

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK	:	
PROCESSORS, CANNERY, DAIRY EMPLOYEES	:	Case II
AND HELPERS UNION LOCAL 695 affiliated	:	No. 21475 Ce-1725
with I.B.T.C.W. & H. OF A.,	:	Decision No. 15369-A
	:	
Complainant,	:	
	:	
vs.	:	
	:	
MINI-BUS CHARTER SERVICE, INCORPORATED,	:	
	:	
Respondent.	:	
	:	

Appearances:

Goldberg, Previant, & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of the Complainant.
 Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. George R. Kamperschroer, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having, on March 21, 1977, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed an unfair labor practice within the meaning of Section 111.06 of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of WEPA; and hearings on said complaint having been held before the Examiner in Madison, Wisconsin, on May 4 and May 10, 1977; and the Examiner having considered the evidence and arguments of counsel makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695 affiliated with I.B.T.C.W. & H. of A., herein Complainant, is a labor organization.
2. That Mini-Bus Charter Service, Incorporated, 1/ herein Respondent, is an employer who began operating a bus service for elderly and handicapped individuals in Madison, Wisconsin, on September 27, 1976; that the Respondent provides this service pursuant to a sub-contract with Handicapped Students of Wisconsin, Inc., a Wisconsin non-profit corporation, which is contractually obligated to the City of Madison to provide this transportation service; that Mark Rulff is president of Respondent and responsible for the daily operation of the bus service while his father, Eugene Rulff, is secretary of Respondent and makes the major policy decisions which affect the service.

1/ The record indicates that Mini-Bus Charter Service, Incorporated, is Respondent's correct name, and thus the caption of the instant case is hereby corrected to indicate same.

3. That in mid-November 1976 Earl Turner was hired by Respondent as a bus driver; that early in his employment Turner told Mark Rulff about a conversation he had had with certain Madison Metropolitan Bus Company employes, who were represented by Complainant, wherein Turner had explained that Madison Metro should have no interest in Respondent's operation because of its unique nature; that Turner informed Rulff of his belief that any problems that arose regarding Respondent's operation could be resolved directly by the employes and the Respondent; that during this conversation Turner indicated that he was formerly a member of the Teamsters union; and that this was the only conversation between Turner and Mark Rulff which in any way dealt with the subject of labor organizations.

4. That late in December 1976 Michael Falconer, a member of the board of directors of Handicapped Students of Wisconsin, Inc., became aware of an incident in which Turner had allegedly criticized the mother of a handicapped passenger for not having her daughter, Nancy McElmurry, ready when Turner arrived to pick her up; that McElmurry was upset that Turner had not directed his criticisms directly to her; and that in early January 1977 Falconer relayed this information to Eugene Rulff.

5. That during January 1977 the three full-time and one part-time bus drivers employed by Respondent began discussing the merits of obtaining union representation; that Earl Turner was active in these discussions and ultimately contacted the Complainant to express the employes' interest in being represented by said labor organization; and that no representative of Respondent became aware of Turner's leadership role in attempting to organize the employes until after his discharge on March 4, 1977.

6. That in mid-January 1977 Turner had an informal conversation with Eugene Rulff wherein he indicated that employes of Madison Metro, represented by Complainant, had been kidding Turner about Respondent's operation and that he had responded by indicating that the bus service was doing fine; that this was the only discussion between Turner and Eugene Rulff which contained any reference to labor organizations.

7. That in mid-January 1977 a psychologist called Mark Rulff and complained about Turner's conduct as a bus driver toward one of his patients, Sue Loseke; that the psychologist indicated that Turner had admonished Loseke about her failure to appear as scheduled for a passenger pick-up and had told Loseke that she belonged in an institution; that he further indicated that his client was extremely upset by the incident; and that Mark Rulff relayed this complaint to his father.

