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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Shallet A. Buchanan, et al.,

Plaintiffs-Appellants,

vs.

**Director, Ohio Department of Job
and Family Services, et al.,**

Defendants-Appellees.

* Case No. CI 12-4157
* Honorable Dean Mandros
* **OPINION AND JUDGMENT
ENTRY**
*
*

During negotiations for a new collective bargaining agreement, the employer proposed changing health care coverage to eliminate the health plan under which the majority of the bargaining employees were covered, increase deductibles, and introduce two new high deductible plans. Most importantly, the employer's proposal eliminated the requirement under the expired contract that the employer maintain the existing or substantially similar coverage and added that the new coverage provision would survive the expiration of the agreement, thereby eliminating the union's ability to bargain regarding health insurance. Even though negotiations were continuing, the employer unilaterally implemented its proposal, so the union commenced a work stoppage. Applying both the *Zanesville* test and the *Bays* test, the Hearing Officer concluded that the work stoppage was a labor dispute other than a lockout and, thus, the claimants were ineligible for unemployment compensation benefits under R.C. 4141.29(D)(1)(a). This Court finds that only the

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Bays test should have been applied and that the employer's new health care coverage was a substantial deviation from that under the expired agreement. Consequently, the employer's unilateral implementation of the new coverage constituted a lockout so the employer was the first to break the status quo; therefore, the claimants are entitled to unemployment compensation benefits.

I. FACTS

At all relevant times, Plaintiffs-Appellants ("Claimants") worked for American Red Cross Blood Services ("Red Cross"), a blood bank operating in ten counties in northwest Ohio and one county in southeast Michigan. Red Cross employs about 245 individuals, and approximately 165 of them are members of United Food and Commercial Workers Union Local 75 ("Union"). (Tr. 14-15)

The Union had a collective bargaining agreement with the Red Cross that was effective from May 1, 2006, through April 30, 2009. (Tr. 17; Er. Ex. 1) Negotiations for a new contract began in early April of 2009. (Tr. 24, 86) While the parties reached some tentative agreements, at the expiration of the contract they still had some unresolved issues, so they entered into several written extensions of the contract. (Tr. 18, 85; Er. Ex. 2) During these extensions, Union members continued to work under substantially the same terms and conditions that existed under the expired contract, except Red Cross ceased Union dues payroll deductions and denied Union arbitration. (Tr. 18, 102) In addition, there were minor changes in the health insurance coverage effective January 1, 2010. (Tr. 59, 102, 109-110)

After the expiration of the final extension on January 10, 2010, Claimants still continued to work under substantially the same terms of the expired contract while negotiations continued, except

for the deduction of Union dues, arbitration, and minor changes to the health insurance coverage effective January 1, 2011. (Tr. 18, 59, 85, 102, 109-110)

On or about October 10, 2011, the Union became aware of the changes Red Cross proposed to make to the 2012 health insurance coverage. (Tr. 120) The parties engaged in at least three negotiation sessions in September through November 2011. (Tr. 116-117) At the end of November, the Union sent an email to Sabin Peterson, lead negotiator for Red Cross, requesting additional negotiation dates but was told Red Cross was not available to meet. (Tr. 117-118) In December 2011, the Union members voted on, and rejected, Red Cross's proposal. (Tr. 103) Even though the parties were still negotiating on the health care coverage, Red Cross implemented its changes to the health insurance coverage on January 1, 2012. (Tr. 51-52, 93, 104)

The Union offered the whole month of January 2012 for negotiation sessions and again was told Red Cross was not available. (Tr. 98) Finally, a bargaining session was held on February 23, 2012. (Tr. 25) At that time the Union submitted another health coverage proposal, Red Cross rejected it, and Red Cross had no new counter proposal. (Tr. 98)

In early March 2012, Union members voted to go on strike and a ten-day Notice to Strike was issued on March 16, 2012, advising Red Cross that the strike would begin March 27, 2012. (Tr. 20-21, 41; Er. Ex.4) On March 21, 2012, Red Cross sent a letter to employees letting them know that if they wanted to keep working they could. (Tr. 45; Er. Ex.5) They would be working under the same terms and conditions in effect prior to the strike. (Tr. 32)

Work stoppage began March 27, 2012, and was continuing as of the date of the hearing. (Tr. 20-21, 86) Eleven to fifteen union members continued to work after the strike commenced. (Tr. 32, 100) Red Cross used these employees, management staff, and nonunion employees and was able

to continue to operate without hiring replacements. (Tr. 32-33, 104) No striking employees were prevented from returning to work. (Tr. 48)

Approximately twenty negotiation sessions for a new agreement were held between the parties beginning in April of 2009 through February 23, 2012, which included the involvement of a federal mediator. (Tr. 19, 24, 86) Despite the work stoppage, the Union continued to seek continuation of the negotiations through the federal mediator. (Tr. 87-88, 98) While Red Cross's representative admitted that Red Cross did not ask for further negotiations nor did the Union come to Red Cross directly and ask for a negotiation session after February 23, 2012, the Union representative testified that he suggested to the federal mediator after February 23, 2012, that they have negotiation sessions. (Tr. 25, 87-88) The mediator indicated that he would contact Red Cross and, if Red Cross was interested in meeting, the mediator would get back with the Union. The Union heard nothing further from the mediator. (Tr. 87-88)

Both parties agreed that the major sticking point in the negotiations was health insurance coverage. (Tr. 22-23, 43, 88, 104; Er. Ex. 6) Since the beginning of negotiations, Red Cross made the same proposal regarding health insurance until claimants' work ceased on March 27, 2012. (Tr. 60-61, 99) The Union, on the other hand, offered several alternative proposals, including Union sponsored Health and Welfare Plans, as well as proposed changes to Red Cross's proposals. (Tr. 106, 126)

The health insurance provision of the expired contract stated as follows:

The Employer shall maintain the existing or **substantially similar** coverage for all full-time and regular part-time employees. Effective January 1, 2007 the Employer will provide the same health insurance for employees and their dependents, under the same conditions, for as long and with the same contributions as for non-bargaining unit employees. **It is recognized and understood that the Region may change**

health insurance providers during the life of the Agreement, provided the major components are offered by the new carrier. The parties recognize that deductibles, co-pays, cost coverages, etc. may change if a new carrier is selected, but this shall not be construed as a violation of this Agreement. The employee will be given the option of choosing any of the plans in effect. * * *. (Emphasis added.) (Er. Ex.1, pg. 16)

The health insurance coverage under the expired contract included a maximum premium contribution of 15% for bargaining unit employees and consisted of a Preferred Provider Organization ("PPO") plan and an Exclusive Provider Organization ("EPO") plan. (Tr. 108-110; Er. Ex.1) The PPO plan had a deductible of \$500 single, \$1,000 family. (Tr. 109-110; Er. Ex.1) The EPO plan did not have a deductible, had a 90/10% coinsurance, and was the plan under which the vast majority of the bargaining unit employees were covered. (Tr. 74, 109-112)

The 2012 provision implemented by the employer provides:

Full-time and regular part-time bargaining unit employees will continue to participate in the same American Red Cross National Group Insurance Plans, as amended from time to time, applicable to all American Red Cross Blood Services Western Lake Erie Region employees. The parties agree that any future changes or amendments to the National Plans will automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to other American Red Cross Blood Services Western Lake Erie Region employees. The parties further agree that the cost of coverage under the National plans will be shared between the bargaining unit employees and the Red Cross on the same basis as such costs are shared between the Red Cross and all other Blood Services Western lake Erie Region employees as in effect from time to time. **This provision will survive the expiration of this agreement.** * * * The increase in the employee premium effective January 1, 2012 (for the calendar year 2012 plans) shall not exceed fifteen percent (15%). (Emphasis added.) (U. Ex. A)

