



OFFICE OF UNEMPLOYMENT COMPENSATION  
DECISION ON LABOR DISPUTE ISSUE



ADP/UC EXPRESS PO BOX 66744 ST LOUIS, MO 63166  1454747005	Date Issued 11/20/2008
	Determination Identification Number 216349001-1
	ODJFS Office  Bureau of UC Program Services
Employer's Name AS AMERICA INC. AMERICAN STANDARD	UC Account Number 1454747005

**THIS DECISION IS ISSUED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 4141.283, OHIO REVISED CODE**

Bureau of UC Program Services  
Ohio Dept. of Job & Family Services  
PO Box 182830  
Columbus, OH 43218-2830  
Telephone: (614) 752-8419  
Web Page: <http://jfs.ohio.gov/labordisputes>

**In The Matter Of A Labor Dispute Between**

Union:	<b>Schwarzwald &amp; McNair LLP</b>	Employer:	<b>AS AMERICA INC. AMERICAN STANDARD</b>
Docket No:	<b>000000000800016</b>	Hearing Officer:	<b>Jim Bubutiev</b>
Date of Hearing:	<b>11/10/2008</b>	Date of Issuance:	<b>11/20/2008</b>

**APPEARANCES:**

Todd Smith, Attorney at Law, represented Local 1538. Joseph Holcomb, a United Steelworkers Staff Representative, was a witness for the Local 1538.

Gust Callas, Attorney at Law, represented American Standard. Dennis Elkins, American Standard Salem Plant Controller, and Gene Garczewski, American Standard Regional manager for Human Resources, were witnesses for American Standard.

Si usted no puede leer esto, llame por favor a 1-877-644-6562 para una traduccion.

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 255 unemployment compensation benefits claims that relate to a labor dispute between Local 1538 and American Standard.

All interested parties were notified of this hearing pursuant to Ohio law. This hearing was held on November 10, 2008, in Akron, Ohio.

#### FINDINGS OF FACT:

American Standard is a manufacturer of steel, enamel steel, bathtubs, kitchen sinks, and bathrooms at a plant located in Salem, Ohio (Transcript Pages 12-13).

The claimants in this matter are members of Local 1538. American Standard employs approximately 385 individuals and 340 of them are members of Local 1538 at the Salem Plant (Transcript Pages 13-14).

Local 1538 had a three year collective bargaining labor agreement with American Standard that was effective from October 1, 2005 through September 30, 2008. The parties agreed to two extensions of the agreement through October 15, 2008. On or about October 15, 2008 American Standard implemented a last, best, and final offer based upon the assertion that negotiations had reached an impasse. Local 1538 responded with a written 48 hour notice that a work stoppage would commence at 1:00 p.m. on October 17, 2008 and asserts there is no impasse. Local 1538 members worked under the implemented terms and conditions of employment on October 16, 2008, and October 17, 2008. On October 17, 2008 a work stoppage began with picketing occurring and it is continuing (Transcript Pages 15-18,88-96,99-103,110,115-116,118-121,132,141-144,150-153/EmployerExhibits A,J,F/Union Exhibit 1).

Negotiation sessions for a new agreement were held between the parties beginning on September 11, 2008 through September 30, 2008. The parties also met on October 13, 2008, and October 17, 2008 (Transcript Pages 52,87,112,114,119,131-133,140,151,159,170).

The American Standard Salem Plant has been operating at a loss since 2006 (Transcript Pages 17,161-165).

American Standard was formerly a much larger international corporation with over eleven billion dollars in sales annually. The American Standard Plumbing international portion of the corporation was sold on November 1, 2007, to Bain Capital, a private equity firm. On approximately November 27, 2007, another private equity firm, Sun Capital, purchased a controlling interest of the American Standard Plumbing Americas portion from Bain Capital. The American Standard Americas portion includes plants in Canada, the United States, Mexico, and some areas in South America. American Standard Americas is not profitable and includes the American Standard Salem Plant. The unaudited financial information for American Standard Americas shows approximately 88.8 million dollars in losses in 2007. The unaudited financial information for the American Standard Salem Plant through July of 2008 shows losses of about 5.4 million dollars. American Standard asserts the audited financial information in the financial report for 2006 shows that the plumbing business portion of the corporation, that the Salem Plant was a part of, lost over 100 million dollars that year (Transcript Pages 18-20,23-27,46-48,53-58,73-85,113/Employer Exhibits B,C).

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Sun Capital has taken the position that each location that is a part of American Standard Americas must stand alone and operate at a profit as an individual entity in order to be a sustainable business (Transcript Pages 23,69-71).

In July of 2008, American Standard made a presentation, including written documentation, about the financial status of the Salem Plant to Local 1538 (Transcript Pages 27,29,103,161-163).

A Salem Plant Gross Profit Improvement Plan document was prepared by American Standard at the request of Chad Apaliski, of the United Steelworkers International headquarters in Pittsburgh, for his review. This document was prepared to respond to his question about the goal of Sun Capital of a 25% gross profit to make the American Standard Salem Plant a profitable and sustainable business. This document presumed a 10% wage concession package would be agreed upon between the parties. However, the last, best, and final offer made by American Standard was a 5% wage concession package that was approximately half as concessionary as the 10% wage concession package (Transcript Pages 29-32,38-39,41,66-72,117-118,159/EmployerExhibits D,E).

The last, best, and final offer made by American Standard that was a 5% wage concession package was presented to Local 1538 on September 30, 2008. The average base wage at the Salem Plant was about \$17.90 an hour under the expired agreement. The last, best, and final offer makes it about \$17.00 an hour. The wage plus benefits average was about \$27.91 an hour under the expired agreement and is estimated to be about \$25.50 to \$26.00 an hour under the last, best, and final offer (Transcript Pages 32-38,115/EmployerExhibit F).

American Standard asserts that Chad Apaliski, of the United Steelworkers, did not refute any of the financial information that was provided to him. Local 1538 asserts he had a problem with the financial information being unaudited but that he would take American Standard at its word on what the numbers are. However, he felt American Standard was not in dire straights or in a bankruptcy type of situation and that it was just the hard economic times that lots of companies are facing right now (Transcript Pages 43-45,153-160/Union2).

The main issues between the parties deal with wages and benefits (Transcript Page 88). American Standard has continued operating using about 38 salaried nonunion employees, 19 Local 1538 members who have crossed the picket line and are working under the implemented terms, and 3 temporary replacement workers (Transcript Pages 96-98,148-150/EmployerExhibit F).

#### 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 claimants' unemployment from American Standard?

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:

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(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 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 claimants' unemployment from American Standard was due to a lockout or a labor dispute other than a lockout.

In *Zanesville Rapid Transit v. Bailey* (1958), 168 Ohio St. 351, the Ohio Supreme Court defined a lockout as a withholding of work from employees in an effort to get more favorable terms for the employer.

In *Zanesville*, the employer implemented a ten percent (10%) wage reduction after the expiration of the labor agreement. The employer was a public utility that had experienced problems making a profit and had been unable to gain permission from the local city council to increase fares.

The court held that the ten percent (10%) wage reduction was reasonable under the circumstances and did not show a purpose on the part of the company to coerce the employees into accepting it and, therefore, was not 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.

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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.

In this matter, the evidence and testimony indicate that the members

of Local 1538 became unemployed when they began a work stoppage on October 17, 2008. Applying the Zanesville decision, American Standard would have allowed Local 1538 members to continue working under the terms and conditions of the implemented last, best, and final offer which was reasonable under the circumstances and did not show a purpose on the part of American Standard to coerce the employees into accepting it and, therefore, was not a lockout. The implemented terms represent an approximately 5% average wage reduction and an approximately 8.6% average wage plus benefits reduction when making a comparison between the expired agreement and the last, best, and final offer.

The witness testimony offered by both parties shows that American Standard did provide Local 1538 with financial information with enough specificity to tend to show that the American Standard Salem Plant has been operating at a loss. If the person Local 1538 chose to review the financial information provided by American Standard decided to accept the financial numbers and acknowledge that American Standard simply faced the same hard economic times that many other companies are facing then this Hearing Officer can not disturb that analysis. The testimony of the controller pertaining to the financial information was credible, forthcoming, inherently believable, and uncontroverted. Thus, applying the Oriti decision standard, American Standard does have a compelling reason to implement the last, best, and final offer.

Using the status quo test from the Bays decision, this Hearing Officer finds, based upon a review of all the evidence and testimony, that American Standard first changed the status quo, while negotiations were ongoing, when the decision was made to not allow the members of Local 1538 to continue working under the terms and conditions of the expired agreement on October 16, 2008, and thereafter. Local 1538 clearly offered to maintain the status quo and continue negotiating. An impasse has been reached as long as one party desires to continue negotiating. An impasse to negotiations cannot be unilaterally declared simply because the parties disagree on what the concessions will ultimately be.

However, the Zanesville and Oriti decisions best apply to the facts in this matter. Both decisions are discussed and noted in the Bays decision and neither has been specifically overruled by the Ohio Supreme Court even when an impasse in negotiations has not been reached.

#### DECISION:

It is the decision of this Hearing Officer that all of the claimants herein are unemployed due to a labor dispute other than a lockout which began on October 17, 2008. The claimants are disqualified from receiving unemployment compensation benefits due to a labor dispute other than a lockout beginning with the week which includes October 17, 2008.

It is also the decision of this Hearing Officer that the labor dispute other than a lockout between American Standard and Local 1538 which began on October 17, 2008, is continuing.

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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, PO Box 182299, Ohio Dept. Of Job And Family Services, 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.

This decision was mailed on **11/20/2008**.

The twenty-one day appeal period ends on **12/11/2008**.



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