STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Peter G. Davis, having on August 5, 1977, issued Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, in the above-entitled matter and, wherein he concluded that the above named Respondent had not committed any unfair labor practice within the meaning of any of the provisions of the Wisconsin Employment Peace Act by terminating the employment of employe Earl Turner, and wherein he dismissed the complaint filed in the matter; and the above named Complainant having timely filed a petition for review pursuant to Section 111.70(5) of the Wisconsin Employment Peace Act, as well as a brief in support thereof; and the Respondent having filed a brief supporting the Examiner's decision, and the Complainant also having filed a brief in reply to the Respondent's brief; and the Commission, having reviewed the Examiner's decision, the entire record, and the briefs of the parties, being satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order should be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Findings of Fact, Conclusion of Law and Order, as well as the Memorandum Accompanying same, be and the same hereby are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Examiner's Decision

In its complaint the Union alleged that the Employer discharged driver Earl Turner because of the latter's protected concerted activity in initiating employes' interest in the Union. Following the conduct of the hearing, a review of the record, as well as the briefs filed by the parties, the Examiner concluded that the Union had not met the necessary burden of proof, by a clear and satisfactory preponderance of the evidence, that Turner had been discriminatorily discharged within the meaning of Section 111.06(1)(c) of the Wisconsin Employment Peace Act. In reaching such conclusion the Examiner set forth his rationale as follows:

> "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 employes' interest in union representation had crystalized through the filing of an election petition. 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 employes, and thus had no reason to be any more hostile toward Turner's activity than that of the other employes.
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> 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."

The Petition for Review

The Union, in its petition for review, and brief in support thereof, argues that the Examiner made erroneous factual findings, which alleged errors prejudicially affected the Examiner's decision. The Union contends that the record establishes that passenger complaints concerning Turner, which came to the Examiner's attention prior to the concerted activity, were investigated by the Employer and discussed with Turner, but that following the Employer's knowledge of Turner's concerted activity, "unfounded" passenger complaints against Turner were neither investigated nor discussed with Turner prior to the latter's termination. The Union sums up its argument as follows:

"Thus, Rulff's willingness to rely on secondhand information by close personal associates whom he knew would be deeply concerned about the Teamster campaign to discharge Turner without any investigation, and his unwillingness to reinstate Turner after learning the true facts, demonstrate that he was, at the very least, willing to find any reason to justify the discharge of a Teamster supporter. 'None are so blind as those who will not see.' But such self-induced 'blindness' is no defense to discharge that interferes with his employees and Teamster Local 695's organizational rights."

Discussion

The Union correctly points out that the Respondent did not call Turner in for a conference concerning the later complaints as it did with respect to the earlier ones. The Union would have the Commission infer that this difference in treatment is due to Respondent's learning in the interim of its employes' interest in organization and of Turner's participation in the organization effort. However it should be also pointed out that the Employer in the letter of termination of Turner continued Turner in employment for an additional two week period and there is no evidence that Turner at any time during said two week period sought out any agent of the Employer to respond to, or to deny, the "allegations" with respect to the matters set forth in said letter as a basis for Turner's termination. It must also be noted, that the Respondent knew of Turner's prior Teamster affiliation and of his occasional discussions about Respondent with Teamster-represented drivers of Madison Metro before it chose to confer about the first series of complaints with Turner. It should also be noted that in a service industry such as Respondent's, customer satisfaction is an important element in employe performance. To the extent that consumer complaints are received, especially from helping professionals or others influential among the handicapped and helping agencies, an adverse impact can result for Respondent's business whether the complaints are altogether well founded or not. In that context, Respondent was, in March, receiving additional complaints about Turner after Turner was warned about the same sort of conduct complained of previously. It

is not unreasonable to conclude that the initial conference with Turner was held both for investigative and for reprimand purposes. Having found the warning unavailing as a progressive deterrent of subsequent conduct inciteful of additional complaints, Respondents might well have concluded that a similar session would have been unavailing as well.

The Union's reliance on Burnup and Sims is misplaced. In that case, the High Court summarized its holding as follows:

> "In sum, Sec. 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 1/

Here, Complainant contends that Turner was discharged for alleged acts of misconduct in the course of the following activities:

> "In Secora's presence, Turner told a customer about the union meeting . . . she relayed this information to Michael Falconer, who, if his testimony is to be credited, then informed Rulff that Turner had predicted 'union troubles' . . .[and] Turner testified that he told Brereton that the drivers were going union after she questioned him about this possibility . . ." 2/

The Examiner has not found, and the record does not support the notion that, Turner was discharged because of misconduct committed in the course of the above-quoted activities or any course of conduct associated with 3/ protected activites. Nor do we find that Respondent's belief that Turner had committed the complained of improprieties has been shown to have been entirely mistaken. For, as the Examiner indicates in his memorandum, the Complainant successfully rebutted the factual basis for several of the most serious complaints but they did not discredit all of those complaints. Turner himself admitted that he had not fully complied with his earlier reprimand. For those reasons, this case is not within the ambit of Burnup and Sims.

The Complainant also contends that Brereton and Falconer "showed hostility to the Teamsters and had a managerial interest in preventing its organizational compaign from succeeding." 4/ From those facts, and others, the Union would apparently urge the inference that said individuals purposefully misinformed Respondent and/or that Respondent had reason to know that information supplied by them was tainted by their alleged

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1/ NLRB v. Burnup and Sims, Inc., 379 U.S. 21, 57 LRRM 2385, 86 (1964).

2/ Union Brief in support of Petition for Review, at 2-3.

3/ Compare, Allied Industrial Workers v. NLRB, 476 F. 2d 868, ___LRRM___(CADC, 1973).

4/ Union Brief in support of Petition for Review, at 3.

anti-union bias. We find these latter arguments to be without support in the record.

Dated at Madison, Wisconsin this 17th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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