

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
UNEMPLOYMENT COMPENSATION PROGRAM SERVICES
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Columbus, Ohio 43218-2830
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In The Matter Of A Labor Dispute
Between:

	:	Docket No. LD-003-001
United Steelworkers of America,	:	
AFL-CIO, Local Union No. 134	:	
(Local 134)	:	
	:	
Union/Claimants	:	Hearing Officer:
	:	Jim Bubutiev
and	:	
	:	
The Waller Brothers Stone	:	Date of Hearing:
Company, Incorporated	:	May 6, 2003
(Waller)	:	
	:	
Employer	:	Date of Issuance:
	:	May 16, 2003

Appearances

James B. Robinson, Attorney at Law, represented Local 134. Randy E. Basham, Business Agent, and Greg Michael Gillette, Vice President of Local 134, were witnesses for Local 134.

R. Alan Lemons, Attorney at Law, represented Waller. Frank L. Waller, President of The Waller Brothers Stone Company, Incorporated, and Lowell M. Shope, Vice President of The Waller Brothers Stone Company, Incorporated, were witnesses for Waller.

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 40 claims for unemployment benefits that relate to a labor dispute between Waller and Local 134.

All interested parties were notified of this hearing pursuant to Ohio law. This hearing was held on May 6, 2003, in New Boston, Ohio.

FINDINGS OF FACT:

The claimants in this matter are members of Local 134 and are employed by Waller.

Waller is a natural stone quarrier and fabricator of sandstone products (Transcript Page 14).

Waller employs 64 individuals and 51 of those individuals are members of Local 134 (Transcript Pages 15,51,125-126,159).

Local 134 had a three (3) year collective bargaining labor agreement with Waller which was effective from March 31, 2000, to midnight March 31, 2003 (Employer Exhibit 10).

There was a mutually agreed upon extension of the collective bargaining agreement to midnight April 15, 2003 (Transcript Pages 17-18/Employer Exhibit 5).

Eight (8) negotiation sessions have been held between Waller and Local 134 from March 18, 2003, through May 1, 2003, in an attempt to reach a new agreement. The negotiation sessions have included a federal mediator since April 21, 2003, by mutual agreement of the parties. At least one (1) negotiation session is scheduled to be held after the date of this hearing (Transcript Pages 18-19,25-26,108,158,183).

Prior to and on March 18, 2003, Waller made an initial offer to Local 134 for a new collective bargaining agreement maintaining the terms and conditions of the expired collective bargaining agreement for one (1) year on the condition that Local 134 would not review and audit Waller's financial information. If Local 134 reviewed and audited Waller's financial information then Waller would seek a new collective bargaining labor agreement with concessions. Local 134 did not accept Waller's initial offer and wanted to review and audit Waller's financial information. On or about April 9, 2003, Local 134 decided to accept Waller's initial offer after reviewing and auditing Waller's financial information but Waller explained the offer was no longer available and any new agreement would have to include concessions (Transcript Pages 62-66,83-90,149,160-163,168-169,184-187,201-202/Employer Exhibit 4).

Local 134 made an initial proposal on March 18, 2003, seeking increases to the now expired collective bargaining agreement (Transcript Pages 69-70/Employer Exhibit 7).

Waller made a proposal on March 25, 2003, seeking concessions to the now expired collective bargaining agreement (Transcript Pages 69-70/Employer Exhibit 8).

On April 15, 2003, Local 134 voted unanimously to reject Waller's offer of a new collective bargaining agreement with concessions (Transcript Pages 67-68,169-170,175-176,185-186,202-203/Employer Exhibit 6).

Local 134 did offer to make concessions during the negotiation session on April 15, 2003, but at the end of the day offered to continue working under the terms and conditions of the expired collective bargaining labor agreement (Transcript Pages 51-52,118,171,196).

On April 15 and 16, 2003, Local 134 offered to continue working under the terms and conditions of the expired collective bargaining labor agreement. However, Waller would only allow work to continue beginning April 16, 2003, under terms and conditions which included concessions and which differed from the terms and conditions of the expired collective bargaining labor agreement (Transcript Pages 29-32,34-35,77,98,102-103,105-106,108-111,132-133,178-181,203-206/Employer Exhibit 1 & 6).

A work stoppage began on April 16, 2003 (Transcript Page 18).

Local 134 has had pickets in place since the start of the work stoppage (Transcript Pages 35-36).

Waller made a proposal on May 1, 2003, seeking concessions to the expired collective bargaining agreement (Transcript Pages 70-71/Employer Exhibit 9).

Waller was aware of annual business losses for 1998 by July of 1999, and of annual business losses for 1999 by July of 2000 (Transcript Pages 152-153).

Waller has lost approximately \$600,000.00 annually during the three (3) year period from 2000 to 2002, and is seeking \$290,000.00 in wage and benefit concessions from Local 134 in a new collective bargaining agreement. Local 134 became aware of Waller's annual losses sometime after March 28, 2003, and before April 9, 2003, and has offered to make concessions but not in the amount that Waller is seeking (Transcript Pages 20-22,40-41,53,76,128-131,134-138,144-145,159-160,167-168,188,206-207/Employer Exhibit 2 & 11).

Local 134 received Waller's written cost savings information regarding the \$290,000.00 in wage and benefit concessions on May 1, 2003 (Transcript Page 167/Employer Exhibit 2 on Page Two).

Wages increased during the three (3) years of the expired collective bargaining agreement (Transcript Pages 61-62).

The main issue between the parties deals with what the amount of wage and benefit concessions will be in a new collective bargaining agreement and includes a disagreement over a "preferred work" process that was used in the expired collective bargaining agreement (Transcript Pages 20-24,40-41,126).

Waller made a business decision to close a laboratory table top department and to increase production in the building stone department. This will create a need for more employees beyond the 51 current members of Local 134. Waller made this business decision sometime in April of 2003 (Transcript Pages 36-40,82-83,141).

Waller hired new employees on or about April 28, 2003. These new employees are not replacements of the claimants and they have not been hired to fill the positions held by the claimants. These new employees are working under different terms and conditions of employment which include concessions as compared to the terms and conditions of the expired collective bargaining agreement (Transcript Pages 26-29,52,127-128,159).

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 Waller?
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 Waller 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 employer implemented a 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 Ohio Supreme Court held that the 10% wage reduction was reasonable under the circumstances and did not manifest 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 pre-existing terms and conditions of employment, while negotiations continue, then the employer is deviating from the status quo. The Supreme Court also referred to *Oriti, Supra*, in noting that an employer would need to have a compelling reason to refuse to maintain 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.

The Supreme Court in *Bays, supra*, also provided the definition of a "lockout" as "a cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for the employer more desirable terms." *Id.* at 133. The Supreme Court in *Bays, supra*, said a lockout "is not confined to an actual physical closing of the place of employment." *Id.* at 134.

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

of Local 134 became unemployed when Waller locked them out on April 16, 2003. Waller would not allow them to continue working under the terms and conditions of the expired agreement, while negotiations continued.

Witness testimony offered by both parties shows that Local 134 did provide Waller with a written offer to continue working under the terms of conditions of the expired agreement on April 15 and 16, 2003, and that, in fact, members of Local 134 showed up to work under those terms and conditions on April 16, 2003.

Waller took the position that the members of Local 134 would only be allowed to work starting on April 16, 2003, under different terms and conditions which would include concessions.

Thus, using the status quo test from the *Bays* decision, this Hearing Officer finds, based upon a review of all the evidence and testimony, that Waller first changed the status quo, while negotiations were ongoing, when the decision was made to not allow the members of Local 134 to continue working under the terms and conditions of the expired agreement on April 16, 2003, and thereafter. Waller's offer to allow work to continue under changed terms and conditions which include concessions is not a maintenance of the status quo.

The *Zanesville* decision does not apply to the facts in this matter because the evidence and testimony clearly indicate that Local 134 and Waller continue to negotiate on a new collective bargaining agreement which will include concessions as compared to the terms and conditions of the expired collective bargaining agreement. An impasse to negotiations cannot be unilaterally declared simply because the parties disagree on what the concessions will ultimately be.

Further, the *Oriti* decision as noted in *Bays, supra*, does not apply in

this matter since there is no compelling reason that made it unreasonable for Waller to agree to a reasonable extension of the expired agreement beyond April 15, 2003.

Waller provided testimony and evidence that there have been business losses since 1998 and that Waller was aware of those losses by no later than July of 1999. Yet, Waller went on to agree to a three (3) year collective bargaining agreement with Local 134, which included wage increases, effective from March 31, 2000, through March 31, 2003. Further, Waller offered a one (1) year extension of the now expired agreement, during negotiations on March 18, 2003, on the condition that Waller's financial information not be reviewed and audited by Local 134.

The evidence and testimony indicate that the parties did agree to a fifteen (15) day extension of the now expired agreement through April 15, 2003. Once Local 134 was made aware of Waller's financial situation, which only happened during the course of the fifteen (15) day extension, the negotiations between the parties quickly became negotiations over the amount of concessions.

The evidence and testimony also shows that Waller did not provide Local 134 with the information detailing the \$290,000.00 in concessions being sought by Waller until the later part of April of 2003 and through to May 1, 2003.

An extension beyond April 15, 2003, as negotiations continue, would have been reasonable under the facts and circumstances present in this matter.

Therefore, it is the conclusion of this Hearing Officer that all the claimants in the instant case were unemployed due to a lockout which began April 16, 2003, and is continuing as of the date of this decision.

DECISION:

It is the decision of this Hearing Officer that all of the claimants herein were unemployed due to a lockout which began April 16, 2003. 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 April 16, 2003.

It is also the decision of this Hearing Officer that the lockout between Waller and Local 134 which began on April 16, 2003, is continuing.

* * * THIS DECISION APPLIES TO 40 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 MAY 16, 2003.

THE TWENTY-ONE (21) DAY APPEAL PERIOD ENDS JUNE 6, 2003.

Jim Bubutiev
Hearing Officer