8. That on January 25, 1977, Mark Rulff received a complaint about Turner's conduct as a bus driver from Andrea Wilson who indicated that Turner had called her "gimpy" in reference to her use of crutches; that Wilson also complained about Turner's reckless driving, use of "coarse" language, and comments to women on the street; that Mark Rulff immediately relayed this complaint to Eugene Rulff; that on January 26, 1977, the Rulffs met with Turner and discussed the McElmurry, Loseke and Wilson complaints; that Turner admitted calling Wilson "gimpy" but indicated that he had just been joking and that he had subsequently apologized; that Turner denied driving recklessly or using coarse language, and later explained that Wilson's reference to his comments to passersby must refer to his harmless remark to a woman and her son with whom Turner was acquainted; that Turner denied the substance of the Loseke and McElmurry complaints; that Eugene Rulff told Turner that he appeared to create problems when he engaged

in conversations with passengers, that he should limit his future conversation with passengers to that which was absolutely necessary; and that failure to follow this directive would mean that his job would be in jeopardy.

9. That Eugene Rulff and Dennis Sigmund, who was employed as a bus driver by Respondent, often talked informally about Respondent's operation; that on or about February 10 Sigmund stopped at Rulff's home and indicated that the drivers were interested in organizing and were considering contacting the Complainant; that Sigmund related the benefits which representation by Complainant would bring and indicated that Turner had pointed out some of said benefits; that Rulff responded by stating that such a decision was up to the employes, and suggesting that employes consider contacting other labor organizations before they made their decision; that in early February Sigmund also informed Falconer of the employes' interest in organizing and that Falconer responded by indicating concern over the affect which the resulting increased operational costs would have on the future of the bus service, but also indicated that the drivers should do whatever they thought was in their self-interest.

10. That on February 22, 1977, the Complainant filed a petition with the Milwaukee office of the National Labor Relations Board (NLRB) requesting that it be certified as the bargaining representative of Respondent's employes; that Eugene Rulff received a copy of said petition on February 23, 1977; that Rulff was subsequently contacted by a representative of the NLRB who indicated that there was some question as to whether the Respondent fell within the NLRB's jurisdictional standard; that said representative informed Rulff that the revenue of Respondent and a separate corporation of Rulff's called Handy Cabs might be lumped together for jurisdictional purposes; that Rulff had questioned this action; that said representative sent a decision to Rulff which she purported would indicate the legitimacy of combining revenue; that Rulff read the decision and concluded that it did not allow for the combining of revenue; that Rulff called the NLRB representative who admitted that she had sent the wrong decision and indicated that she would attempt to forward the proper decision; that Rulff was rather upset by this episode and called Sigmund to discuss same; that during this conversation an agitated Rulff asked Sigmund "What are you trying to do, take away my livelihood?"; that Sigmund responded by stating that it was not the employes' intent to take away Rulff's livelihood; that shortly after this conversation with Sigmund, Rulff received a phone call from the NLRB representative who indicated that she had misread the decision in question, and thus that the revenue from the two corporations would not be lumped for the purposes of a jurisdictional determination; that Sigmund then dropped by Rulff's home and was told by Rulff that the misunderstanding with the NLRB had been cleared up; and that Rulff also told Sigmund that the employes should get all the information they could about their rights and then make the decision which was in their self-interest.

11. That in late February Eugene Rulff received a minor complaint about Turner from an employe who indicated that she and another driver found Turner's conduct irritating.

12. That on March 3, 1977, Respondent received a document from the NLRB indicating that the election petition filed by Complainant had been dismissed; that on that same day Kayleen Brereton, president of Handicapped Students of Wisconsin, Inc., called the Rulffs and related complaints which she had received from eight separate individuals regarding Turner's conduct as a bus driver; that said complaints included Turner's alleged failure to strap in a passenger, calling passengers at their home, and inconveniencing wheelchair-bound passengers

by changing his scheduled route; that Brereton also indicated that Turner had called her at home and told her about an "asshole" passenger who hadn't cooperated with a newspaper reporter doing a story on Respondent's operation; that Brereton reiterated a complaint which she had recited earlier to the Rulffs regarding Turner's having made embarrassing comments to a third party while transporting her; that later on March 3 Falconer called Eugene Rulff to talk about Respondent's operation; that during the course of this conversation Falconer related a complaint which he had received from a social worker to the effect that an on-duty driver, who Falconer believed to be Turner, had discussed the numerous operational difficulties which allegedly plagued Respondent's operation with her client; that Turner's remarks were sufficient to raise doubts in the social worker's mind about Respondent's future, and thus precipitated her call to Falconer; that as of March 3, 1977, Respondent had not received any complaints regarding the conduct of any other driver; that there was a very limited factual basis for the substance of the social worker's complaint or Brereton's complaint about the "asshole" remark; that plausible explanations existed to rebut the substance of several other complaints; and that as Eugene Rulff did not investigate any of the complaints which he had received on March 3, he was not aware that certain of the complaints lacked merit when he concluded that Turner should be discharged.

13. That on March 4, 1977, Eugene Rulff sent the following letter to Turner:

"Earl Turner:

Your job with Mini-Bus Charter service, Inc. will be terminated on 3-19-77. I am giving you this advance notice because I want you to have time to find another job.

There are several reasons why I must release you from your job. The main one is that you failed to follow my specific instructions to you after you had been told that three specific complaints brought against you by passengers were serious and that unless you stopped engaging passengers in conversation your job would be in jeopardy. I stress this point: I told you to stop engaging passengers in conversation except that needed for safety reasons and for normal conversation of a social nature involving saying 'hello, how are you today?' and 'goodbye, it was nice seeing you.' Or other words to that effect. I told you that because of the complaints received and the fact that each of them involved what you said to passengers and others while passengers were in hearing distance, you were to stop all conversation that was not essential to the transporting of passengers. You have failed to do this.

I have received calls from two persons, both of whom are in wheelchairs and both of whom are members of MOBIL and Handicapped Students of Wisconsin, Inc. telling me that they have received reports from passengers you have transported which said that you engage them in unwanted conversation and that not only is that conversation unwanted by them but it frequently irritates them, embarrasses them or disturbs them.

In addition to the above failure to follow orders it has also come to my attention that two other employees have expressed the feeling that you are either disturbing or irritating to them.

It has also come to my attention through talking with other people that you 'bad mouth' the operation of the E/H Bus System. For example, you have been heard to say to a passenger that the E/H buses are being operated in a poor manner that that [sic] the service will soon break down. (For your information, ridership is increasing and I have received specific complaints only about you.)"

On the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondent Mini-Bus Charter Service, Incorporated, by its discharge of Earl Turner, did not commit an unfair labor practice within the meaning of Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

On the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 5th day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In its complaint, filed March 21, 1977, the Complainant alleged that Respondent discharged Earl Turner because of his protected concerted activity on Complainant's behalf, and thereby committed an unfair labor practice within the meaning of Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act. The Respondent filed an answer on April 26, 1977, which substantially denied Complainant's allegations and affirmatively asserted that Turner was discharged because of misconduct as an employe.

Initially it must be noted that the Complainant has the burden of proving the allegedly discriminatory nature of the discharge. To meet this burden Complainant must prove by a clear and satisfactory preponderance of the evidence that Respondent had knowledge of Turner's protected concerted activity; that Respondent was hostile toward said activity; and that the discharge was motivated, at least in part, by Respondent's opposition to said activity. 2/

The record clearly reveals that Respondent was aware of its employes' desire to be represented by a labor organization. In early February Sigmund told Eugene Rulff of the employes' interest in organizing and this interest was subsequently confirmed when Respondent received a copy of Complainant's February 22 election petition. The record is somewhat less clear with respect to Respondent's knowledge of Turner's protected concerted activity. However, given Respondent's general knowledge of employes' concerted activity, Turner's past affiliation with the Teamsters, and Sigmund's statement that Turner had pointed out some of the advantages of union affiliation, it can readily be inferred that Respondent was aware that Turner was one of the employes who was actively interested in organizing a union. However, the above factors are not sufficient to warrant an inference that Respondent was aware of Turner's leadership role in the employes' organizational activity.

Having concluded that Respondent was aware of Turner's protected concerted activity, the Examiner turns to the question of whether Respondent was hostile thereto. The record indicates that while the Respondent made no overt effort to combat the employes' interest in organizing a union, there was a real concern on the part of Eugene Rulff as to the negative impact which a union might have upon Respondent's operation. While Rulff's remark to employe Sigmund about "taking away my livelihood" was made during a brief period of dismay over the NLRB's conduct, it is still indicative of the depth of this concern and must be translated into distaste and hostility toward the possibility of union representation for his employes. Combining this general hostility to the appearance of a union with Respondent's knowledge of Turner's interest in same, it may reasonably be concluded that Respondent was therefore hostile to Turner's protected concerted activity on the union's behalf. However, there is no evidence in the record which would warrant a conclusion that this hostility was in any way focused on Turner any more than it would have been upon any of the other employes who were interested in union representation.

2/ St. Joseph's Hospital (8787-A, B) 10/67, 12/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71; Rocky Rococo Corporation (13556-A, B 13557-A, B) 12/75; Harry Vine, Inc. (13828-A, B) 4/76.

The Examiner is thus ultimately confronted with the issue of whether Respondent's discharge of Turner was based, at least in part, upon its hostility toward his protected concerted activity. The record establishes Respondent's knowledge of Turner's concerted activity and its general unfocused hostility thereto. It is also clear that the discharge occurred after the employees' interest in union representation had crystalized through the filing of an election petition. ^{3/} This evidence is sufficient to create an inference of discriminatory discharge which would meet Complainant's burden of proof in the absence of persuasive evidence that Respondent had a different motivation for the discharge. However the strength of this inference is limited somewhat by the fact that Respondent lacked knowledge of Turner's leadership role in organizing the employees, and thus had no reason to be any more hostile toward Turner's activity than that of the other employes.

Arrayed against this inference is a substantial amount of evidence supporting the Respondent's allegation as to the reason for Turner's discharge. The record reveals that in January 1977, before Respondent had any knowledge of Turner's protected concerted activity, several passenger complaints were made against Turner, and that Eugene Rulff responded by instructing Turner to end the offending conduct and warning him of the consequences of further misconduct. Turner admits that he did not completely follow Rulff's instructions to limit his conversations with passengers. The record also reveals that on March 3, 1977, the date of the discharge decision, Respondent received separate unsolicited phone calls from Brereton and Falconer, representatives of Handicapped Students of Wisconsin, Inc., who related at least nine separate passenger complaints against Turner. As of that date, Rulff had not received any complaints against any other driver. At the hearing Complainant successfully rebutted the factual basis for several of the most serious complaints and introduced evidence indicating that Turner was popular with the majority of the passengers. This successful effort would be extremely significant if the issue before the Examiner were one of determining whether the Respondent had cause to discharge Turner. However its significance in the instant proceeding is limited because the Complainant has not demonstrated that, at the time of the discharge decision, Rulff was aware of the dubious nature of the complaints. In summary, the record reveals that on the date of discharge Rulff received what he believed to be significant complaints against an employe who he had earlier warned regarding similar types of misconduct. This evidence creates a potent inference that it was the passenger complaints which motivated Rulff to discharge Turner. It forces the Examiner to conclude that the Complainant has not met its burden of proving discriminatory discharge by a clear and satisfactory preponderance of the evidence.

Dated at Madison, Wisconsin this 5th day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner

^{3/} Complainant made much of the fact that the discharge occurred the day the Respondent became aware that the NLRB had dismissed Complainant's election petition. However it would appear that the timing would be much more significant if the discharge had occurred shortly after Respondent became aware of Turner's activity or of the petition's existence, instead of after the dismissal of the petition. Thus the strength of any inference to be drawn from the timing of the discharge is drawn from the fact that it followed the formalization of employe interest in Complainant via the election petition.