Thus, the 2012 coverage required all bargaining unit employees be subject to the same National Plans as all other employees, removed the "existing or substantially similar" language, and added that the new health care coverage provision will survive the expiration of the agreement. In addition, the 2012 coverage included premium contribution rate caps through the 2012 calendar year

only, not the life of the contract, and added two new High Deductible Health Plans: The Low for In-Network providers have deductibles at \$1,500 for single, \$3,000 for family, and the High for In-Network providers had deductibles at \$1,200 for single, \$2,400 for family. The 2012 coverage also eliminated the EPO plan, which had no deductible. (Tr.95; Un.Ex.C)

The Union maintained that the changes for the 2012 Plan year were not consistent with previous health insurance coverage in light of the fact that the EPO plan, the plan almost every bargaining unit employee was covered under, was eliminated, the deductibles were increased under the PPO plan, and high deductible plans were introduced. (Tr. 72-75, 95, 109-112) Further, unlike prior years, the employer rejected inserting maximum contribution rates for the term of the contract. (Tr. 108) Moreover, as Red Cross admitted, under the new coverage the Union would have no ability to negotiate regarding health insurance. (Tr. 62-63, 108) The 2012 provision added that it "will survive the expiration of this Agreement." The Union representative testified that when he asked Sabin Peterson what that meant, he said "it would be in the language from here on out, but would not have a right to bargain any further." (Tr. 139) Union members did not have any idea what the insurance plans, premiums or coverage would be under the remaining years of the contract. (Tr. 93, 96)

Red Cross, on the other hand, asserted that the 2012 insurance coverage was substantially similar to the coverage under the expired contract and, in fact, some employees actually stood to benefit from the changes. (Tr. 43) While Red Cross could not state how many employees would benefit, the Union representative testified that it would be cheaper only to those that had no utilization of the insurance. (Tr. 72, 137, 143)

The parties agreed that negotiations were continuing and that they had not reached an

impasse. (Tr. 26, 101) Red Cross has never taken the position with the Union that if there wasn't a new contract in place, there would be no work available to them. (Tr. 31) Nor has the Union ever stated that if they don't get a new contract, they're not going to work. (Tr. 32)

II. PROCEDURAL BACKGROUND

Claimants filed for unemployment compensation benefits with the Ohio Department of Job and Family Services ("ODJFS"). The claims were consolidated pursuant to R.C. 4141.283, and a hearing was held on April 23, 2012.

The Hearing Officer issued his decision on May 3, 2012. According to the Hearing Officer, the major issue between the parties was health insurance coverage and they had not reached an impasse. The Hearing Officer did not think it was necessary for him to determine whether the 2012 health insurance coverage was substantially similar to that of prior years.

In deciding whether the reason for the unemployment of the Claimants from Red Cross was due to a lockout or a labor dispute other than a lockout, the Hearing Officer applied both the *Zanesville* test and the *Bays* test for determining whether the strike constituted a lockout. *See, Zanesville Rapid Transit, Inc. v. Bailey*, 168 Ohio St. 351, 155 N.E.2d 202 (1958); *Bays v. Shenango Company*, 53 Ohio St.3d 132, 559 N.E.2d 740 (1990). Under the *Zanesville* reasonableness test, the Hearing Officer found it was not reasonable for the Union to strike over the 2012 health care changes. The Hearing Officer stated that if the health insurance coverage changes were onerous and unreasonable, then the Union should not have waited nearly three months after the changes were effective to assert a work stoppage. Additionally, the Hearing Officer noted that neither the strike notice itself nor any of the exhibits indicated the reason the Union was commencing a work stoppage

was because of the 2012 health insurance changes.

Applying the *Bays* status quo test, the Hearing Officer found:

[T]he American Red Cross would have allowed Local 75 members to continue working under the terms and conditions of the expired contract while negotiations for a new contract continued. There was no indication ever made to Local 75 that any proposals made by the American Red Cross would be implemented. The American Red Cross was maintaining the status quo while negotiations continued. However, Local 75 broke the status quo by taking the action of commencing with a work stoppage on March 27, 2012 * * *.

The Hearing Officer concluded that claimants are disqualified from receiving unemployment compensation benefits under R.C. 4141.29(D)(1)(a) due to a labor dispute other than a lockout beginning March 27, 2012.

Claimants requested final administrative review under R.C. 4141.283(C). On June 15, 2012, the full Ohio Unemployment Compensation Review Commission summarily and unanimously denied the request under R.C. 4141.283(D).

Claimants then filed this administrative appeal requesting the Court to reverse the Review Commission's decision.

III. STANDARD OF REVIEW

The standard of review to the common pleas court level is set forth in the clear language of R.C. 4141.28(O)(1) which states that any interested party may appeal from the Commission's decision to the court of common pleas, and the court of common pleas must reverse or modify such decision if it finds the decision was unlawful, unreasonable, or against the manifest weight of the evidence.

The court may not substitute its judgment for that of the Review Commission and it may not

reverse simply because it interprets the evidence differently than did the Commission. *Angelkovski v. Buckeye Potato Chips Co. Inc.*, 11 Ohio App.3d 159, 161, 463 N.E.2d 1280 (10th Dist. 1983).

The resolution of purely factual questions and the credibility of the witnesses are primarily within the province of the Hearing Officer and Board of Review. *Baker v. Unemployment Compensation Review Commission*, 6th Dist. No. L-01-1503, 2002-Ohio-3154, ¶ 8, 2002 Ohio App. LEXIS 3201.

Though deference is due the findings of an administrative body, the Court is not bound to accept improperly drawn inferences from the evidence. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111-112, 407 N.E.2d 1265 (1980).

IV. ANALYSIS

Both parties carry a burden of proof as to whether claimants are entitled to unemployment compensation: the claimant has the initial burden of proving a right to compensation, and the employer must prove any claimed exception to that right. *Aliff v. Ohio Bureau of Employment Services*, 2nd Dist. No. 18647, 2001 Ohio App. LEXIS 4485, *7 (Oct. 5, 2001). Here, it is undisputed that claimants have a claim for benefits. The issue then presented is whether by undertaking a strike action they have created an exception to their claim.

R.C. 4141.29(D)(1)(a) provides that no individual is entitled to unemployment compensation benefits for any week during which his or her unemployment is due to a labor dispute other than a lockout. Therefore, the Court must determine whether the claimants' unemployment was due to a lockout or a labor dispute other than a lockout.

A. The Hearing Officer's Application of the *Zanesville* Test When Deciding Whether the Work Stoppage Constituted a Lockout Was Unlawful.

A lockout is not confined to an actual physical closing of the place of employment. Rather, a constructive lockout may exist. *Bays*, 53 Ohio St.3d at 134. In determining whether a lockout exists, courts have applied two tests: the *Zanesville* "reasonableness" test and the *Bays* "status quo" test. Under the *Zanesville* test, a lockout occurs if the conditions of further employment announced by the employer are so unfavorable to the employees that they could not reasonably be expected to continue to work under such terms. *Zanesville*, 168 Ohio St. at 355. Under the *Bays* test, the court must determine which side first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing. *Bays*, *supra* at 135.

The Second District Court of Appeals in *Johnson v. Administrator, Ohio Bureau of Employment Services*, 82 Ohio App.3d 293, 299, 611 N.E.2d 896 (2nd Dist. 1993), summarized the difference between the two tests as follows:

According to *Bays/Oriti*, a lockout occurs even if the terms of the employer's unilaterally implemented offer are favorable to the employees if the employer is the first to deviate from the status quo of the pre-existing agreement while negotiations continue. Even after negotiations have ceased, however, *Zanesville* holds that a lockout may occur if the terms of the employer's unilaterally implemented offer are so unfavorable to the employees that they could not reasonably be expected to continue to work under such terms.

The appellate districts are divided on the question of how to apply the *Bays* and *Zanesville* tests and have adopted one of two approaches. *Abel v. ADP/UC Express AS America, Inc.*, 193 Ohio App.3d 247, 2011-Ohio-1649, ¶ 36 (7th Dist.). The First, Second, Sixth, Eighth, Tenth, and Eleventh Districts have determined that they present two alternative tests depending on the facts of the case. When the parties have ceased negotiations and reached an impasse, the *Zanesville*

"reasonableness" test applies, but when negotiations are ongoing between the parties, the *Bays* "status quo" test applies. *Id.* at ¶ 37. In contrast, the Third and Fifth Districts have held the tests must be applied together. *Id.* at ¶ 38.

In finding that the alternative test approach was more persuasive, the court in *Abel* noted:

It is a much simpler and direct approach that leaves little room for confusion. The only preliminary question that must be determined is whether negotiations are ongoing or the parties have reached impasse. Once this determination is made, the test to apply is clear. Furthermore, had the Supreme Court intended to combine both tests into one, it would seem that it would have made this clear in *Bays*. Instead, the Court set out the status quo test as the test to be used while negotiations are ongoing. This left the *Zanesville* test to be applied when negotiations have ceased. *Id.* at ¶ 42.

This Court must follow the controlling precedent of the Sixth District Court of Appeals in *Baker*, which applied the majority approach that *Zanesville* and *Bays* represent two alternative tests depending upon whether the parties have reached an impasse. *Baker*, 2002-Ohio-3154; *see also*, *Carter v. Ohio Unemployment Compensation Board of Review*, 101 Ohio App.3d 527, 655 N.E.2d 1373 (6th Dist. 1995). An impasse is defined as "the deadlock reached by bargaining parties 'after good-faith negotiations have exhausted the prospects of concluding the agreement.'" (Citation omitted.) *East Cleveland v. East Cleveland Firefighters Local 500, I.A.F.F.*, 70 Ohio St.3d 125, 131 n.1, 1994-Ohio-175, 637 N.E.2d 878 (1994).

Here, it is undisputed, and the Hearing Officer found, that the parties had not reached an impasse. Therefore, only the *Bays* status quo test should have been applied and the Hearing Officer erred in applying both tests.

B. The Hearing Officer's Findings Under the *Bays* Status Quo Test Were Unreasonable and Against the Manifest Weight of the Evidence.

According to *Bays*, the sole test to be used to determine whether the work stoppage was the

responsibility of the employer or the employees is as follows:

* * * Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification of unemployment benefits in the case of a 'stoppage of work because of a labor dispute' [under the R.C. 4141.29(D)(a)(a) exception] does not apply. 53 Ohio St.3d at 134-135.

In the instant case, the Hearing Officer noted in his Findings of Fact that the primary issue between the parties was health care coverage and that the Red Cross unilaterally implemented its own health care coverage proposal on January 1, 2012. Yet the Hearing Officer concluded that there was no indication ever made by Red Cross to the Union that any proposals made by Red Cross would be implemented, that Red Cross would have allowed Claimants to continue working under the terms and conditions of the expired contract while negotiations continued, and that it was unnecessary to determine whether the 2012 coverage was substantially similar to that of prior years. Thus, according to the Hearing Officer, it was the Union that broke the status quo by commencing the work stoppage.

For the reasons that follow, the Court finds that the Hearing Officer's conclusions are not supported by the record.

1. Red Cross had already unilaterally implemented its new health care coverage prior to the March 27, 2012 work stoppage.

It is undisputed that Red Cross's new health care insurance coverage proposal was unilaterally implemented on January 1, 2012. Both parties' representatives so testified at the hearing. (Tr. 51-52, 93, 104, 120) Even the Hearing Officer himself stated in his Findings of Fact that the Red Cross

proposal was implemented January 1, 2012.

Consequently, the Hearing Officer's conclusion that there was no indication ever made to the Union that any proposal made by Red Cross would be implemented is contrary to the record since the Red Cross health benefits proposal was, in fact, implemented prior to the work stoppage.

2. Red Cross would have allowed Claimants to continue working during negotiations under the terms and conditions in effect at the time the strike commenced, not under the terms and conditions of the expired contract.

Red Cross's representative testified that the Claimants would continue to work under the "same terms and conditions they were working under prior to going on strike." (Tr. 32) The parties agree the contract that expired on April 30, 2009, had been revised in subsequent years, including the elimination of Union dues payroll deductions and Union arbitration, and, most importantly, the health care coverage changes effective January 1, 2012. Therefore, the Claimants were not working under the same terms and conditions of the expired contract at the time the strike commenced on March 27, 2012.

3. The Bays test requires a determination as to whether the 2012 health care coverage is substantially similar to that of prior years.

The Hearing Officer, without explanation, stated: "This Hearing Officer makes no finding of fact and draws to no conclusions regarding whether the 2012 health insurance changes are, in fact, such that the coverage is not substantially similar to the coverage in prior years. Such a finding is not necessary in order to arrive at a decision in this matter."

The *Bays* test requires a finding as to which side first refused to continue operations under the status quo after the contract had expired, but while negotiations were continuing. Therefore, it must first be determined what constitutes the "status quo" under the expired contract and then decide

whether Red Cross's 2012 health care insurance proposal substantially deviates from the coverage under the expired contract.

4. Under the *Bays* test, Red Cross's unilateral implementation of its health care insurance coverage proposal constituted a lockout.

Not only does the 2012 coverage eliminate the EPO plan, the plan under which the majority of the bargaining unit employees were covered, and include a premium contribution rate cap through the 2012 calendar year only, it removed the requirement that Red Cross maintain substantially similar coverage and added that the new coverage will survive the expiration of the agreement. In other words, it is not just that the new coverage has increased the costs of insurance for bargaining unit employees -- the 2012 provision eliminates the Union's ability to negotiate health care coverage in the future. Red Cross could decide to eliminate health insurance coverage for Union members completely and such employees would have no recourse.

Consequently, the Court finds that eliminating the Union's ability to negotiate health care coverage constitutes a significant deviation from the expired contract. As a result, Red Cross's unilateral implementation of the new health care coverage effective January 1, 2012, was the first breach of the status quo and constitutes a constructive lockout.

The Sixth District case *Baker v. Unemployment Compensation Review Commission*, 2002-Ohio-3154, is similar to the case sub judice in that the employer unilaterally implemented its proposal and the employees then began to strike. Since negotiations were ongoing, the court applied the *Bays* test, finding that the employees became unemployed as a result of a lockout rather than as a result of a labor dispute. *See, also, Aliff v. Ohio Board of Employment Services*, 2nd Dist. No. 18647, 2001 Ohio App. LEXIS 4485 (Oct. 5, 2001) (Employer's enforcement of its final offer, which

included a change in the health care benefits, was a constructive lockout.); *Carter v. State Unemployment Compensation Board of Review*, 101 Ohio App.3d 527, 655 N.E.2d 1373 (6th Dist. 1995) (Employer's implementation of its final offer and refusal to maintain the status quo during negotiations constituted a lockout.); *Abate v. Wheeling Pittsburgh Steel Corporation*, 126 Ohio App.3d 742, 711 N.E.2d 299 (7th Dist. 1988) (Board erred in accepting employer's offer to extend only part of the expired contract as an offer to extend the status quo.).

5. ODJFS failed to establish a compelling reason for Red Cross to implement its 2012 health care coverage proposal.

Under *Bays*, an employer may deviate from the status quo when it has a compelling reason for doing so. 53 Ohio St.3d at 135. No argument has been raised, and the evidence does not support a conclusion that Red Cross was in straitened financial circumstances or that it had any other compelling reason to deviate from the status quo. The only reasons given by Red Cross for the 2012 changes were that it wanted to have a nationwide plan, promote healthier lifestyles among its employees, and control its health care costs. (Tr. 52-53, 76) No evidence was introduced as to how the health costs affected Red Cross, what national uniformity would do for Red Cross, or what harm would result if there was no uniformity.

C. ODJFS's Reasonable Time, Waiver, and Notice Arguments Are Without Merit.

Red Cross cannot justify its unilateral implementation of its proposal by asserting that it had waited a reasonable time. In *Albaugh v. Unemployment Compensation Review Commission*, 5th Dist. No. 00CA024, 2001 Ohio App. LEXIS 2237 (May 11, 2001), the union went on strike after being notified by the employer that it was going to unilaterally implement its proposal. The employer argued that it had waited a reasonable time before changing the status quo. The Court of

Appeals disagreed, stating that the mere passage of time is insufficient. "The employer must show how the passage of time has impaired its business or will adversely affect its immediate future." *Id.* at *9. The court concluded that the employer, not the employee, changed the status quo in implementing what was, in effect, a "take it or leave it" offer. *Id.* Here, as in *Albaugh*, the record is devoid of any evidence regarding how continuing under the existing health coverage until an agreement is reached would impair Red Cross's business or adversely affect its immediate future.

Nor can ODJFS maintain that Claimants waived the insurance issue by working under the changed coverage. Claimants did not strike immediately after the proposal was implemented because a negotiation session was scheduled for February and they hoped the issue would be resolved at that time. (Tr. 96-97) Moreover, the authority cited by ODJFS to support the waiver argument stands for the rule that the union must act with due diligence in requesting bargaining after receiving notice of a proposed change. Here, the parties agreed, and the Hearing Officer found, that negotiations were continuing. The Union was informed of the 2012 changes to the health care coverage in early October of 2011, and negotiation sessions were held until the end of November. Although the Union requested further bargaining sessions in December and January, another session was not held until February because Red Cross stated it was not available. Even after the Red Cross rejected the Union's proposal in February and Red Cross failed to come up with a new counter proposal, the Union requested the federal mediator contact Red Cross about further negotiations, but again Red Cross was not available. Thus, the Union had always aggressively pursued negotiations with the hope of avoiding a strike.

ODJFS further contends that the Union never specifically stated in its Notice to Strike that the new 2012 health care coverage was the reason it was going on strike. 29 U.S.C.S. § 158(g) does

not require the Union to include the reason for the strike within its Notice. In addition, it is undisputed that health care coverage was the major sticking point in the negotiations and was debated at the last negotiation session just prior to commencement of the strike.

VI. CONCLUSION

The parties agreed that Red Cross unilaterally implemented its new health care coverage on January 1, 2012, prior to the March 27, 2012, work stoppage. It is also undisputed that Red Cross would have allowed Claimants to continue working during negotiations under the terms and conditions in effect at the time the strike commenced, which would necessarily include Red Cross's 2012 health care coverage proposal. Therefore, the Hearing Officer's contrary findings are against the manifest weight of the evidence.

In addition, contrary to the majority view and Sixth District precedence, the Hearing Officer unlawfully applied both the *Zanesville* test and the *Bays* test to determine whether the lockout exception under R.C. 4141.29(D)(1)(a) was applicable.

Finally, Red Cross's 2012 health care insurance coverage proposal was substantially different from the coverage under the expired contract. By unilaterally implementing its proposal while negotiations were continuing, Red Cross was the first party to refuse to continue operations under the status quo after the contract had expired. Therefore, under the *Bays* test, implementation of the proposal constituted a lockout and the exception to entitlement to unemployment compensation benefits under R.C. 4141.29(D)(1)(a) is not applicable.


Accordingly, the Court finds that the Review Commission's decision is unlawful, unreasonable, and against the manifest weight of the evidence and that Claimants are entitled to unemployment compensation benefits.

JUDGMENT ENTRY

It is **ORDERED** that the decision of the Ohio Unemployment Compensation Review Commission is **REVERSED**.

This is a final and appealable order.

Date: 3-28-13


Dean Mandros, Judge