VERMONT LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 597	)	
v.	)	DOCKET NO. 90-26
CHITTENDEN COUNTY TRANSPORTATION AUTHORITY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 20, 1990, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 597 ("Union") filed an unfair labor practice charge, alleging that the Chittenden County Transportation Authority ("CCTA") violated 21 V.S.A. §1726 (a)(1), (3) and (4), by discharging Richard Hill because of his union activities. The Labor Relations Board issued an unfair labor practice complaint on May 8, 1990.

Hearings were held in the Board hearing room in Montpelier on September 13 and October 4, 1990, before Board Members Charles H. McHugh, Chairman; Catherine L. Frank and Louis A. Toepfer. Attorney Alan Biederman of Biederman and Rakow represented the Union. Attorney Joseph Obuchowski of Carroll and Obuchowski represented the CCTA.

Requested findings of fact and memoranda of law were filed by both parties on October 11, 1990.

FINDINGS OF FACT

1. CCTA is a municipal employer within the meaning of 21 V.S.A. §1722(13). CCTA is organized for the purpose of providing bus service to Burlington, South Burlington, Essex, Shelburne and Winooski. CCTA generally is divided into three divisions: a division of bus drivers and a terminal duty person, a maintenance division consisting

primarily of mechanics who maintain the buses, and a division of office workers (Joint Exhibit 1).

2. Since 1974, the Union has served as collective bargaining representative for CCTA's bus drivers and terminal duty person. Prior to the events at issue herein, neither the office workers nor the mechanics had engaged in union organizing activity or were represented by a union.

3. At all times relevant, it has been the practice of CCTA to apply many of the provisions of the collective bargaining agreement between the Union and CCTA covering the bus drivers and terminal duty person to all CCTA employees generally. This has included provisions relating to vacations and sick leave, including the following provision on sick leave found in Article V(E)(4) of the agreement effective July 1, 1989, to June 30, 1992:

> . . .(A)ccrued sick leave is not compensatory and may be used only on actual illness. An employee reporting sick may or may not be required to furnish a Doctor's certificate at the discretion of management. (Joint Exhibit 7)

4. At all times relevant, CCTA has had in effect Personnel Rules and Regulations which have contained Disciplinary Action Guidelines for use in applying discipline to CCTA employees. These Guidelines provide in pertinent part:

> The following are intended to be guidelines for use by Supervisors in applying discipline. When, in the sole judgment of the General Manager, based upon reasonable grounds, there exists mitigating circumstances, Supervisors may apply lesser penalties.
>
> I. <u>Class "A" Infraction</u>
> <u>First Offense:</u> Discharge
> Examples: . . .
>
> --refusal to obey direct order from management
>
> II. <u>Class "B" Infraction</u>
> <u>First Offense:</u> Suspension <u>Second Offense:</u> Discharge
> Examples: . . .
>
> --insubordination

... V. Class "D" Infraction
First Offense: Verbal Warning (recorded in file)
Second Offense: Written Warning Third Offense: Time off -- one day Fourth Offense: Time off -- two days Fifth Offense: Time off -- three days Sixth Offense: Discharge
Examples: . . .

--repeated absenteeism

. . . (Joint Exhibit 5)

5. The Personnel Rules and Regulations further provide that an employee may grieve a suspension or dismissal by making a written request to the CCTA General Manager within seven days of the disciplinary action. A hearing on the grievance is held before the CCTA Board of Commissioners (Joint Exhibit 5).

6. From approximately 1977 until his dismissal from CCTA on March 28, 1989, Richard Hill was employed by CCTA as a bus mechanic.

7. At all times relevant herein, Hill reported to Halsey Dunton, Shop Foreman; who reported to Gary Thompson, Superintendent of Maintenance; who reported to Catherine Debo, General Manager. Thompson became Superintendent of Maintenance on or about September 30, 1989. For approximately three years previous to that date, Thompson served as Assistant Superintendent of Maintenance.

8. On or about August 31, 1989, Hill did not show up for work and did not call in to say that he would be absent for the day. In early September, 1989, Hill was informed by letter that he was suspended for three days for failure to notify his supervisor that he would not be into work, and was "warned that permanent dismissal will incur the next time." Hill did not grieve this suspension (Joint Exhibit 8)

9. At some point in December, 1989, Peter Bessery, an apprentice mechanic, was promoted to parts manager. At the time of the promotion, Bessary was not the most senior employee eligible for promotion. Bessery was promoted to the parts manager position without the position being advertised among employees. Some employees of the maintenance division were dissatisfied that the position of Parts Manager had not been advertised and that a junior employee had been selected for the position.

10. At or about the same time as Bessery's promotion, a union organizing drive was started by the Union among the CCTA maintenance division employees. Hill was active in the organizing effort. He attended meetings among Union representatives and the employees and handed out union authorization cards to some of the employees, which employees would sign indicating that they desired to be represented by the Union. At some point in the union organizing effort, Hill was elected Union shop steward.

11. By letter of January 9, 1990, Earl Nolan, Secretary-Treasurer of the Union, notified Debo that a majority of the mechanics, partsmen, bus cleaners and working foremen had signed authorization cards to have the Union represent then. Nolan requested that the CCTA voluntarily recognize the Union as bargaining representative. (Joint Exhibit 2).

12. On January 10, 1990, the Union filed a Petition for Election of Collective Bargaining Representative with the Vermont Labor Relations Board, seeking to represent the mechanics, bus cleaners, parts men and working foreman (Joint Exhibit 3, VLRB Docket No. 90-4).

13. In response to the election petition, CCTA did not agree to voluntarily recognize the Union as bargaining representative of the

employees, but by February 7, 1990, had agreed to a consent election whereby the employees the Union was seeking to represent would decide whether they wished to be represented by the Union. On February 7, 1990, the Labor Relations Board notified the Union and CCTA that the Board would conduct an election at CCTA on February 26, 1990, where employees would vote on whether they wished to be represented by the Union or no union.

14. On January 31, 1990, Thompson notified Hill by letter that he was suspending him for three days for "unacceptable performance based on complaints from Delphia Construction," and informed Hill that "(a)ny further conduct of this nature could result in termination." Thompson and Debo suspended Grievant. They believed that Hill, on January 24, 1990, inappropriately had been alone in a trailer on CCTA premises owned by Delphia Construction Company, which was doing renovation work to the CCTA building. Thompson and Debo also believed that Hill had threatened one of the Delphia employees. Thompson and Debo based this belief on reports made by Delphia employees, which they accepted as true. Neither Debo nor Thompson spoke with Hill concerning his version of the incident. Debo would not have believed Hill in any event. Debo and Thompson considered dismissing Hill, but ultimately decided to suspend him. Hill filed no grievance concerning this suspension (Joint Exhibits 11-12).

15. When Hill learned of the suspension, Hill locked his tool box and walked off the job without permission. No further action was taken against Hill for walking off the job without permission.

16. At the February 26, 1990, election conducted by Timothy Noonan, Board Executive Director, Hill was present as an observer for

the Union and Thompson observed for the CCTA. During the election, Hill and Thompson had a brief conversation concerning the Union organizing drive. Hill told Thompson that he was neutral as to the outcome of the election. There is no evidence that, prior to the election, Thompson or Debo knew of any of Hill's activities concerning the Union organizing drive. The result of the election was 6 votes in favor of the Union, and four votes for no union.

17. On March 7, 1990, CCTA filed an objection to the conduct of the election claiming, in part, that Hill had engaged in behavior at the election which was threatening and coercive of employee rights (See VLRB Docket No. 90-4).

18. On March 6 and 9, 1990, Hill was absent from work due to sickness. Prior to these absences , Hill had taken a number of sick days during the previous seven months, as follows:

August 1989	2 days
September 1989	2 days
October 1989	3.5 days
November 1989	5 days
December 1989	3 days
January 1990	2 days
February 1990	2 days

(Joint Exhibit 10)

19. During the early part of 1989, Hill had missed a substantial amount of work due to a back injury. There is no evidence that Hill's absences of August, 1989, through March, 1990, were related to his prior back injury. Hill never indicated to Thompson or Debo that his prior back injury caused any of his absences during this period.

20. On March 12, 1990, Thompson provided Grievant with a letter, which stated:

> Due to the amount of times that you have called in sick in the last six months, I am now requiring you to furnish me with a

Doctor's certificate everytime you call in reporting that you won't be in because you are sick (Joint Exhibit 4).

21. Thompson required Grievant to bring in a doctor's certificate because he believed that Hill was abusing the sick leave policy. On some prior occasions when Hill had called in sick, Thompson had attempted to call Hill at home and had gotten no answer. Thompson thought that requiring Hill to bring in a doctor's certificate would stop unnecessary absences and/or would force Hill to seek medical attention if an actual problem existed.

22. In requiring Hill to bring in a doctor's certificate, Thompson was relying on the provision of the collective bargaining agreement covering the CCTA bus drivers and terminal duty person cited above in Finding #3. Neither Thompson nor Debo had ever required any other employee to bring in a doctor's certificate for each absence.

23. Prior to March 12, 1990, neither Debo nor Thompson had ever spoken to Hill about the number of his absences due to illness.

24. Hill's absences disrupted work scheduling and placed a greater work burden on other CCTA mechanics.

25. At the time of Hill's March work absences, Hill has used up all his allotted sick days. Up until approximately December 1989, an employee who used all the allocated sick days was allowed to charge subsequent sick days against his or her allotted vacation leave. In about December 1989, Thompson changed this policy and directed that vacation time could no longer be applied to sick days. Following this change, an employee who had used up all the allocated sick days was not paid for further absences due to illness. Hill was not paid for the March absences.

26. Hill's foreman, Halsey Dunton, took a similar number of sick days as Hill. Dunton's absences were due to the fact that he had to attend to the needs of his wife, who was going blind. Thompson was aware of the reason for Dunton's absences. Dunton sometimes gave Thompson a week's notice prior to his absence, and tried to give Thompson at least a day's notice. Thompson was able to fill in as foreman for Dunton during his absences so that the work schedule was not disrupted. Thompson did not instruct Dunton to bring in a doctor's certificate for each absence.

27. On Monday, March 26, 1990, Hill called in sick due to a sore throat. At some time on March 26, Hill made a doctor's appointment. The appointment was scheduled for Thursday, March 29.

28. On Tuesday, March 27, 1990, Hill reported for work at the normal time. Thompson arrived at the work site about noon, and shortly thereafter spoke with Hill. Thompson reminded Hill that he needed to bring in a doctor's certificate. Hill asked Thompson whether he would be fired if he did not bring in a doctor's certificate. Thompson indicated that Hill probably would be fired in that event. Thompson told Hill to bring in the doctor's certificate the following day and everything would be fine. Later that day, Hill and Thompson had another conversation concerning Hill bringing in a doctor's certificate. The conversation became heated, and Hill told Thompson that he would bring Thompson the certificate when he was "good and fucking ready," or words to that effect.

29. Hill did not inform Thompson in any of his conversations with him on March 27 that he had made a doctor's appointment.

30. Later than afternoon after the conclusion of the work day, Thompson called Hill at home and left a message on Hill's answering

machine informing Hill that he should not come into work the next day without a doctor's certificate. Hill heard the message on his answering machine sometime than evening.

31. On Wednesday, March 28, 1990, Hill did not call or come into work. When Hill did not bring in a doctor's certificate or call, Thompson believed that Hill was challenging his authority. Later that afternoon, in a meeting with Debo, Thompson indicated that he thought Hill should be dismissed. Debo concurred. Neither Debo nor Thompson were aware at that point that Hill had scheduled a doctor's appointment for March 29.

32. In deciding that Hill should be dismissed, Thompson was guided by the disciplinary guidelines of CCTA's Personnel Rules and Regulations. Thompson believed that Hill's failure to bring in a doctor's certificate constituted refusal of a direct order, a Class "A" infraction for which the specified penalty was dismissal (Joint Exhibit 5).

33. On Wednesday afternoon, March 28, 1990, Thompson wrote Hill a letter of dismissal, which he had Bessery mail to Hill that afternoon and which was received by Hill by Friday, March 30, 1990. The letter provided in pertinent part:

> Pursuant to early written warnings about "no shows" and sick day abuse, and with failure to bring in a written doctor's letter (per prior written request) concerning your absence on Monday March 26th, you are hereby terminated from employment with CCTA, effective immediately.
>
> A review of your record shows:
> --a record of "no shows",
> --a substantial number of sick days, with the following pattern:
> --August: 2 sick days
> --Sept.: 2 sick days
> --Oct. : 3.5 sick days

--Nov. : 5 sick days
--Dec. : 3 sick days
--Jan. : 2 sick days
--Feb. : 2 sick days
--Mar. : 3 sick days

22.5 sick days--2.81 ave. sick days

Moreover, on days when you were called in "sick" you could not be reached at your home telephone number where you would be expected to be recuperating from illness.

--refusal to comply with prior written company request for a doctor's letter indicating that you sought and received medical attention on the day you called in sick.

--low productivity when on duty in comparison with peer mechanics (job tickets show least productive mechanic in month of February)

. . .

(Joint Exhibit 6)

34. Thompson had not previously discussed with Hill his concerns over Hill's low productivity.

35. Hill kept his doctor's appointment for Thursday, March 29, 1990, and received a doctor's certificate excusing his absence on an unspecified "Monday". At some time during the day on March 29, Hill called CCTA to report that he had a doctor's certificate for his March 26 absence and to ask whether he should come into work. Thompson was not in the office at the time, and Bessery took the call. Bessery told Hill he should talk to Thompson and that he should check his mail. Later that day, Bessery told Thompson that Hill had called in and that Hill had obtained a doctor's certificate for the March 26 absence (Union Exhibit A).

36. Before Thompson left work on March 29, 1990, he told Dunton that, if Hill should call or come in the following day, Dunton should tell Hill that he could meet with Thompson or Debo to discuss his dismissal.

37. Early in the morning on Friday, March 30, 1990, Hill called Dunton to ask if he could come into work. Dunton told Hill that he had been dismissed and that he could meet with Thompson or Debo concerning his dismissal. Hill did not indicate that he wanted to meet with them.

38. Hill subsequently appealed his dismissal to the CCTA Board of Commissioners, which appeal was denied (Joint Exhibit 9).

39. By Memorandum and Order of May 31, 1990, the Vermont Labor Relations Board denied CCTA's objection to the conduct of the February 26, 1990, election, and certified the Union as the exclusive bargaining representative of the mechanics, bus cleaners, parts men and working foreman employed by CCTA. 13 VLRB 112.

40. During the period of approximately nine years that Debo has been General Manager at CCTA, the Union has made no prior charges, and employees have informed the Union of no incidents, concerning discrimination against bus drivers or the terminal duty person due to union activities. Relations between the Union and CCTA generally have been good.

OPINION

At issue is whether CCTA dismissed Richard Hill due to his union activities. Under the Municipal Employee Relations Act, 21 V.S.A. §1721 et seq. ("MERA"), employees have the right to self-organization, to form, join or assist employee organizations, and to bargain collectively through the exclusive bargaining representative of employees. 21 V.S.A. §1721, §1722(4). It is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of these rights and to discharge employees to discourage membership in any employee organization. 21 V.S.A. §1726(a)(1) and (a)(3).

Hill clearly was engaged in activities protected by MERA. He was active in the effort engaged in by the Union to organize the CCTA maintenance division employees. He attended meetings among Union representatives and the employees, handed out union authorization cards to some of the employees, was elected Union shop steward, and was the Union observer at the election where employees voted on whether they wished to be represented by the Union.

In determining whether an employee was dismissed for engaging in union activities, the Board employs the analysis used by the U.S. Supreme Court and the National Labor Relations Board in such cases. Once an employee demonstrates protected conduct, he or she must show the conduct was a motivating factor in the decision to take action against the employee. Then, the burden shifts to the employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct. Horn of the Moon Workers Union v. Horn of the Moon Cafe, 12 VLRB 110 (1988). Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). NLRB v. Transportation Management Corp., 462 US 393 (1983). Wright Line, 251 NLRB No. 150 (1980).

At the heart of any employment action allegedly linked with anti-union discrimination is the question of employer motivation. Ohland v. Dubay, 133 Vt. 300, 302 (1975). The guidelines the Board follows in determining whether the protected conduct of engaging in union activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the discharge was suspect, 4)

whether the employer gave as a reason for the decision a protected activity, 5) whether the employer interrogated the employee about protected activities, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, or 7) whether the employer warned the employee not to engage in protected activity. Id, at 302-303. Horn of the Moon, supra, at 126-127.

The Union contends that three of the guidelines are relevant herein: 1) timing, 2) knowledge of Hill's protected activities, and 3) discriminatory treatment. The Union alleges that an examination of the evidence concerning these three guidelines makes it clear that the protected activities engaged in by Hill were a motivating factor in CCTA's decision to dismiss him.

The Union contends that the timing of the suspension of January 31, 1990, concerning the Delphia Construction incident, and the discharge of March 28 are each suspect. We disagree that the timing of the January 31 suspension was at all suspect. It is true that the suspension occurred a few weeks after CCTA became aware that a union organizing drive was underway among its maintenance employees. However, at the time Hill was suspended, there is no evidence that CCTA managers, General Manager Catherine Debo and Superintendent of Maintenance Gary Thompson, knew of Hill's activities concerning the union organizing drive.

The dismissal of Hill is suspicious due to the timing, since it occurred only a month after Hill became the only employee to publicly act on behalf of the Union when he was an Union observer at the February 26 representation election. At the point Hill was present as

an observer for the Union at the election. Debo and Thompson certainly became aware that he was engaged in activities protected by MERA. Two weeks after the election, Hill was required by Thompson to submit a doctor's certificate for each subsequent sick day he took, although such a requirement had never been imposed on any other employee and Thompson previously had not indicated to Hill that he thought his use of sick days was excessive. Just over two weeks thereafter, Hill was dismissed when he did not bring in a doctor's certificate after taking a sick day.

However, the timing of management's actions are considerably diminished when they are examined in light of Hill's work record and attendant circumstances. The requirement that Hill produce a doctor's certificate immediately followed a seven month period where Hill had taken 21.5 sick days, an average of three sick days a month. His absences disrupted work schedules and placed a greater burden on other CCTA mechanics. Also, Thompson reasonably suspected that Hill might be abusing sick leave since, on some prior occasions when Hill had called in sick, Thompson had attempted to contact Hill at home and had received no answer. The suspect timing of the doctor's certificate requirement also is diminished considerably by the fact that Hill took two sick days during the week immediately preceding the imposition of the doctor's certificate requirement.

The timing of Hill's subsequent dismissal is considerably less suspect when his conduct leading up to the dismissal is examined. Clearly, if Hill had complied with Thompson's directive to bring in a doctor's certificate upon each absence due to sickness, he would not have been dismissed. However, upon the first occasion that he was

absent due to illness, Hill did not produce a doctor's certificate upon returning to work. When Thompson spoke to Hill about bringing in a doctor's certificate, Hill indicated he would bring in a certificate when he was "good and fucking ready'" or words to that effect. Hill never told Thompson of the doctor's appointment he had scheduled for March 29. When Thompson subsequently notified Hill by leaving a message on his telephone answering machine that he should not come to work the next day without a doctor's certificate, Hill did not report to work the next day and never called Thompson to inform him he was not coming to work or that he had scheduled a doctor's appointment.

Under such circumstances, Thompson reasonably concluded that Hill's failure to bring in a doctor's certificate constituted a challenge to Thompson's authority and a refusal of a direct order, an infraction for which the specified penalty under the disciplinary guidelines of CCTA's Personnel Rules and Regulations was dismissal.

The Union contends that management discriminated between employees engaged in protected activities and employees not so engaged by treating Hill in a different manner than other employees. The Union points out that Hill was the only employee ever required to produce a doctor's certificate upon each absence due to sickness, even though his foreman, Halsey Dunton, had an absenteeism record no better than Hill.

We do not believe the evidence indicates CCTA management demonstrated discriminatory treatment in this regard. While it is true that no other employee was ever required to produce a doctor's certificate, there is no evidence that management suspected any other employees of abuse of sick leave, as they reasonably suspected of

Hill. Also, while Dunton took a similar number of sick days as did Hill, the circumstances surrounding such use of sick leave were much different. There was no question of abuse of sick leave, since Dunton's absences were due to the fact that he had to attend to the needs of his wife, who was going blind. Dunton further tried to give Thompson at least a day's notice, and sometimes gave as much as a week's notice, of absences. Dunton's absences did not disrupt work scheduling, as did Hill's absences, since Thompson was able to fill in as foreman for Dunton during his absences.

In sum, and upon the careful examination of the actions of all parties concerned and the character and demeanor of witnesses, we are persuaded that the dismissal of Hill was not motivated by his union activities. Instead, we believe that his dismissal was motivated by his refusal to comply with the directive to produce a doctor's certificate, taken together with a prior work record that was less than satisfactory. We view this as a proverbial "straw that broke the camel's back" dismissal. CCTA management viewed the refusal to produce a doctor's certificate as a challenge to Thompson's authority which could not be tolerated, particularly in light of Hill's previous unsatisfactory work record.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is HEREBY ORDERED that the unfair labor practice charge filed in this matter by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 597, is DISMISSED.

Dated this 20th of December, 1990, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer