

STATE OF WASHINGTON
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DANIEL J. BRITE,)	CASE NO. 4392-U-82-705
Complainant,)	DECISION NO. 1906 - PECB
vs.)	
BEN FRANKLIN TRANSIT,)	FINDINGS OF FACT,
Respondent.)	CONCLUSIONS OF LAW,
)	AND ORDER

David E. Williams, Attorney at Law, appeared on behalf of the complainant.

Anthony F. Menke, Attorney at Law, appeared on behalf of the respondent.

The above-named complainant filed a complaint with the Public Employment Relations Commission on December 17, 1982, wherein he alleged that the above-named respondent had committed unfair labor practices within the meaning of RCW 41.56.140(1). George G. Miller was designated to make and issue Findings of Fact, Conclusions of Law, and Order. Pursuant to notice issued by the Examiner, matter was heard on Tuesday, July 12, 1983, at Kennewick, Washington. The parties filed post-hearing briefs.

THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleges:

The above-named respondent violated RCW 41.56 140(1) by discharging complainant Daniel J. Brite, a bus driver, on account and by reason of his organizing activities on behalf of Local 280, International Union of Operating Engineers, AFL-CIO.

Relief sought:

Reinstatement with backpay.

BACKGROUND

The Ben Franklin Transit System, with headquarters in Pasco, Washington, provides bus service for Pasco, Richland, West Richland, Kennewick and

Franklin and Benton Counties. The operation is under the direction of a general manager appointed by a board of directors consisting of representatives selected by the governing bodies of the communities served.

Complainant, Daniel J. Brite, was hired in July, 1982. Initially, he was on a six-month probationary status. After a three-week training class, he was certified as a driver on July 24, 1982.

The International Union of Operating Engineers had, prior to Mr. Brite's employment, intervened before the Public Employment Relations Commission in a representation case initiated by an independent association. An election was conducted on September 27, 1982 with the association being certified as the exclusive representative of a bargaining unit described as:

INCLUDED: All full-time and regular part-time employees classified as coach operators and coach operator-dispatcher.

EXCLUDED: Management personnel, supervisors, clerical personnel, temporary employees not to exceed 30 days, and all other employees of the employers.

See: Ben Franklin Transit, Decision 1509 (PECB, 1982).

On October 12, 1982 Brite filed an incident report regarding an improperly mounted seat. In the report, he refused to drive the bus until the seat was adjusted. Four days later he refused to trim his mustache to conform to policy "until others were notified". A month later, on November 15th he was given a written reprimand for reporting to work with a beard. The following day he was suspended for two days without pay when he again reported to work with a beard, refusing to shave. On November 29, he wrote an obscenity on a memo and placed it on his supervisor's desk.

The employer received reports of incidents on Brite's disregard for policies relating to the safe operation of the bus. In one instance he swerved the bus out of the lane to run over a dead rabbit. On other occasions he took both hands off the steering wheel, endangering his passengers. Mr. Brite admits this is a dangerous act, but denies doing it.

On December 3, 1982 Brite was terminated by the respondent for negative attitude and other deficiencies while still in a probationary status. He filed a complaint alleging unfair labor practices with the Commission on December 17, 1982.

POSITIONS OF THE PARTIES

Complainant asserts that he was discharged because of his union activities, because of his participation in the union organizational drive, and that respondent did not have any legitimate reason for discharging him.

Respondent denies that it committed any unfair labor practices. Respondent argues that it made its decision to discharge Brite solely on the basis of his performance, and that his union activities had no effect on the discharge.

DISCUSSION

RCW 41.56.040 prohibits a public employer from interfering with employee attempts to organize for purposes of collective bargaining. The statute provides:

No public employer, or other person, shall directly or indirectly, interfere with, restrain, coerce, or discriminate against any public employee or group of employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or any other right under this chapter.

The complainant has the burden of proof. To be successful in his claim, complainant must show that he was engaged in protected activity, that respondent had knowledge that complainant was engaged in protected activity, and that respondent's motivation for the discharge was based on his protected activity. See: Port of Seattle, Decision No. 1624 (PECB, 1983) and Whatcom County, Decision No. 1886 (PECB, 1984). The evidence must be more than mere suspicion. See City of Olympia, Decision No. 1208-A (PECB, 1982).

In support of this burden, Mr. Brite offers evidence that in July, 1982, an instructor in his training class cautioned the student-drivers against any discussions about unions until after completing their probation. Mr. Brite's testimony was corroborated by another trainee. The instructor, who was also a bus driver, denied anti-union bias. He remembered that the discussion on the value of unions was initiated by the students. He testified that he suggested they pay attention to their job before getting involved. The instructor did not know what the attitude of management was toward unions, and denied he was acting on management's behalf. The instructor's casual remarks cannot be charged to the transit system and, therefore, do not constitute evidence of employer animus. In addition, although the instructor appeared to represent the employer, he was in fact a fellow bus driver. In Bennington Iron Works, 267 NLRB 203 (1983), disparaging remarks about unions were held not to be employer animus because the speaker was part of the unit.

Brite testified to several phone conversations with the business agent of the Operating Engineers Local 280, but the record does not disclose that he was active as a "union organizer" or even that he was a member of the union. The evidence does show he talked in favor of an outside union in the employee's lounge and that he initiated conversations with supervisors on why he favored the union. Such conversations, especially when employee initiated, are not sufficient to show animus. Brown and Lambrecht, 267 NLRB 35 (1983). While management was aware of Mr. Brite's position in favor of the union, the record does not support his contention that such knowledge alone establishes union animus as the reason for his discharge. Different from Olympia, supra, where timing of the discharge was a significant factor, there was a two-month gap in this case between the end of the organization drive and the discharge. The operations director, a former member of a union, testified he had worked with unions and had no problems. There is simply no evidence of anti-union animus in the record.

The examiner is convinced that the true reason for Mr. Brite's discharge was his consistently poor record as an employee. The record shows that after several months of employment, Mr. Brite changed from a conscientious worker into one who was uncooperative and sarcastic towards the transit system's management and personnel policies. There is ample evidence of his dissatisfaction with his employment. Supervisors testified that on numerous occasions he referred to the equipment as "junk". As in Parger Laboratory, 267 NLRB 162 (1983), the writing of obscenities on a memo and placing it on a supervisor's desk appears to be the last straw in a series of childish confrontations with his employer. See also: Icicle Irrigation District, Decision 1177 (PECB, 1981), and West Valley School District, Decision 1179 (PECB, 1981).

FINDINGS OF FACT

1. The Ben Franklin Transit is a public transit benefit area and is a "public employer" within the meaning of RCW 41.56.030(1).
2. Daniel J. Brite began his employment with Ben Franklin Transit in July, 1982, as a bus operator. He was initially on probationary status as a new employee.
3. In the Summer of 1982, transit system employees expressed an interest in being represented by a union for purposes of collective bargaining.
4. Brite had telephone conversations with a representative of International Union of Operating Engineers, Local 280, and spoke up in favor of representation by a union (as opposed to an in-house association). The record does not establish that Brite was a member of Local 280 or that he was identified as a leader of its organizational efforts.

5. An election was conducted on September 27, 1982 by the Public Employment Relations Commission and an in-house association was duly certified as exclusive bargaining representative.
6. During his probationary period Brite's performance as an employee was unsatisfactory. The employer discharged Brite on December 3, 1982.
7. Brite's discharge was not based on anti-union animus. He failed the test of probation because he was unsatisfactory.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter RCW 41.56.
2. By discharging Daniel J. Brite, as described in the above Findings of Fact, Ben Franklin Transit did not violate RCW 41.56.040 and RCW 41.56.140(1).

ORDER

The complaint charging unfair labor practices filed in the above entitled matter is dismissed.

DATED at Spokane, Washington, this 3RD day of May, 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION


GEORGE G. MILLER, Examiner

ISSUED at Olympia, Washington, this 8th day of May, 1984.

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.