STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALAN VINCENT MC NEIL, Complainant, vs. STUDENT TRANSPORTATION COMPANY, INC., Respondent.	:	Case IX No. 22768 Ce-1771 Decision No. 16247-A

Appearances:
Mr. Julian A. Modjeski, Wisconsin Director, appearing on behalf of the Complainant.
Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys at Law, by Mr. Mark W. Schneider, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having, on March 7, 1978, 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 the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Stephen Pieroni, 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 111.70(5) of the Wisconsin Statutes; and a hearing on said complaint was held before the Examiner in Milwaukee, Wisconsin on April 11, 1978; and a transcript of said proceedings was received on May 19, 1978 and the parties submitted briefs until June 16, 1978; 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 Student Transportation Company, herein Respondent-Company, is an Employer operating a transportation company in Milwaukee, Wisconsin; that said Respondent-Company employs approximately 120 employes at two terminals in Milwaukee, Wisconsin; that Charles Monfre, Sr., is Respondent-Company's General Manager and Charles Monfre, Jr. and Michael Warshauer are Respondent-Company's co-terminal managers; and at all times material herein, functioned as Respondent's agents.

2. That Alan Vincent McNeil, herein Complainant, was employed as a part-time school bus driver by Respondent-Company from September 6, 1977 until his discharge on January 11, 1978; Complainant was rehired on February 3, 1978 and again discharged on February 28, 1978; that during the period from September 6, 1977 to January 11, 1978, Complainant occasionally discussed with other employes the possibility of being represented by the Communication Workers of America (CWA) for purposes of collective bargaining; that said conversations took place after working hours when Complainant and his co-employes were away from the Respondent-Company's premises; that prior to Complainant's discharge on February 28, 1978 Complainant did not discuss the prospect of forming a Union with Respondent-Company's General Manager, Charles Monfre, Sr., nor with the co-terminal managers, Charles Monfre, Jr. and Michael Warshauer; that prior to February 28, 1978, Respondent's management personnel (Monfre, Sr., Monfre, Jr. and Warshauer) were not aware of Complainant's interest in forming a Union among Respondent-Company's employes.

3. That Respondent-Company issues work rules to its employes during an orientation program for new hires; Complainant attended such an orientation program shortly after being hired in September, 1977; that No. 10 of said work rules states: "Improper or unseemly conduct not becoming a school bus driver will not be tolerated. This includes all relationships with pupils, teachers, parents, fellow employees and employer"; that on two or three different occasions prior to January 11, 1978 as a result of complaints about Complainant's behavior being loud and unruly, Monfre, Sr. called Complainant into his office and cautioned Complainant about using loud and profane language toward other employes; that on January 11, 1978, Complainant became involved in two separate altercations with co-employes McClellan and Hess in the drivers' room on Respondent's premises; that about 30 other drivers were present during said altercations; that Complainant, but not McClellan nor Hess, used loud and abusive language; and that Complainant's separate remarks to McClellan and Hess respectively could only be understood as a challenge to each of them to step outside the drivers' room to engage in a fight; that Charles Monfre, Jr. and Michael Warshauer overheard Complainant's loud remarks from their respective offices and Warshauer proceeded to break up the situation before any blows were delivered; and that based upon his knowledge of Complainant's conduct, Warshauer terminated Complainant's employment as of January 11, 1978.

4. That subsequent to January 11, 1978, Complainant contacted Monfre, Sr. several times by telephone and requested to be reinstated to his former position; that Monfre, Sr. agreed to rehire Complainant and met with Complainant on or about February 3, 1978 wherein Monfre, Sr. informed Complainant that Complainant would be rehired on condition that he follow certain ground rules; after Monfre, Sr. and Complainant discussed said ground rules, Monfre, Sr. called Monfre, Jr. and Warshauer into his office to attend said meeting and repeated the fact that Complainant was being hired upon condition that he follow certain ground rules, and said ground rules were again repeated orally to Complainant; the ground rules essentially required Complainant to perform his job without using loud and profane language and to avoid arguing with management and co-employes; said ground rules did not prohibit Complainant from engaging in union organizing activities; and Complainant agreed to return to work pursuant to said ground rules.

5. That on the afternoon of February 28, 1978, both Monfre, Jr. and Warshauer were standing in the dispatch room when Complainant approached the dispatch window and requested the rest of the afternoon off in order to take care of personal business; Complainant's request was denied by Monfre, Jr.; that after his request was denied, Complainant slammed a clipboard down on the dispatch counter, took the route slips off the clipboard and threw them inside the dispatch window in the direction of Monfre, Jr. and Warshauer; and that Complainant stated in a voice loud enough for the other drivers present to hear: "If any of these Uncle Toms would come up and ask you for time off, you'd let them off"; and that immediately following said incident and based upon his observation of Complainant's conduct, Monfre, Jr. discharged Complainant on Respondent's behalf on February 28, 1978.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Respondent-Company, by discharging Complainant, Alan Vincent McNeil, did not commit an unfair labor practice within the meaning of Section 111.06(1)(a) or (c) of the Wisconsin Employment Peace Act.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin this 31st day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

STUDENT TRANSPORTATION COMPANY, INC., IX, 16247-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

The Communication Workers of America filed a complaint on behalf of Complainant alleging that Complainant's discharge in February, 1978 was "in violation of his (McNeil's) rights." Respondent's answer substantially denied Complainant's allegations and affirmatively alleged that Complainant failed to allege the "jurisdictional prerequisites" of Sections 111.02(2), 111.02(3) and 111.07(2), Wis. Stats. At the hearing herein, Respondent's counsel concluded his opening statement by inquiring of the Examiner if he would render a decision from the bench on said affirmative defenses. The Examiner declined to rule on said affirmative defenses at that time, but indicated that Respondent was free to make a motion in that regard at the conclusion of the hearing. Although Respondent neither pursued a motion to dismiss at the hearing, nor argued the merits of the alleged jurisdictional defects in its brief, the undersigned will now proceed to consider and resolve said issue.

It should initially be noted that Section 111.02(2) defines the term "employer"; Section 111.02(3) defines the term "employe"; and Section 111.07 is entitled "Prevention of unfair labor practices" and paragraph 2 contains four sub-paragraphs, none of which were specifically referred to in Respondent's affirmative defense. The complaint herein did not specifically allege that Complainant was an "employe" within the meaning of Section 111.02(2), Wis. Stats.; nor did said complaint allege that Respondent was an "employer" within the meaning of Section 111.02(3), Wis. Stats.; lastly, the Complaint did not allege with particularity the specific section(s) of ch. 111 which were allegedly violated by Respondent's action. Section 111.07(2)(a) suggests that the complaint should state the specific unfair labor practice which was allegedly committed by the other party. Here, the Examiner finds that the complaint substantially alleged a violation of Section 111.06(1)(a) and (1)(c) of WEPA, by stating:

> "The reason for the discharge is a pretext. The fact that McNeil had promoted Union organizing efforts is known to the Company. When McNeil was re-engaged on February 3, 1978, the Company insisted that McNeil was not to organize anything, in violation of his rights. The real reason for McNeil's discharge was to discourage support of employes for the Communication Workers of America."

Inasmuch as the first two alleged jurisdictional defects were cured during the course of the hearing herein, and Respondent made no showing that it was in any way prejudiced by these alleged jurisdictional defects in the preparation and presentation of its defense, the Examiner concludes that Respondent's affirmative defenses do not require dismissal of the complaint herein.

Turning to the merits of the instant complaint, Complainant's assertion that Respondent violated his statutory rights is based upon a belief that the Respondent-Company illegally insisted that McNeil not engage in union organizing activity and that Complainant's discharge of February 28, 1978 was intended to discourage support among Respondent's employes for the Communication Workers of America. To meet his burden of proof with respect to the discriminatory nature of the discharge, Complainant must prove by a clear and satisfactory preponderance of the evidence that he was engaged in concerted activity which is protected by WEPA; that Respondent was aware of Complainant'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. 1/ If Complainant were to meet

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1/ St. Joseph's Hospital (8787-A, B) 10/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage, (9781-A, B, C) 3/71, 4/71, 7/71; and A.C. Trucking Company, Inc. (11731-A) 11/73.

his burden of proof, the Examiner would find Respondent to have committed an unfair labor practice within the meaning of Section 111.06(1)(a) and (c) of WEPA.

Section 111.04 of WEPA states: "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

It is Respondent's initial position that Complainant failed to establish that he was involved in "lawful concerted activity" within the meaning of Section 111.04. Although Complainant's testimony was somewhat sketchy as to the extent of his organizing activity, it is undisputed in the record that Complainant did engage in occasional conversations with his fellow employes, wherein they discussed forming a union. The Examiner finds that the record contains sufficient evidence to support a conclusion that these conversations between Complainant and his fellow employes, in which they discussed forming a union, did constitute lawful concerted activity which is protected by WEPA.

Having concluded that Complainant did engage in protected concerted activity, the question becomes one of determining whether Respondent-Company was aware of said activity and hostile thereto. It is the undersigned's conclusion that Complainant has failed to meet his burden of proof regarding Respondent's knowledge of his protected activity.

The record reveals that the only conversations that Complainant could recall having with other employes concerning the formation of a union took place prior to January 11, 1978. None of these conversations occurred at work. Complainant did testify that he told Monfre, Jr. on February 28, 1978, the day of the discharge in question, that he "hoped they do get a union out here" and during the same conversation also told Monfre, Jr. that "if they come to vote, I'll vote." Although Complainant initially testified that these statements were made just prior to his discharge on February 28, 1978 2/ he later testified during the hearing that these statements were made just after Monfre, Jr. told him he was discharged. 3/ Reviewing the context of the verbal exchange that led up to Complainant's discharge of February 28, 1978, it is noted that Complainant and Monfre, Jr. were not discussing the union issue; rather, Complainant had requested time off for that afternoon, and Monfre, Jr. had denied said request. It appears that Complainant's latter testimony is more accurate and the undersigned concludes that Complainant's above-stated remarks to Monfre, Jr. occurred after his discharge of February 28, 1978.

In addition, Monfre, Sr., Monfre, Jr. and Warshauer all credibly testified that they were not aware of Complainant's alleged organizing activity at any time prior to his discharge of February 28, 1978. Indeed, it would seem highly improbable that Respondent's agents would rehire Complainant on Febraury 3, 1978 if they were aware of said Union activity and then terminate him three and one half weeks later for activity which occurred prior to Complainant's rehire. Hence, the record reveals that Respondent had no opportunity to learn of Complainant's protected activity and there is simply no evidence to indicate that Respondent's agent had, in fact, obtained any knowledge of Complainant's protected activity at any time prior to Complainant's discharge of February 28, 1978.

The other aspect of Complainant's charge that must be discussed is the allegation that upon his rehire Complainant was told by Respondent that he

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2/ Tr. 21.

3/ Tr. 51.

could not engage in any union organizing activity. If Complainant had established that allegation it would tend to demonstrate Respondent's knowledge of Complainant's protected activity, as well to prove a case of unlawful interference of the employe's protected rights under WEPA. However, the undersigned concludes that Complainant's testimony falls short of meeting his burden of proof.

Initially, it must be noted that Complainant was given two opportunities at hearing to describe the conversation during which Monfre, Sr. allegedly stated that Complainant was not to engage in any organizing activity. Complainant stated as follows:

> ". . . I came to his office, and I sat down, and he said, 'I'm going to give you back your job under the conditions that you do not use loud or abusive language, do not blow up, do not -- whatever they give you, you accept that. You're not to be congregating in a crowd. You're not to be -- whatever he says, whatever there is, I don't want to hear your name mentioned about nothing.' He says, 'If I hear it mentioned, you'll have to come in here and explain nothing to me at all. You'll be fired right then and no questions asked.'" (Tr. 6 and 7.)

> "THE WITNESS: Well, as I said before, you know, I was, you know, not to be loud or get up, you know, get upset or cause a disturbance in the driver's room, on the lot. In other words, I was told word-for-word, that I could just come in there and breathe and drive. I'll also state that they did say that if I had a problem that I could come to either one of them and discuss it with them." (Tr. 10)

Said testimony more closely comports with the testimony of Monfre, Sr. in that the conditions established for his rehire were directed at problems that Complainant had during the first period of his employ, and that Monfre, Sr. simply told Complainant to avoid any possible trouble situations. Given Complainant's rather stormy history of employment and Monfre's lack of prior knowledge of Complainant's union activity, it is the undersigned's conclusion that Monfre, Sr. credibly testified that he did not make any reference to union organizing activity when he spoke to Complainant on February 3, 1978 concerning the conditions of his re-employment. Thus, the Examiner cannot conclude that Complainant has met his burden of proof regarding Respondent's knowledge of his protected concerted activity or Respondent's alleged interference with said protected activity. Therefore, the instant complaint must be dismissed.

Dated at Madison, Wisconsin this 31st day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner