VERMONT LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 300	)	
v.	)	DOCKET NO. 85-16
ENOSBURG FALLS WATER AND LIGHT DEPARTMENT	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

The International Brotherhood of Electrical Workers, Local 300 ("Union"), filed an unfair labor practice charge on April 12, 1985, and an amended charge on April 25, 1985. The charge and amended charge alleged the Enosburg Falls Water and Light Department ("Department") committed unfair labor practices in violation of 21 VSA §1726(a)(1), (3) and (5) by failing to bargain in good faith from on or about June 1, 1984, to the present; discharging employees represented by the Union who were engaged in a lawful strike; conditioning the employees' reinstatement upon the signing of a statement they would not be members of the Union; and refusing the bargain in good faith by refusing to resume negotiations.

After investigating the matter, the Labor Relations Board issued an unfair labor practice complaint, taking the allegations contained in the charge and amended charge as true. A hearing was held before the full Board on May 23, 1985. Attorney Richard Gadbois represented the Department. Attorney Aaron Krakow represented the Union.

The Union filed Requested Findings of Fact and a Memorandum of Law on June 6, 1984. The Department filed no brief.

FINDINGS OF FACT

1. The Union has been the exclusive bargaining representative of the line crew, hydro and diesel operators, utility men, billing clerks and systems manager of the Department for over 10 years (Union Exhibit 19). There are 10 employees in the bargaining unit.

2. The Water and Light Department supplies electrical power and water to the residents of the Village of Enosburg, the Town of Enosburg and certain surrounding Towns. The Department is a separate and distinct corporation established by the Legislature and its income is derived from assessing fees to users which are approved by the Public Service Board. The Department is governed by a three-person board of commissioners. The commissioners have the sole and exclusive authority for the governing and administration of the Department. At all times relevant, the commissioners were Noel Blouin, Chairperson; James Hayes and George Sumner (Union Exhibit 19).

3. The most recent collective bargaining contract between the Union and Department covered the period from August 23, 1982, to August 22, 1984. The contract provided that during its life no strikes or lockouts would be authorized (Article 5, Strikes and Lockouts) and that should negotiations for a successor contract continue beyond the expiration date of the 1982-84 Contract, all items and conditions in the 1982-84 Contract would remain in effect until negotiations were concluded (Article 32, Terms of Agreement) (Exhibit 19).

4. On June 6, 1984, James Merrigan, Business Agent for the Union, notified the Federal Mediation and Conciliation Service ("FMCS") the 1982-84 agreement between the Union and the Department was to expire on

August 22, 1984, and that agreement on a successor contract had not been reached between the Union and the Department as of that date. The Vermont Department of Labor and Industry received a copy of the notice sent to the FMCS (Union Exhibit 21).

5. On June 6, 1984, Merrigan sent a letter to the Department commissioners presenting a series of contract proposals. Five of the proposals contained in that letter requested changes in contract language relating to working hours, medical insurance, insurance (wage continuation), sick leave and bereavement and overtime, while one proposal requested a "substantial wage increase" (Union Exhibit 4).

6. On July 18, 1984, Attorney Richard Gadbois informed Merrigan by letter the Department Commissioners had retained him to negotiate the successor contract on their behalf and requested Merrigan to provide him with specificity as to the Union's proposals (Union Exhibit 5).

7. Within one to two weeks, Merrigan informed Gadbois by letters the Union was requesting a 7 percent wage increase and that, with regard to the non-wage proposals: "the items presented in our demands for the most part are minor and simply reflect updating the agreement to provide for changes that are already in place at Enosburg. #5 is a request to actually increase sick time accumulation" (Union Exhibits 6, 7).

8. On August 23, 1984, Gadbois notified Merrigan the five proposals presented by the Union concerning non-wage issues were acceptable to the Department "subject to agreement on the specific language", but that the Department was seeking a two-year contract with a zero percent wage increase in the first year and a 5 percent wage increase the second year (Union Exhibit 8).

9. On September 7, 1984, the Union and the Department held a negotiation session attended by the Union negotiating committee consisting of Ernest Robbins, Union Representative; Frank Elkins and Greg Clark, Department employees, and by Department Commissioners Blouin, Sumner and Hayes; and Gadbois. The major discussion at the negotiation session related to wages. No agreement was reached on wages. The Department continued to offer a 0 percent increase in the first year of the contract and a 5 percent increase in the second year. The Union continued to seek a 7 percent increase for a one-year contract.

10. In a September 11, 1984, letter to Robbins, Gadbois offered to reopen wage discussions with regard to the second year 5 percent increase, provided the Department of Labor cost of living index exceeded 10 percent in the first year of the Contract (Union Exhibit 10). The Union considered this new offer to be insignificant since the cost of living was increasing at a rate less than 5 percent a year at that time. The Department's September 11th offer did not include any increase for the first year of the contract.

11. After receiving Gadbois' September 11, 1984, letter, the Union believed negotiations had reached an impasse.

12. Between September 11, 1984 and October 11, 1984, Ira Lobel, FMCS Mediatior, had several phone conversations with Merrigan and Gadbois. As a result of those conversations, Lobel scheduled a mediation session for October 11, 1984, in Enosburg Falls to assist the parties in reaching agreement. The mediation was agreed to voluntarily by both parties. Although the Department attorney suggested at the hearing Lobel was not appointed precisely as required by statute (see 21 VSA §1731), the Department acquiesced in the process of Lobel serving as mediator and thus waived any irregularity.

13. On October 11, 1984, there was a mediation session in Enosburg Falls, conducted by Lobel, attended by Gadbois for the Department and Merrigan, Robbins, Clark and Elkins for the Union. Merrigan was surprised the commissioners were not at the mediation session.

14. The Union representatives attended the mediation session based on the assumption Gadbois had authority from the commissioners to make a binding offer and to reach an agreement with the Union. The Union would not have participated in the October 11 mediation session if it had known wage offers made by Gadbois were not authorized by the Department.

15. For the greater part of the October 11 mediation session, Lobel met with each of the parties individually. During mediation, both the Union and the Department presented several proposals to Lobel which indicated movement from their respective wage positions. While no agreement was reached, the parties were closer to reaching settlement during mediation than they had been at any time prior to the session.

16. At the conclusion of the October 11 mediation session, Gadbois and the Union representatives met together with Lobel. At that time, Gadbois informed the Union he would have to speak with the commissioners concerning those offers.

17. On October 22, 1984, Gadbois notified the Union by letter the commissioners were unwilling to modify the wage offer set forth in their letters to the Union dated August 23, 1984 and September 11, 1984 (i.e., 0 percent in year one and 5 percent in year two, with reopening of negotiations for year two if the cost of living index exceeded 10 percent in year one)(Union Exhibit 12). This letter effectively repudiated all proposed compromises in wages Gadbois had made at mediation.

18. In a November 6 letter, Merrigan notified Brian Burgess, Commissioner of the State Department of Labor and Industry, there was an impasse in negotiations and there had been mediation which was unsuccessful in resolving the dispute. Merrigan requested that a fact finder be appointed (Department Exhibit A).

19. Pursuant to the Union's request, Burgess appointed Alan Rome as fact finder on December 20, 1984 (Union Exhibit 14).

20. In a December 28, 1984, letter to Rome, Gadbois stated: "Please schedule the first meeting at a time and place convenient for you. My client will be there." (Union Exhibit 20).

21. At no time did the Department express any objection to proceeding through fact finding.

22. On January 18, 1985, the "Union Employees" of the Department sent Department commissioners a letter which provided in pertinent part:

> It has been close to five months without coming to terms on our contract. This is a very long time considering the only real issue is wages... We as conscientious employee's (sic) believe that alot (sic) of money could have been, and still could be saved, by having enough respect for the employee's (sic) to sit down and talk. You as commissioners have sat in on one negotiation session. Since there has (sic) been only two I guess you can say you sat in on half. As for the second session which was conducted with a mediator and Mr. Gadbois... Mr. Gadbois gave us, through the mediator, many different proposals, this was done very professionally, except for one thing, he did not have the authority to offer these proposals. When the proposals were presented to you the commissioners they were all recinded (sic) and we were back to square one. This was a waste of time and money to both parties, and caused some hard feelings.
>
> ...We are sure that an agreement can be reached, but in order for this to come about there must be communication between the employees and you. We were and still are willing to sit down and negotiate at any time.
>
> (Union Exhibit 15)

23. The Department commissioners did not respond to this January 18 letter.

24. On January 26, 1984, a fact finding hearing conducted by Alan Rome was held in Enosburg Falls. Present at the hearing for the Union were Merrigan, Elkins, Clark and Robbins. Gadbois was present for the Town. When Merrigan asked Gadbois where the commissioners were, Gadbois responded, "one's delivering oil, one's breeding a cow and one's milking a cow". None of the commissioners attended the hearing.

25. At the fact finding hearing, evidence was presented comparing wages and working conditions of Department employees with wages and working conditions of other municipal utility employees and private utility employees in comparable Vermont communities. The Department claimed inability to pay more in wage increases to its employees than its proposal, but failed to offer substantive evidence in support of its contention (Union Exhibit 1).

