack of normal delivery service caused a substantial decrease in business. Eventually, the employer had no more work for the claimants and they were laid off due to a lack of work.

The Ohio Supreme Court ruled that the claimants in *Cornell* were unemployed due to a labor dispute other than a lockout. The court held that the statute did not differentiate between those individuals who were actually on strike and those individuals innocently unemployed because of the strike. The court explained that the only question to answer was whether the claimants lost their employment by reason of a labor dispute

and that the only answer to that question had to be in the affirmative.

In *Ohio Bureau of Employment Services v. Hodory*, (1977), 97 S. Ct. 1898, the claimant was an employee at one of the employer's plants and he was furloughed when the plant was shut down because of a reduction in fuel supply resulting from a national strike by the employer's coal mine workers.

The United States Supreme Court held in *Hodory* that the Ohio statute disqualifying an "innocent bystander" from unemployment compensation benefits because his unemployment was due to a labor dispute other than a lockout was constitutional because it had a rational relation to a legitimate state interest.

In *Bays v. Shenango Co.* (1990), 53 Ohio St. 3d 132, a collective bargaining agreement between the employer and the union expired and the union offered to continue working under the terms of the expired contract for one year while a new contract continued to be negotiated.

The Ohio Supreme Court held that if an employer refuses to allow work to continue for a reasonable time under the pre-existing terms and conditions of employment, while negotiations continue, then the employer is deviating from the status quo.

Thus, the Supreme Court has set forth what is known as the "status-quo" test for deciding whether a work stoppage was the result of a lockout or due to a labor dispute other than a lockout.

In applying this test it must be determined "which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing." *Id.* at 134-135.

In this matter, the testimony indicates that the members of Local 55 became unemployed when, after voting for a work stoppage on August 18,

2002, they began a work stoppage on August 19, 2002, and set up picket lines at the Kroger Columbus Bakery where all the claimants work.

Therefore, using the status quo test from the *Bays* decision, this Hearing Officer finds, based upon the testimony, that it was Local 55 that first changed the status quo, while negotiations were ongoing, when the decision was made via a vote on August 18, 2002, to conduct a work stoppage and begin picketing on August 19, 2002. Thus, the members of Local 55 became unemployed when they started a labor dispute other than a lockout on August 19, 2002.

This Hearing Officer also finds, based upon the testimony, that the claimants who did not carry out the work stoppage, and who are members of Local 57, did work at the same location as the claimants who are members of Local 55, and became unemployed because they honored Local 55's picket lines.

Thus, by applying the holdings of the *Cornell* and *Hodory* decisions, it is the conclusion of this Hearing Officer that the claimants who are members of Local 57 also became unemployed due to the labor dispute other than a lockout between Local 55 and Kroger. There is no so-called "innocent bystander" provision in Section 4141.29 (D)(1)(a) of the Ohio Revised Code. All the claimants worked at the same location where the members of Local 55 picketed and their unemployment was directly caused by the labor dispute between Local 55 and Kroger.

Therefore, it is the conclusion of this Hearing Officer that all the claimants in the instant case were unemployed due to a labor dispute other than a lockout which began August 19, 2002, and ended August 23, 2002, when Local 55 voted to accept a new agreement with Kroger and all the claimants returned to work.

DECISION:

It is the decision of this Hearing Officer that all of the claimants herein were unemployed due to a labor dispute other than a lockout at Kroger which began August 19, 2002. The claimants are disqualified from receiving unemployment compensation benefits due to a labor dispute other than a lockout for the week which includes August 19, 2002, pursuant to Section 4141.29 (D)(1)(a) of the Ohio Revised Code.

It is also the decision of this Hearing Officer that the labor dispute other than a lockout between Local 55 and Kroger which began on August 19, 2002, ended on August 23, 2002, when the members of Local 55 accepted a new agreement with Kroger and all the claimants returned to work.

* * * * *

THIS DECISION APPLIES TO 154 NAMED CLAIMANTS

* * * * *

If you disagree with this decision then you may appeal it. The following paragraph provides a detailed explanation of your appeal rights:

APPLICATION FOR APPEAL BEFORE THE UNEMPLOYMENT COMPENSATION REVIEW COMMISSION, 145 SOUTH FRONT STREET, P.O. BOX 182299, COLUMBUS, OHIO 43218-2299; OR BY FAX TO (614) 752-8862; MAY BE FILED BY ANY INTERESTED PARTY WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF MAILING OF THIS DECISION. IN ORDER TO BE CONSIDERED TIMELY, THE APPEAL MUST BE FILED IN PERSON, FAXED, OR POSTMARKED NO LATER THAN TWENTY-ONE (21) DAYS AFTER THE DATE OF MAILING INDICATED ON THIS DECISION. IF THE 21ST CALENDAR DAY IS A SATURDAY, SUNDAY OR LEGAL HOLIDAY, THE PERIOD FOR FILING IS EXTENDED TO INCLUDE THE NEXT SCHEDULED WORK DAY. UPON RECEIPT OF CERTIFIED MEDICAL EVIDENCE STATING THAT THE INTERESTED PARTY'S PHYSICAL CONDITION OR MENTAL CAPACITY PREVENTED THE FILING OF AN APPEAL WITHIN THE SPECIFIED 21 CALENDAR DAY PERIOD, THE INTERESTED PARTY'S TIME FOR FILING THE APPEAL SHALL BE EXTENDED AND CONSIDERED TIMELY IF FILED WITHIN 21 CALENDAR DAYS AFTER THE ENDING OF THE PHYSICAL OR MENTAL CONDITION.

THIS DECISION WAS MAILED SEPTEMBER 12, 2002.

THE TWENTY-ONE (21) DAY APPEAL PERIOD ENDS OCTOBER 03, 2002.

Jim Bubutiev
Hearing Officer