VERMONT LABOR RELATIONS BOARD

HINESBURG SCHOOL DISTRICT AND BOARD OF SCHOOL DIRECTORS	)	
v.	)	
VERMONT-NATIONAL EDUCATION ASSOCIATION, CHITTENDEN SOUTH EDUCATION ASSOCIATION, CHITTENDEN SOUTH EDUCATION ASSOCIATION/HINESBURG UNIT, BURLINGTON EDUCATION ASSOCIATION AND ITS AGENTS	)	DOCKET NO. 85-26

MEMORANDUM AND ORDER

At issue is whether we should issue an unfair labor practice complaint. On May 13, 1985, the Hinesburg School District and Board of School Directors ("School Board"), filed unfair labor practice charges against the Respondents alleging Respondents violated 21 VSA §1726(b)(1), (3) and (10), 16 VSA §1982(a) and (c), and 16 VSA §1991(c) by interfering with, coercing and restraining employees in the exercise of their rights guaranteed by law; intentionally discriminating against employees because of their refusal to join or assist the Respondents, to engage in a strike and to honor a picket line; refusing to represent all employees in the bargaining unit without regard to union membership; and engaging in a pattern of harassment, threats, coercion and intimidation of employees and other individuals who have sought to exercise their rights guaranteed by law.

In filing this charge, Petitioner requested that it be consolidated with Docket No. 85-15, Chittenden South Education Association, Hinesburg Unit v. Hinesburg School District and Hinesburg School Board, wherein the Association alleged the School Board committed unfair labor practices

by its conduct during the course of negotiations for a contract for the 1984-85 school year and during the ensuing strike initiated by the Association on April 3, 1985. The Labor Relations Board has issued Findings of Fact, Opinion and Order in Docket No. 85-15 today. 8 VLRB 219.

On May 16, 1985, at the hearing on Docket No. 85-15, the Board asked counsel for the School Board to prepare a memorandum in support of its charge against Respondents and in support of its request to consolidate the charge with Docket No. 85-15. The School Board filed the Memorandum on May 22, 1985. Respondents filed a Memorandum in opposition to issuance of a complaint and consolidation on June 3, 1985. Board Member James Gilson has disqualified himself from participation in this case and has not participated in the decision.

The bulk of the School Board's charge focuses on alleged actions by Respondents against strike replacements at Hinesburg which is alleged to be threatening and coercive in nature and operates to restrain the replacement employees in the exercise of their rights under law. Principal among these allegations are picketing at the homes of replacements and at their spouses' places of business, leafletting in neighborhoods of the replacements, and individual acts of coercion and threatening conduct.

Upon investigation of the charge, we exercise our discretion pursuant to 21 VSA §1727(a) not to issue an unfair labor practice complaint and decline to consolidate the charge with the merits of the underlying complaint in Docket No. 85-15. Instead, we believe the best way to handle these allegations is through compliance proceedings arising from our Order in Docket No. 85-15. Therein, we ordered the School Board to offer strikers reinstatement to their former jobs (and replacements

discharged) upon an unconditional offer to return to work. If, upon unconditional application, the School Board alleges misconduct by individual strikers has resulted in their loss of right to reinstatement, that issue can be litigated in compliance proceedings over our Order in Docket No. 85-15. These proceedings would provide the appropriate forum where the School Board could offer evidence on any alleged misconduct by individual strikers. We would then determine what appropriate action to take, including possible denial of reinstatement to individuals because of strike misconduct.

In so proceeding, we are adopting the analogus practices of the National Labor Relations Board (NLRB). It is NLRB practice in like cases to Docket No. 85-15 to order reinstatement of unfair labor practice strikers upon their unconditional application to return to work. However, such an order is written in general terms and disputes over the details of reinstatement and back pay are left to the compliance stage of the proceedings. Clear Pine Mouldings, Inc., 268 NLRB 1044 (1984). Windham Community Memorial Hospital, 230 NLRB 1070 (1977). Federal courts have long recognized and accepted this practice of the Board. Sure-Tan, Inc. v. NLRB, 81 L Ed. 732, 749-750 (1984). NLRB v. Rutter-Rex Manufacturing Co., 396 US 258, 260 (1969). NLRB v. Windham Community Memorial Hospital, 577 F2d 805 (2nd Cir., 1978). NLRB v. Rutter-Rex Manufacturing Co., 245 F2d 594 (5th Cir., 1957).

We find the reasoning of the 5th Circuit Court of Appeals in Rutter-Rex, supra, at 598, particularly persuasive with respect to not consolidating allegations of strike misconduct with the merits of an underlying unfair labor practice complaint against the employer:

> The numerous questions which the Employer insists now plague it, such as... misconduct of some specified strikers which might afford a basis for denying reinstatement, are not foreclosed. Their resolution can come ... in further administrative proceedings before and through the Board...

> The employer certainly has no right to insist that until the strike whose continuation is a direct by-product of his own Section 8(a)(5) violation is terminated, no order of reinstatement can validly be made. Nor can the employer confound its violation by demanding that all of the matters be threshed out in the initial Board proceedings. Undertaking to ascertain the myriad of details respecting the right to, and extent of, the remedy as to each specific striker out of a large labor force would complicate the proceeding and perhaps make it endless. The final order declaring it to be an unfair labor strike cannot be obtained unless the hearing on the main issues can end. Until that is done, there is no basis for an order of reinstatement, and nothing upon which, as a foundation for a claim for reinstatement with possible restitution, the employee could make a demand for reinstatement.

We recognize the charges filed by the School Board allege violations by various teachers organizations and their agents in addition to the strikers themselves, and our refusal to issue a complaint will mean only the actions of individual strikers will be subject to further review. However, our review of the charge, memoranda and case law convinces us this is the best way to proceed. Our decision is influenced by Vermont-NEA General Counsel Robert Chanin's representation at the hearing in Docket No. 85-15 that Respondents have directed every striking teacher not to do what is alleged in the charge. To our knowledge, actions such as alleged in the charge have ceased and we believe it unnecessary to issue a complaint.

In its charge, the School Board raises the further issue that Respondent Chittenden South Education Association, Hinesburg Unit, violated 16 VSA §1991(c) and 21 VSA §1726(b)(3) because all the permanent replacements are members of the bargaining unit and, as such, are represented by the Association, which has violated its duty to represent the replacements "without discrimination or prejudice" without regard to their lack of union membership or refusal to support the strike. The School Board alleges the Association demonstrated its unwillingness to represent these individuals fairly by its correspondence to them, its threatening conduct

toward them and by its refusal to bargain with the School Board for 1985-86 with such individuals employed.

We doubt very much the Association has a responsibility to fairly represent replacements during a strike such as in progress here. As Respondents state, one of the chief goals of any union in this situation is to bargain with the employer for a return of all strikers and the displacement of all strike replacements. In any event, we have determined today in Docket No. 85-15 the School Board must discharge permanent replacements upon strikers' unconditional application to return to work. In essence, we determined an employer does not have the right to permanently replace unfair labor practice strikers. Clearly then, the Association is not required to represent such illegally-hired employees.

Now therefore, based on the foregoing reasons, we decline to issue an unfair labor practice complaint and it is hereby ORDERED the unfair labor practice charge filed by the Hinesburg School District and Board of School Directors on May 13, 1985 is DISMISSED.

Dated this 30th day of August, 1985, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.