26. On or around February 26, 1985, Rome issued the following recommendation:

> It is woefully evident that the employees under consideration are underpaid as compared with the employees performing similar work in both public and private work in similar communities. It is, also, obvious that 20% and 15% increases, although needed, could not be absorbed sufficiently by the municipality.
>
> Therefore, the following recommendation is made:
>
> 9.5% increase (first year, 8/84 - 8/85).
> 2nd year to be bargained forthwith.
>
> (Union Exhibit 1)

27. On March 7, 1985, Merrigan informed Gadbois the Union would accept the fact finding report in its entirety (Union Exhibit 16).

28. In a letter of March 19, 1984, Gadbois notified Union Representative Robbins the Department was presenting the same wage proposal that it had presented back in August and September of 1984 (i.e., 0 percent in year one, 5 percent in year two with a wage reopener in year two if the cost of living index exceeded 10 percent in year one). Gadbois indicated the offer would expire 30 days from the date of the letter (Union Exhibit 17).

29. In a letter of March 25, 1985, Robbins notified Gadbois that since the Department had not altered its wage position, there was a need for the Union to meet with the commissioners present and that it was essential Gadbois reply to the letter by Friday, March 29, 1985 (Union Exhibit 18).

30. On March 29, 1985, at which point the Union had received no response to its March 25 letter, Merrigan indicated to Gadbois' secretary it was essential Gadbois meet with the Union that day in Enosburg.

31. On March 29, at approximately 4:00 p.m., Gadbois and Commissioners Blouin and Sumner came to the Water and Light Department plant to meet with Merrigan and the Union employees. Merrigan told Gadbois there was a "serious problem" and that "we should sit down and talk" by Monday (i.e., April 1). Gadbois responded, "You have our offer; if you have nothing new, there's no sense rehashing" or words to that effect. The last comment made at the meeting by Gadbois to Merrigan was "do what you have to do". Merrigan responded, "I intend to". Merrigan understood this exchange to indicate Gadbois understood the Union was planning to go on strike.

32. At the March 29 meeting, Gadbois presented a proposal in which the Department's 5 percent wage increase would be split between year one and year two. This proposal had not previously been reduced to writing by Gadbois but it had been discussed and presented by Gadbois in previous conversations with Merrigan.

33. On April 1, 1985, at approximately 7:00 a.m., more than 30 days after the issuance of the fact finder's report, the Department employees represented by the Union went out on strike.

34. At or about 7:30 a.m., Clark notified Commissioner Blouin the strike was to occur and that the Union would leave two employees in the plant to answer the ambulance and fire phones which were job functions of Union employees, until such time that the Commissioners could have someone else take over those tasks. Alan Demar and Patrick Gilman, two Union employees, remained in the plant to answer the fire and ambulance phones.

35. At or about 8:00 a.m., Blouin arrived at the plant. Demar asked Blouin whether he wanted him to turn the operating wheel off or just put it in the neutral position. Blouin indicated the wheel should be turned off. Demar told Blouin that could be costly. Blouin responded "I don't care what it costs, you guys are done." Demar said to Gilman, "I guess that means we're fired". When Demar made that comment, Blouin was in the area. Blouin did not respond to the comment. Demar and Gilman understood Blouin's comment to mean he was firing them.

36. At or about 8:15 a.m., when a replacement showed up to take their place, Demar and Gilman left the plant and went outside to the picket line which was set up in front of the plant. James Merrigan, Robbins, and employees Clark, Elkins, Barbara Kennison, Mike Merrigan and other employees were on the picket line. Demar stated to the picketers, "we're all done, boys" or words to that effect, and told the picketers what Blouin had said. The picketers present understood being "done" to mean they were fired.

37. On April 1, 1985, as a result of the information presented by Demar, Elkins, Mike Merrigan, Clark, Kennison, Robbins and James Merrigan were of the opinion all of the strikers had been fired.

38. Within a few days after the beginning of the strike, Mediator Lobel called James Merrigan and asked if he could be of any assistance in resolving the dispute. Merrigan told Lobel he would meet at any time. Lobel suggested Merrigan call Gadbois. Merrigan called Gadbois and told him of Lobel's offer of assistance. Merrigan told Gadbois the parties should "talk" and reach agreement somewhere between the Department's proposal and the fact finder's recommendation. Gadbois told Merrigan he would talk to the commissioners and get back to him.

39. In the late afternoon on or about April 4, 1985, Gadbois drove to the picket line and spoke to James Merrigan in the presence of the picketers who included Elkins and Clark. Gadbois told Merrigan the commissioners did not want to meet with the Union; that the Union had their offer. Merrigan asked Gadbois if the issue was the Department not having enough funds. Gadbois indicated inability to finance a wage increase was not a problem; that there was a "bottomless pot" and that any wage increase would be presented to the Public Service Board for approval and then passed on to the customers. Gadbois stated the Department commissioners thought the employees "were paid enough" for the Enosburg area. In the same conversation, Gadbois told Merrigan this was "serious business" and that Merrigan should advise employees to fill out employment applications; that the Department would consider them for employment. Elkins, Clark and Merrigan understood this comment concerning the filling out of applications to mean each of the employees had been fired; otherwise the employees would not have to fill out applications.

40. On April 8, 1985, at about 9:50 p.m., there was a power outage in Enosburg Falls. At about 11:00 p.m., Demar and Mike Merrigan arrived at the plant. Demar and Merrigan were observing the situation at the

plant along with several other Enosburg residents when Blouin approached Demar and said words to the effect of, "I thought I fired you a week ago. You have no invested interest here. You're just harassing us. Why don't you leave". Neither Demar nor Merrigan heard Blouin order any other person to leave the property. At no time was Demar harassing any of the workers who were trying to restore the power nor did he interfere with their work.

41. On April 6, 1985, Commissioner Blouin called employee Kennison at her home and asked her whether she would like to return to work. He told her if she returned, it would be to a non-Union position. In addition, Blouin informed Kennison if she wanted to return to her job, she needed to fill out a job application.

42. On or about April 9, 1985, Kennison filled out a job application for the position of clerk and mailed the application to the Department. On or about April 10, 1985, Commissioner Sumner called Kennison and asked her to come down to the plant for an interview prior to beginning work.

43. On April 12, 1985, Kennison met with Sumner at the Water and Light Department plant. At that meeting on April 12, Sumner informed Kennison she had to resign from the Union in order to return to work. Kennison began work that day, and at or about noon she telephoned the Union office and notified the Union secretary she was resigning from the Union. Kennison's job duties were the same as those she performed before she went on strike.

44. Within a week, Sumner approached Kennison while she was working and asked her if she had resigned from the Union. Kennison informed Sumner she had resigned from the Union.

45. On April 26, 1985, another mediation session was held between the Union and Gadbois with Federal Mediator Lobel.

46. In a newspaper article in the St. Albans Messenger of April 27, 1985, a local newspaper, Commissioner Blouin was quoted as saying, "I think it's just a matter of being polite", when asked why the Department had agreed to sit down with the strikers and a Federal mediator. In addition, he was quoted as saying, "We wouldn't have any of them back" (Union Exhibit 2). This article contributed to employees' perceptions they had been discharged for going on strike. Blouin never contested the accuracy of these reports at the hearing or elsewhere.

47. On approximately April 28, 1985, there was a phone conversation between James Merrigan and Gadbois. This conversation was a follow-up to the mediation session of April 26, 1985. In this phone conversation, the Union and the Department reached an agreement over the economic issue of the wage increase. The Department conditioned its wage proposal on the Union withdrawing its unfair labor charges at the Labor Relations Board and the employees being entitled to return to work, but not immediately.

48. On April 28, 1985, the Union was willing to accept the Department's offer, and send the strikers back to work if the wage offer had not been conditioned on the Union withdrawing its unfair labor practice charge and if the Department had been willing to reinstate the strikers to their positions they held prior to their discharges.

49. At the hearing, the Department attorney attempted to impeach Mike Merrigan on the issue of whether he was discharged by attempting to introduce alleged prior inconsistent statements made by Merrigan while applying for unemployment compensation. The Board ruled this evidence was inadmissible pursuant to 21 VSA §1314(g). Blouin, who was present at the hearing, was not called as a witness to repudiate, explain or defend any statement attributed to him by others on this issue.

OPINION

There are four issues before us raised in the charge and amended charge and adopted in our complaint: whether the Department committed unfair labor practices by: 1) failing to bargain in good faith before Union employees went on strike on April 1, 1984; 2) discharging employees represented by the Union who were engaged in a lawful strike; 3) conditioning employees' reinstatement upon the signing of a statement they would not be members of the Union; and 4) refusing to bargain in good faith after the commencement of the strike by refusing to resume negotiations. We discuss each of these issues in turn:

I. Refusal to Bargain in Good Faith before April 1 Strike

The Municipal Employee Relations Act (MERA) requires representatives of the employer and employees to meet at any reasonable time and bargain in good faith with respect to wages, hours and conditions of employment and execute a written contract incorporating any agreement reached; provided, however, that neither party shall be compelled to agree to a proposal nor to make a concession. 21 VSA §1725 (a). It is an unfair labor practice for an employer to refuse to bargain collectively in good faith with the exclusive bargaining agent. 21 VSA §1726(a)(5).

Where the language of MERA and the National Labor Relations Act (NLRA) are virtually identical, we look to Federal court decisions interpreting the NLRA for guidance. In re Local 1201, AFSCME, 143 Vt. 512, 515 (1983). Burlington Fire Fighters Association v. City of Burlington, 142 Vt. 434, 435 (1983). §1725(a) and §1726(a)(5) of MERA substantively parallel the language of Section 8(a)(5) and Section 8(d) of NLRA. Thus, we look to case law under those sections for guidance to determine whether the Department refused to bargain in good faith.

The duty to bargain in good faith is an "obligation... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement". NLRB v. Montgomery Ward and Co., 133 F2d 676, 686 (CA 9, 1943). This implies "an open mind and a sincere desire to reach an agreement", Id., as well as a "serious intent to adjust differences and to reach an acceptable common ground". NLRB v. Insurance Agents Union, 361 US 477, 485 (1960).

Employer bad faith bargaining may be manifested in many ways. The employer may intend to subvert the authority of the bargaining representative, avoid settlement altogether, or attempt to effect an agreement on terms substantially dominated by management. Rutland School Board v. Rutland Education Association, 2 VLRB 250, 273 (1979). The totality of the employer's conduct must be analyzed and the context in which the bargaining took place must be evaluated to determine if bad faith exists. Id., at 273, 276. Continental Insurance Co. v. NLRB, 495 F2d 44, 48 (CA 2, 1974).

The municipal employer shall be represented in bargaining by its legislative body or its designated representative or representatives. 21 VSA §1725(b). The commissioners' appointed representative for negotiations was Department attorney Richard Gadbois. However, the commissioners did not empower Gadbois to bargain authoritatively with the Union. After the Union participated in a mediation session, in which Gadbois made various proposals indicating movement in the Department's wage position, Gadbois informed the Union the Department commissioners were not moving from their pre-mediation wage proposal. We suspect this was a surprise to both Gadbois and the Union. Be that as it may, where a representative makes concessions in bargaining, and leads the parties

towards a compromise, and then is repudiated, we have no hesitancy in finding he lacked authority to bargain.[1] Failure to appoint a negotiations representative with full authority to enter into a binding agreement, as distinguished from authority to concede some points, while not dispositive of whether the employer acted in bad faith, can serve as evidence of bad faith as it presents an obstacle to the bargaining process. NLRB v. Fitzgerald Mills Corp., 313 F2d 260, 267 (CA 2, 1963). Here, the lack of authority was so evident it is by itself an unfair practice.

Mediation is one of the statutory dispute resolution mechanisms created by the Legislature to actively assist parties in resolving negotiations disputes, 21 VSA 1731, and the Department's actions at mediation lends weight to a conclusion the employer lacked "intent to arrive at an agreement". NLRB v. Fitzgerald Mills Corp., supra., 21 VSA §1722(4).

The Department's further actions at fact finding provide more evidence of failure to bargain in good faith. Although Gadbois has previously indicated to the Union and fact finder his "client" would be present at fact finding, none of the Department commissioners attended the fact finding session. In practice, fact finding, like mediation, involves an active effort to identify an acceptable compromise settlement to resolve a negotiations dispute. Unified School District #36 School Board v. Vermont-NEA, 8 VLRB 77, 78-79 (1985). The Department

[1]We note the mediation session occurred on October 11, 1984, which was more than six months prior to the filing of the unfair labor practice charge herein on April 12, 1985. 21 VSA §1727(a) provides no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. However, the consequences of the futility of the mediation session did not become evident until October 22, 1984, when Gadbois informed the Union the Department commissioners were not moving from their pre-mediation wage proposal; and it is from that date we conclude the six month clock began running. That date is less than six months prior to the filing of the charge.

commissioners hindered that effort here by failing to attend the fact finding session. We think 21 VSA §1732(b), which orders the fact finder to convene "the parties", requires a party, or someone with authority to conclude an agreement, to be present.

Further evidence of the Department's bad faith is its stated justification for adhering substantially to its initial wage offer conflicted at different points during negotiations. At fact finding, Gadbois indicated the Department could not afford wage increases beyond its proposal to its employees, although no evidence in support of this position was presented. In a subsequent conversation between Gadbois and Union representatives, Gadbois indicated inability to finance a wage increase was not a problem, that there was a "bottomless pot". Instead, he indicated the commissioners were unwilling to raise the salaries of the Union members because the employees "were paid enough" for the Enosburg area.[2] Good faith bargaining requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. NLRB v. Truitt Mfg. Co., 351 US 149, 152 (1956). The evidence indicates the Department's pre-strike claim of inability to pay was not an honest claim.

When the aforementioned actions of the Department are taken into consideration, we also conclude their actual wage proposals indicate bad faith bargaining. The Department made an initial wage offer and moved off it only slightly prior to the April 1 strike. Case law treating "hard bargaining" indicates an employer is not required to make

[2]We note the fact finder was so appalled by the employees' low wages relative to utility employees in comparable Vermont communities he recommended a larger wage increase than the Union had requested.

concessions as evidence of good faith but may hold a bargaining position to the point of impasse, so long as that position is based on sound reasons and is not taken to frustrate bargaining. NLRB v. American National Insurance Co., 343 US 395 (1952). Rutland, supra, at 274-275. Given the fact the Department's initial justification for refusing to move from its wage offer was dishonest and based on its other aforementioned actions, we conclude the Department position was not based on "sound reasons" and was taken to frustrate bargaining. The Department was not engaging in "hard bargaining" but "surface bargaining".

Based on a totality of the Department's conduct during the pre-strike period, we conclude the Department refused to bargain in good faith in violation of 21 VSA §1726(a)(5). The Department, beyond any doubt, engaged in unfair labor practices because it showed contempt for the process by failing to even appear at negotiations, failing to empower a representative to bargain, and making wage proposals having no basis in economic reality which amounted to surface bargaining.

The Department's pre-strike unfair labor practices made the resultant April 1 strike an unfair labor practice strike. The Department's bad faith bargaining contributed to the employees striking, as they were faced with a situation where they could submit to the Department's bad faith and accept the Department's terms or strike.

Thus, the strike was at least partly motivated by the unfair labor practices. That the strike also had economic objectives and may have stemmed from mixed motives does not mean the strike was not an unfair labor practice strike. A strike may be an unfair labor practice strike even though it also has economic motives. NLRB v. Fitzgerald Mills Corp., supra, at 269. NLRB v. Heads and Threads Co., 724 F2d 282, 288 (1983).

II. Discharging Employees Engaged in Strike

§1730 of MERA sets forth the conditions under which a strike shall not be prohibited. Here, the Union fulfilled all the requirements of that section before commencing its strike. Thus, the strike was lawful, and the Department raised no claim it was unlawful.

The Union contends the Department discharged the strikers in violation of 21 VSA §1726(a)(1). It is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed by this chapter or by any other law, rule or regulation".

In interpreting the NLRA, Federal courts have held that discharging employees (as distinguished from hiring replacements) for engaging in either an unfair labor practice strike or an economic strike is an unfair labor practice. NLRB v. International Van Lines, 409 US 48 (1972). Servair, Inc. v. NLRB, 726 F2d 1435 (CA 9, 1984). NLRB v. Lyon and Ryan Ford, Inc., 647 F2d 745 (CA 7, 1981). NLRB v. Hilton Mobile Homes, 387 F2d 7 (CA 8, 1967). We so conclude under MERA also. We can think of few actions more inherently destructive of employees' collective bargaining rights than discharging employees engaged in a lawful strike.

We now turn to determining whether the Department discharged the striking employees. The evidence makes it clear the Department commissioners through a series of actions discharged all the striking employees. First, on April 1, 1985, the first day of the strike, Commissioner Blouin told two employees they were "done". Whether this comment constituted an unlawful discharge depends on whether it would reasonably lead the employees to believe they had been discharged. NLRB v. Hilton Mobile Homes, supra, at 9. The employees reasonably understood being "done" to

mean they were fired. They informed other striking employees they were "done", who in turn reasonably believed they had been discharged. Second, on April 4, Department Attorney Gadbois told Union Representative Merrigan, in the presence of several employees, he should advise employees to fill out employment applications. This caused employees reasonably to conclude each of the employees had been discharged; otherwise employees would not have to fill out applications as if they were seeking to be hired. Third, when two of the striking employees were standing at the scene of a power outage at the power plant on April 8, Commissioner Blouin told one of the employees, "I thought I fired you a week ago". Blouin had told this employee he was "done" on April 1.

These actions, without more, clearly indicate the Department commissioners discharged the striking employees. The testimony presented at the hearing by striking employees indicate the employees had reasonable cause to believe they were discharged. If they were not in fact discharged, the Department commissioners could have so notified them. Also, the failure by the Department to produce the commissioners as witnesses to refute the testimony of striking employees leads us to conclude their testimony accurately reflected the facts. This is especially so where, as here, Blouin was present at the hearing and never testified. We are entitled to draw an inference adverse to a party's position if it fails to call a present witness to contest a fact advanced by its opponent.

