

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 Department of Job and Family Services has currently received 106 unemployment compensation benefits claims that relate to a labor dispute between Local 8565 and Rotek.



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All interested parties were notified of this hearing pursuant to Ohio law. This hearing was held on February 11, 2013, in Akron, Ohio. This Hearing Officer held the record open until February 19, 2013, to allow for the receipt of post hearing briefs from both parties, due to the length of the hearing, and for cause to review the briefs and hearing transcript. Consequently, the ten calendar day statutory deadline for issuance of the decision is March 1, 2013.

FINDINGS OF FACT

Rotek is a manufacturer and servicer of slewing bearings, and forged steel and non-ferrous metal rings. The Rotek facility is located in Aurora, Ohio, and houses a bearing plant and a ring rolling mill. Rotek also has a facility and plants located in Florence, Kentucky. The Kentucky facility does some of the same work that is done in Aurora, Ohio. The Kentucky facility does smaller capacity bearings work while the Ohio facility does larger capacity bearings work. The Florence, Kentucky facility is not involved in this labor dispute. (Transcript Pages 18-19,168,179,239-240).

Rotek is a wholly owned subsidiary of ThyssenKrupp USA and, in turn, ThyssenKrupp USA is a wholly owned subsidiary of ThyssenKrupp AG. ThyssenKrupp AG has an international presence. Work can flow back and forth with the Aurora, Ohio facility and other international locations as well as with the Florence, Kentucky facility. (Transcript Pages 236-240).

The claimants in this matter are members of Local 8565. Rotek employs approximately 280 individuals. Roughly 180 of these individuals are members of Local 8565 and the other 100 are salaried personnel. It is estimated that about 125 members of Local 8565 were working for Rotek when the labor dispute began. The remaining members of Local 8565 were laid off by Rotek, over the course of several months, prior to the commencement of the labor dispute. (Transcript Pages 19,61,170,231-240, Union Exhibit 6).

Local 8565 had a five year collective bargaining labor agreement with Rotek Incorporated that was effective from November 1, 2007 through November 1, 2012. On October 26, 2012, the parties agreed to an extension of the agreement on a day to day basis with a five day notice to terminate provision for either party. (Transcript Pages 21-23,48-49, Union Exhibit 1,2).

On October 19, 2012, Rotek made a financial presentation to the members of Local 8565 indicating that from 2010 to 2012 there were twenty million dollars in losses and that losses were projected to continue from 2013 to 2015. The presentation included a wage data survey comparison. (Transcript Pages 172-178,217-221,240-243,Employer Exhibit A).

The approximately 100 salaried personnel working for Rotek during the three year period from 2010 to 2012 had their wages frozen in two of those years, and after a wage data survey analysis was done, received a wage increase in one of those years. Their wages are frozen for 2013 and will be reviewed again in September of 2013. (Transcript Pages 231-236).

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On December 14, 2012, Rotek issued a written five day notice to terminate the extension. On December 19, 2012, Local 8565 offered to continue working under the existing agreement for three more weeks while negotiations continued and, on that same day, Rotek made a final offer to Local 8565. The parties then agreed to extend the existing collective bargaining agreement until January 5, 2013 in order to allow the members of Local 8565 to vote on the final offer made by Rotek. On January 5, 2013 the members of Local 8565 voted to reject the final offer. In a separate vote, that same day, a strike authorization was given to the bargaining committee for Local 8565, but they were willing to continue to work under the previous collective bargaining agreement and to negotiate on a new agreement. (Transcript Pages 33-34,49-54,65-66,95-98, Union Exhibit 3,4,5,7).

A total of fourteen negotiation sessions for a new agreement were held between the parties beginning October 19, 2012 through January 10, 2013. A further negotiation session was scheduled for February 19, 2013. (Transcript Pages 22-25,66,171,193).

Local 8565 asserts that they have requested verbally, and in writing, further and more detailed financial information from Rotek on several occasions during the course of negotiations. Local 8565 is seeking this kind of financial information in order to have it reviewed by Chad Apaliski with the United Steelworkers International in Pittsburgh to help determine if Rotek is truly operating at a profit or at a loss. Local 8565 asserts further and more detailed financial information was verbally requested from Rotek as early as October 26, 2012, and a detailed request was put in writing most recently on January 30, 2013. Rotek asserts that enough financial information has been provided to Local 8565 although it is in a summarized form and does not go down to a detailed level. Rotek acknowledges Local 8565 verbally expressed an interest in auditing Rotek, and the request was made sometime in late December of 2012, but that Rotek rejected the audit request. Rotek indicates a response will be made to the January 30, 2013 written request and hoped to provide it by February 19, 2013. (Transcript Pages 42-47,70-71,75-77,81-85,98-101,245-253, Union Exhibit 5,9,10,11, Employer Exhibit C).

On January 10, 2013 Local 8565 requested to see the company books and financials and Rotek denied the request. Rotek viewed the request as asking for financial information about the salaried workforce and about the Florence, Kentucky facility and Rotek deemed that information to be irrelevant. Rotek asserts that the backup information to the October 19, 2012 financial presentation and additional supporting data could be provided to Local 8565. As of the date of hearing Rotek had not provided the backup information or additional supporting data. (Transcript Pages 182-185,210-213, Union Exhibit 9,10, Employer Exhibit A).

Rotek sent Local 8565 a letter on January 11, 2013 stating that a concessionary final offer would be implemented on January 14, 2013. Rotek asserts an impasse to further negotiations had been reached because Local 8565 had made it clear that no concessions would be accepted. Rotek does not view maintaining the previous agreement as a concession. Local 8565 views maintaining the previous agreement, while negotiations on a new agreement continue, to be a concession. Local 8565 asserts an impasse had not been reached and that requested financial information had not been received from Rotek to be able to consider a concessionary package. (Transcript Pages 32, 72-75,189-195,203-205,221-222, Union Exhibit 5, 8, Employer Exhibit C).

Local 8565 asserts that Rotek did not claim any financial distress. Local 8565 asserts that Rotek claimed concessions were needed in order to restructure and be competitive in the marketplace because of the downturn in the wind turbine business. (Transcript Pages 35-37,67-68).

On January 10, 2013, Local 8565 offered to extend the existing collective bargaining agreement for one year. (Transcript Pages 37-38,67-68).

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Rotek implemented a concessionary final offer on January 14, 2013. The members of Local 8565 worked under the terms and conditions of the concessionary final offer through January 17, 2013, and then commenced with a work stoppage on January 18, 2013. The work stoppage is continuing. Local 8565 estimates the concessions in the final offer represent a total of 9,280 dollars annually per person. Local 8565 commenced with the work stoppage because Rotek implemented the final offer. (Transcript Pages 25-29,31-33,54-55,63-65,89-95,102-103,114-115,UnionExhibit 5,6,Employer Exhibit A).

The Local 8565 analysis of the final offer implemented by Rotek indicates total yearly economic concessions of 1.175 million dollars in year one and of 1.25 million dollars in years two and three for the approximately 125 members working when the labor dispute began. The Local 8565 analysis of the final offer by Rotek indicates total yearly economic concessions of 1.85 million dollars in year one and 1.925 million dollars in years two and three when the previously laid off Local 8565 members are included. The estimated concession amounts to a range of about three and half dollars an hour up to seven dollars an hour depending on the particular Local 8565 member being looked at. Local 8565 believes the final offer represents an approximately twenty to twenty one percent concession per person when wages and benefits are all taken into consideration. (Transcript Pages 56-65,110-111,123,140-141,152-158,164-165,198-200)Union Exhibit 1,5,6,13,14,15).

One witness for Rotek indicates that the implemented concessionary final offer represents an eleven and a half to twelve percent wage and benefits reduction for the members of Local 8565. The other witness for Rotek indicates that the implemented concessionary final offer represents an average concession of fourteen percent in wages for the members of Local 8565 and the range of the concessionary wage reduction falls between eight and twenty percent depending on the person. (Transcript Pages 187-188,245-253,UnionExhibit 5).

Members of Local 8565 are picketing at the Rotek facility plants in Aurora, Ohio. As of the date of hearing no one had crossed the picket line to work under the concessionary final offer that had been implemented by Rotek. (Transcript Pages 38,41-42,131-132/UnionExhibit 12).

Rotek has not hired any permanent replacement workers and appears to be operating with the use of salaried personnel and with a few temporary replacement workers. (Transcript Pages 39-40,106,196-197).

The main issues between the parties deal with wages, insurance, pensions, overtimes, holidays, and vacation pay. (Transcript Pages 26-29,63-65,201/UnionExhibit 6).

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 issues are:

1. What is the reason for the unemployment of the claimants from Rotek Incorporated?
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:

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(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 the individual's 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 were found to be a lockout.

The issue to be resolved is whether the reason for the unemployment of the claimants from Rotek Incorporated was due to a lockout or a labor dispute other than a lockout.

In *Oriti v. Board of Review* (1983), 7 Ohio App. 3d 311, a collective bargaining contract between management and labor expired and the employees offered to continue working under the terms of the old contract while a new contract continued to be negotiated. The employer refused to allow the employees to continue working on this basis and a work stoppage began at the expiration of the old contract.

The Court of Appeals held that where employees offer to continue working under the terms of a preexisting collective bargaining agreement, pending a final settlement of the labor dispute, then the failure of the employer to accept such an offer constitutes a lockout unless the employer demonstrates it had a compelling reason for failing to agree to such an extension of the contract. The compelling reason must be of a nature that to require the employer to agree to the extension would be unreasonable under the circumstances.

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 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.

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In *Abel v. ADP/UC Express AS America, Inc.* (2011), 193 Ohio App. 3d 247, the Court of Appeals held that the Bays status quo test was the sole test for determining whether a lockout occurred when an impasse has not been reached. Although the employer had indicated it was suffering economic losses, and implemented a final offer which included a five to nine percent wage and benefits concession package, the parties had not reached impasse because the employees were willing to maintain the status quo and keep negotiating. The court held the Oriti decision standard for a compelling reason exception was not applicable as the evidence did not demonstrate that the employer could not have continued under the terms of the expired collective bargaining labor agreement until the parties negotiated a new agreement. The evidence provided by the employer regarding its financial position did not show it was in such straightened financial circumstances that it would have been unreasonable to extend the expired agreement for at least a short period of time while negotiations were ongoing.

In this matter, applying the status quo test from the Bays decision, the evidence and testimony indicate that the members of Local 8565 became unemployed when they began a work stoppage on January 18, 2013, after Rotek had changed the status quo by implementing a concessionary package final offer a few days earlier, on January 14, 2013.

The implemented final offer, depending on which witness testimony is accepted as most accurate, represents a range of eight to twenty one percent wage and benefits reduction when comparing the expired agreement and the final offer. Rotek was the first party to change the status quo. Local 8565 was always willing to maintain the status quo while negotiations continued.

Rotek cannot unilaterally declare an impasse and implement its final offer simply because it has supplied some financial information it believes supports imposing a concessionary package upon the members of Local 8565. A review of the witness testimony and exhibits offered by both parties, while at all times believable and credible, is at best inconclusive.

Consequently, the evidence fails to show that Rotek Incorporated did provide Local 8565 with financial information with enough specificity to tend to show that the Rotek Incorporated Aurora Plants have been operating at a loss since 2010.

It is clear that Local 8565 has requested on an ongoing basis some kind of more detailed and specific financial information during the course of negotiations.

Perhaps the most succinct explanation was made when this Hearing Officer asked Dennis Brubaker, the main witness for Local 8565, if he thought Rotek remained profitable at page 70 of the transcript. Mr. Brubaker responded as follows:

I do not know if they are profitable. They have made it clear across the table that they have lost millions for the last, I think they said three years. So we do not question that. It is, you know the financials tell us where the problem is. Is it money going to the parent? Is it money, they have a plant down in Kentucky, is there money going there? If we do not see where the flow is, we do not know, I mean I worked for companies where the parent company said, well, you are going to send me a million a year or you are going to send me a million a month, and, you know, that has an effect on profitability, not that they are not entitled to it, but it is hard to put a plan together without that information.

Abel is the most factually similar decision to this matter. The employer in Abel had an international presence just as Rotek does in this matter. Although the employer in Abel is located in a different county and Appellate District than Rotek, the fact remains that these employers are only 41 miles apart.

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The employer in Abel provided its employees and this Hearing Officer far more specific financial information than Rotek has in this matter. In fact, the decision of this Hearing Officer was in favor of the employer in Abel due to the detail provided in the financial information. However, the Columbiana Court of Common Pleas and the Seventh District Court of Appeals found that such evidence did not rise to the level of such straightened financial circumstances that it would have been unreasonable to extend the expired agreement while negotiations continued. Therefore, the Oriti decision standard for a compelling reason exception did not apply.

Thus, applying the Oriti and Abel decision standards, Rotek does not have a compelling reason to implement its final offer. The witness testimony provides as many questions as it does answers on the question of the profitability of Rotek between 2010 and 2012. The fact that the salaried employees had a wage freeze in two of those three years and actually received a wage increase in the other year does not tend to indicate a lack of profitability. Additionally, when there is a possibility that at least some work can be transferred from Rotek in Aurora, Ohio to Florence, Kentucky or to other international locations owned and operated by ThyssenKrupp AG there is no clear indication of a lack of profitability. Finally, Robert J. Brown, the lead witness and lead negotiator for Rotek, responding to the question posed at page 260 and 261 of the transcript, about Mr. Brubaker asking if Rotek was pleading poverty at the very first negotiation session held on October 19, 2012 stated as follows:

I told him that we are not pleading poverty. That we were seeking to become competitive and try to gain more of the market. That we had been unprofitable. That we were not saying we did not have the ability to pay.

The testimony of Mr. Brown is vague. Is Rotek pleading poverty? Is Rotek stating that it is unprofitable? Is Rotek saying that it does have the ability to pay or not? The answers to these questions were never definitively answered at hearing.

There is no reliable way to ascertain whether Rotek was profitable or not from 2010 to 2012 based upon a review of the testimony and exhibits provided at hearing.

DECISION:

It is the decision of this Hearing Officer that all of the claimants herein are unemployed due to a lockout which began on January 18, 2013. The claimants are not disqualified from receiving unemployment compensation benefits due to a labor dispute other than a lockout beginning with the week which includes January 18, 2013.

It is also the decision of this Hearing Officer that the lockout between Rotek and Local 8565 which began on January 18, 2013, is continuing.

This decision applies to:
CLAIMANTS WHO ARE DISQUALIFIED

This decision applies to:
CLAIMANTS WHO ARE NOT DISQUALIFIED

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APPEAL RIGHTS: If you disagree with this decision, you have the right to appeal. The following paragraph provides a detailed explanation of your appeal rights:

Application for appeal before the Unemployment Compensation Review Commission, Ohio Dept. Of Job And Family Services, PO Box 182299, Columbus, OH 43218-2299; or by fax to 1-614-387-3694; may be filed by any interested party within twenty-one (21) calendar days of the date of mailing of the 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 falls on 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. **If unemployed**, claimants should continue to file weekly claims for benefits while under appeal.

This decision was mailed on **02/28/2013**.

The twenty-one day appeal period ends on **03/21/2013**.

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DSN: 021373

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