The employer hints Blouin was without authority to discharge employees, saying this is a responsibility of the full board of commissioners. We reject that contention. In re Southwestern Vermont Education Association, 136 Vt. 490, 492 (1978)(Actions of supervisory personnel of a school

district are attributable to the district in determining whether a district has committed an unfair labor practice).

III. Conditioning Reinstatement on Resigning from the Union

The commissioners demanded that before striking employee Barbara Kennison would be permitted to return to work she would have to fill out an employment application, and if she returned, the commissioners told her the position she formerly held would be a non-Union position and she would have to resign from the Union.

Requiring Kennison to resign from the Union was a clear violation of 21 VSA §1726(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to hiring or tenure of employment or by any terms or conditions of employment to encourage or discourage membership in any employee organization". An employer may not lawfully demand an abandonment by employees of protected, concerted activities or a surrender of rights bestowed by statute. NLRB v. Pecheur Lozenge Co., 209 F2d 393, 403 (CA 2, 1953). Kennison had protected statutory rights to belong to the Union and to strike. To require her to resign from the Union as a condition of returning to work after a strike was a blatant violation of these rights.

IV. Refusal to Bargain in Good Faith by Refusal to Resume Bargaining

The Union's claim the Department violated MERA by refusing to resume negotiations after the commencement of the strike has apparently been dropped. Accordingly, it is not addressed. Also, we will not rule on issues attempted to be raised by the Union which were not encompassed within the unfair labor practice complaint we issued. 21 VSA §1727(a) and (b). Further, it is unnecessary to decide these issues given our disposition of the case.

V. Remedy

We have concluded the Department committed unfair labor practices by refusing to bargain in good faith, discharging employees engaged in a protected unfair labor practice strike and conditioning reinstatement of an employee upon her resignation from the Union. We rely on 21 VSA §1727(d), and the fact the NLRA [See Section 10(c)] and MERA are parallel legislation, in fashioning a remedy. In re Local 1201, AFSCME, supra. Under the NLRA, strikers who engage in an unfair labor practice strike, and who are permanently replaced, are entitled to reinstatement to their former jobs (and replacements discharged) upon an unconditional offer to return to work. No such offer has been made in this case. Mastro Plastics Corp. 350 US 270, 278 (1956). NLRB v. Heads and Threads Co., supra. NLRB v. Windham Community Memorial Hospital, 577 F2d 805 (CA 2, 1978). NLRB v. Fitzgerald Mills Corp., supra.

However, such strikers who are actually discharged are entitled to reinstatement and back pay from the date of discharge, even absent an unconditional offer to return to work. Mindful as we are of the Supreme Court's admonition not to rely on National Labor Board opinions, we still find the best rationale for these distinctions in an NLRB case, Abilities and Goodwill, Inc. and Abilities and Goodwill Association of Professional Employees, 241 NLRB 27 (1979), the reasoning of which persuades us and which we quote at length. There is ample court of appeals precedent for the result reached. Conair Corp. v. NLRB, 721 F2d 1355 (CA D.C., 1983). Garrett R.R. Car and Equipment Inc. v. NLRB, 683 F2d 731, at 740-742 (CA 3, 1982). NLRB v. Lyon and Ryan Ford, 647 F2d 745 (CA 7, 1981). cf. NLRB v. International Van Lines, supra. In Abilities and Goodwill, at 27, the NLRB stated:

The issue is whether an unlawfully discharged striker, unlike an unlawfully discharged employee, must unconditionally request reinstatement in order to trigger an employer's backpay obligation. We believe that the equities and policies of the Act compel a negative answer. It is, of course, well settled that a discriminatorily discharged employee is entitled to reinstatement and backpay from the date of the employer's unlawful action. There is no requirement that such employee first request reinstatement. Indeed, such a request, in all likelihood, would fall upon deaf ears when one considers that the employer has just fired the employee. In this connection, the Board has frequently said that it will not require a person to perform a futile act. Furthermore, since it is the employer who has acted unlawfully in discharging the employee, the burden is on that employer to undo its unfair labor practice by offering immediate reinstatement to the employee, and by reimbursing the employee for all losses suffered from the date of its discriminatory action.

The foregoing rationale is, in our view, equally applicable to employees who are unlawfully discharged while engaged in a lawful strike. A discharged striker is a discharged employee, and is entitled to be treated as such, for there is nothing peculiar to a strike which justifies dissimilar treatment. The nature of the employer's unlawful conduct is not changed by the fact that the employee happens to be a striker at the time of discharge. Furthermore, to require a discharged striker to request reinstatement would be no less futile than it would be for a discharged employee. Thus, no logical reason presents itself for treating the two categories of employees differently. In both cases, the employer has acted in violation of the Act in terminating the employee, and in both cases the burden rightfully rests on the employer to remedy the situation. Accordingly, we now hold that a discharged striker is entitled to backpay from the date of discharge until the date he or she is offered reinstatement.

If the discharged striker responds to the employer's offer of reinstatement by continuing to withold his or her services, the employer's backpay obligation is tolled and the employee resumes the status of a striker. As such, the employee will, of course, be required to request reinstatement upon the conclusion of, or the striker's abandonment of, the strike. In addition, even in the absence of an offer of reinstatement, the employer remains free to avoid or reduce its backpay obligation by establishing that the employee would not have accepted the offer if made, or by any other evidence showing the incurrence of a willful loss of earnings.

A bargaining order is also necessary here. The normal remedy we apply for failure to negotiate in good faith is to order the offending party back to the negotiations table to negotiate in good faith, Local 98, International Union of Operating Engineers, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984), and we believe that is appropriate here where employer bad faith bargaining has contributed to an unfair labor practice strike. Windham Community Memorial Hospital, 230 NLRB 1070 (1977), aff'd, 577 F2d 805 (CA 2, 1978). Lyon and Ryan Ford, Inc., 246 NLRB 1 (1979); aff'd 647 F2d 745 (CA 7, 1981).

The Department will also be ordered to cease and desist from the blatant unfair labor practice of conditioning reinstatement of employees upon their resigning from the Union. Also, we believe it necessary to grant an affirmative remedy to Barbara Kennison, whose fundamental statutory right to belong to and participate in an employee organization was violated. A mere cease and desist order would amount to a mere slap on the wrist to the Department and would not strongly deter the Department from engaging in such conduct in the future. Accordingly, if Kennison wishes to apply for readmittance to the Union, we believe it appropriate to order the Department to pay the Union the dues Kennison would have paid from the date she was reinstated until the time she is readmitted to the Union and to reimburse the Union for any required readmittance fees.

ORDER

Now therefore, based on the foregoing findings of fact and the foregoing reasons, and pursuant to our authority to prevent unfair labor practices under 21 VSA §1727(d), it is hereby ORDERED the Enosburg Falls Water and Light Department shall:

1. Cease and desist from:

a) Interfering with, restraining and coercing its employees in the exercise of their right to strike guaranteed in 21 VSA §1730, in violation of 21 VSA §1726(a)(1), by discharging Department employees engaged in a protected strike;

b) Refusing to bargain in good faith with International Brotherhood of Electrical Workers, Local 300 ("Union"), in violation of 21 VSA §1726(a)(5);

c) Discriminating against employees in regard to hire or tenure of employment by discouraging membership in the Union, in violation of 21 VSA §1726(a)(3), by conditioning reinstatement of employees on resignation from the Union;

d) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Municipal Employee Relations Act or any other law, rule or regulation, in violation of 21 VSA §1726(a)(1).

2. Take the following affirmative action:

a) Bargain collectively in good faith with the Union with respect to wages, hours and conditions of employment;

b) Offer the Department employees on strike immediate and full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their

seniority or other rights or privileges, discharging, if necessary, any replacements hired on or after the April 1, 1985, strike, with the proviso that any employees working for the Department before the commencement of the strike shall not be discharged;

c) Award the striking employees back pay and benefits from April 1, 1985, the date of their discharge, until their reinstatement, provided they accept the Department's offer of reinstatement indicated in subsection 2(b) of this Order, for all hours of their regularly assigned shifts, minus any income (including unemployment compensation received and not paid back) received by employees in the interim. If any employee has accepted employment in the interim and does not seek reinstatement, the employee shall be awarded backpay on the above terms from the date of discharge until the date of beginning other employment. The interest due employees on backpay shall be at the rate of 12 percent per annum and shall run from the date each paycheck during the period commencing with the April 1, 1985, strike, and ending on the date of their reinstatement was due; such interest for each paycheck shall be computed from the amount of each paycheck minus unemployment compensation and any income received by employees during each payroll period;

d) If Barbara Kennison elects to rejoin the Union, the Department shall pay the Union the dues Kennison would have paid from the date she was reinstated to her position on April 12, 1985, until the date she is readmitted to the Union and shall pay the Union any required readmittance fees;

e) Post copies of this Order on all Department bulletin boards customarily used for employer-employee communication for a period of 60 consecutive days.

It is further ORDERED that the parties shall notify the Vermont Labor Relations Board within 30 days of this Order of any disputes in computations regarding Subsection 2(c) above.

Dated this 24th day of July, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson