STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1348,	)	CASE NO. 6145-U-85-1160
Complainant,	)	DECISION NO. 2580 - PECB
vs.	)	
INTERCITY TRANSIT,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Frank and Rosen, by Jon Howard Rosen, Attorney at Law, appeared on behalf of the complainant.

Thomas J. Taylor, Attorney at Law, appeared on behalf of the respondent.

Amalgamated Transit Union, Local 1384 (complainant) filed a complaint charging unfair labor practices with the Public Employment Relations Commission (PERC) on December 31, 1985, alleging that Intercity Transit (respondent) had discriminated against a member of a bargaining unit represented by the complainant in connection with a disciplinary action involving said employee, in violation of RCW 41.56.140(1) and (2). Specifically, the complainant alleged that an employee of the respondent was discriminated against because of his union activities.

A notice of hearing was issued to the parties on March 4, 1986. In addition to setting the date for a hearing on the complaint, the notice provided that the respondent was to file its answer to the allegations on or before March 14, 1986, in accordance with WAC 391-45-170. The respondent's answer was filed on March 17,

1986. On March 20, 1986, the complainant moved to strike the respondent's answer as untimely. The motion was denied without prejudice on March 26, 1986.

The hearing on the merits was conducted on March 28, 1986, at Olympia, Washington, before Examiner Walter M. Stuteville. At the hearing, the complainant renewed its motion for default. In response to the examiner's questions, the complainant stated that it had not been prejudiced by the late answer. Based upon that response, the motion was denied and the hearing proceeded on the merits. Both parties had filed briefs on the motion for default, and both parties filed post-hearing briefs.

BACKGROUND

Harold R. Cooper had been employed by Intercity Transit since 1979. He worked as a bus driver and was in the bargaining unit represented by the complainant union. Early in 1985, Cooper became the shop steward for the union.

On October 16, 1985, Cooper was involved in a traffic accident while working as a bus driver. On that occasion, the bus that Cooper was driving struck a blind pedestrian in a marked cross-walk in Olympia, Washington. The bus had been parked along the side of the street just prior to the accident. Cooper had started the bus and was moving it toward the traffic lane when he stopped the bus. His attention was diverted to a conversation with persons on the left side of the bus. While Cooper was so engaged, the pedestrian, who was on the right side of the bus, heard the bus stop and believed that the bus was stopping for him. The pedestrian, therefore, proceeded to cross the street in the crosswalk. Cooper started the bus moving again and struck the pedestrian causing him to fall. Cooper moved the bus to the

side of the street and called the dispatcher to report that he had struck a pedestrian. A transit supervisor responded to the call and called the police and medics. The pedestrian suffered minor injuries which required some medical attention from his own physician. Cooper was cited by the Olympia police for failing to yield to a pedestrian.

Following procedures of Intercity Transit, the Intercity Transit Accident Review Committee met on October 30, 1985, to review the circumstances of the accident. The committee had Cooper explain the circumstances and asked him questions as to specifics of the location of the bus and of the pedestrian. The four-person committee then voted unanimously to recommend that the accident was "chargeable". Roy Burns, the employer's road supervisor/-safety supervisor, met with the committee and forwarded the recommendations of the committee to the superintendent of operations, Henry White. Burns and White agreed with the committee that the accident was chargeable.

On November 7, 1985, White met with Cooper and informed him that, based upon the decision of the accident review committee, he would be disciplined and that he should contact his union. There is a conflict in testimony as to exactly what was said on that occasion. White is quoted by Cooper as saying that the committee had found numerous violations of the rules and regulations of Intercity Transit that had been committed in connection with the accident. White is further quoted by Cooper as saying that he would have to discipline Cooper because of Cooper's job and that Cooper should be setting a higher standard. White, on the other hand, recounts that he told Cooper that he should understand which Intercity Transit rules that he had violated because he was in a position, as shop steward, to administer the rules.

On November 11, 1985, White and Burns met with Cooper. The

acting president and business agent for the union, Warren Bovee, was also present. The accident and the Intercity Transit rules alleged to have been violated were discussed, and White read to Cooper the rules that had been determined to have been broken. Cooper testified that White made a statement similar to the statement on November 11th concerning the reasons for the disciplinary action. Cooper was given a written warning of dismissal and a statement of the rules and regulations that were alleged to have been broken. The warning stated that if any occurrence of the same magnitude should happen within the next three years, it would result in termination of employment. A memo accompanying the warning from Cooper to White listed four violations of the employer's operational rules "or basic defensive driving habits".

On November 13, 1986, Bovee met with White to request reconsideration of Cooper's disciplinary action. Bovee testified that White again referred to the fact that Cooper should set an example for other employees at Intercity Transit. The request for reconsideration was denied.

POSITION OF THE PARTIES

The points of contention in this unfair labor practice case are the severity of the disciplinary action taken against Cooper and those portions of the conversations which occurred on November 7, 11, and 13, 1985, which dealt with why Cooper should have understood the Intercity Transit rules. The complainant admits that the respondent has a legitimate reason for issuing the discipline against Cooper, but it contends that there is a second motive for the disciplinary action: that is, the involvement of Cooper in the union as the shop steward. According to the complainant, the references made by Intercity Transit managers to Cooper's status

as shop steward meant that the respondent was considering Cooper's union position in taking the disciplinary decision. The complainant relies heavily on the credibility of its witnesses and on the claimed "unbelievability" of the respondent's witnesses, particularly White.

The respondent also understands this case to be governed by precedents concerning "dual motive" situations. The respondent contends that it had legitimate justification for disciplining Cooper, and that the statements attributed to White which are alleged to show union animus were misunderstood, misconstrued, or untrue. In regard to the November 7th meeting, where White informed Cooper that he would be disciplined, the employer contends that White first explained that the basis for the discipline was the violation of Intercity Transit rules and then stated that Cooper should have some knowledge of the rules, because he was the shop steward. Concerning the November 11th meeting, the employer alleges that Cooper was given the reasons for the disciplinary action in writing and that the comment relating to Cooper's office as shop steward was in response to his apparent lack of understanding the safety rules in place at Intercity Transit.

DISCUSSION

Complainant's Motions for Default

In its memorandum filed with its motion for default, the union argued that PERC precedent establishes that, in the absence of good cause shown, a late answer is in and of itself justification for a default judgment. The union cites PERC decisions where

lack of "familiarity with the procedures of PERC"[1] and "overlooking" the obligation to file a timely answer[2] have been held to be insufficient explanations for failure to file a timely answer.

The employer's memorandum in opposition to the motion to strike its answer poses the argument that the delay in receiving the answer was too short to have prejudiced the union in the preparation of its case. Because a weekend intervened between the date the answer was due and the date it was filed, respondent argues that the actual delay in terms of business hours was only one-half of a day. Respondent recounted the actual reasons for the delay in delivering the answer. The reasons for delay recounted by the employer's attorney include his attendance at an out-of-town seminar and the failure of his secretary to follow up on his directions while he was away.

The applicable rules state:

> WAC 391-45-210 ANSWER--CONTENTS AND EFFECT OF FAILURE TO ANSWER. An answer filed by a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as the facts so admitted.

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1 Seattle Public Health Hospital (American Federation of Government Employees, Local 1170), Decision 1781-A (PECB, 1984).

2 City of Benton City, Decision 436, 436-A (PECB, 1978); aff. Benton County Superior Court (1979).

> WAC 391-08-003 POLICY--CONSTRUCTION--WAIVER. The policy of the state being primarily to promote peace in labor relations, these rules and all other rules adopted by the agency shall be liberally construed to effectuate the purposes and provisions of the statutes administered by the agency, and nothing in any rule shall be construed to prevent the commission and its authorized agents from using their best efforts to adjust any labor dispute. The commission and its authorized agents may waive any requirement of the rules unless a party shows that it would be prejudiced by such a waiver.
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> WAC 10-08-200 PRESIDING OFFICER. The presiding officer shall have authority to:
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> * * *
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> (11) Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver.

Thus, even though WAC 391-45-210, read strictly, might lead to a conclusion that an examiner must grant a motion to admit all facts of the complaint as true and limit the respondent to affirmative defenses in the absence of a showing of good cause for a late answer, that is not the case. WAC 391-08-003 and WAC 10-08-200(11) provide the examiner a range of discretion within which to inquire as to the existence of prejudice and, where no prejudice is shown, rule on that basis. This, the examiner has done.

The Commission's rules evidence that the normal situation is to have a hearing on the merits of an unfair labor practice case. The cases cited by the union are consistent with this. In City of Benton City, supra, no answer had been filed and the respondent did not appear at the time set for opening of the hearing. The examiner made contact with the respondent by telephone and postponed the hearing until later that day in order

to permit the respondent to be present. When the hearing was reconvened, it became clear that the requirement to answer the complaint had been overlooked. Nevertheless, a further postponement of the hearing (to the next day) was granted, and it was only after the respondent came unprepared on that occasion that the examiner granted the complainant's motion for default. In Pasco School District No. 1, Decision 1053 (EDUC, 1980), the respondent did not file an answer until the day of the hearing. The examiner permitted the filing of an answer, but the respondent then withdrew from the hearing without presenting its defense. Under these circumstances, the examiner found that good cause had not been shown for the failure to provide a timely answer. In both cases, the filing of an answer on the day of the hearing was much more likely to prejudice the complainants than in the instant case, where the answer was filed late but still well in advance of the hearing. Thus, none of the extreme circumstances of Benton City or Pasco School District exist here.

In a more recent case, Battle Ground School District, Decision No. 2449 (PECB, 1986), the respondent was 13 days late in filing an answer. There, as here, the complainant argued that the burden was on the respondent to show good cause and not on the complainant to show prejudice. The motion for default was denied because prejudice was not alleged and the complainant declined an offer of a continuance to allow for any possible prejudice involving a late answer.

In questioning the examiner regarding his decision to deny the union's "default" motions in this case, counsel for the union acknowledged that there had been no prejudice due to the late answer. WAC 391-45-170 requires that the date specified for the filing of an answer shall be "not less than ten days prior to the date set for hearing". In this case, the union had eleven days

to prepare its case after receipt of the late answer. The denial of the union's motions is confirmed.

Discrimination Based upon Union Activity

The Public Employees Collective Bargaining Act, Chapter 41.56 RCW, prohibits public employers from discriminating against public employees based on their participation in collective bargaining activity. The statute provides:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. 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.

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
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> (1) To interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by this chapter.

The complainant has the burden of proof. To be successful in the prosecution of its claim, the complainant must show that Cooper was engaged in protected activity; that the respondent had knowledge of Cooper's protected activity. The complainant must also make a prima facie demonstration that the respondent's motivation(s) for the discipline could have included Cooper's protected activity. Port of Seattle, Decision 1624 (PECB, 1983); City of Asotin, Decision 1909 (PECB, 1984).

Cooper's involvement in the traffic accident was not protected activity, but Cooper was an active union member and steward. The record clearly indicates that respondent knew of Cooper's union activities and of his status as the union steward.

The testimony of Cooper and Bovee is basis for the union's contention that Cooper's union activity was a component in the employer's motivation to discipline. Both Cooper and Bovee testified that White stated on several occasions that Cooper's "job" had an impact on the disciplinary process. Indeed, both sides are in agreement that Cooper's role as union steward was a point of discussion at the disciplinary meetings. It would be logical to infer that, since the employer believed that Cooper should understand the Intercity rules because he was the shop steward, the employer might have believed it appropriate to mete out harsher-than-normal discipline to the union steward in order to set an example to other employees. Weakening, although not destroying, such an inference is the absence of any evidence of other statements or activities of the employer, either before or after the disciplinary action was taken against Cooper, that would demonstrate a discriminatory motivation. Nevertheless, because Cooper's union responsibilities were specifically commented upon during the disciplinary process, the union will be deemed to have met its burden to show a prima facie case.

Under City of Olympia, Decision No. 1208-A (PECB, 1982), the burden of proof now shifts to the employer to demonstrate that the same action would have been taken against the employee without regard to his union activity. On the record made here, the respondent's assertion that it had "just cause" for its discipline of Cooper is sustained.

There was evidence that negligence on the part of Cooper was a factor in causing the accident. In particular, Cooper's talking

with people on one side of the bus while failing to pay attention to a pedestrian on the other side of the bus leaves a strong implication of negligence which was not disputed by the complainant. In light of the nature of the accident and the probability of driver negligence, the disciplinary action implemented by the respondent was neither extreme nor can it be implied that it was motivated by discriminatory motive.

The complainant acknowledged that some disciplinary response on the part of the employer was appropriate and limited its argument to a contention that the punishment was harsher in this instance because of union animus. The complainant cites several cases at Intercity Transit where it believes that a lesser disciplinary response was taken. None of the examples were precisely comparable or involved the aggravating factor of the handicap of the pedestrian involved here. The complainant has thus not discredited the employer's showing of just cause for the respondent's disciplinary action and this unfair labor practice complaint must be dismissed.

FINDINGS OF FACT

1. Intercity Transit, located in Thurston County, Washington, is a public transit benefit authority organized under the laws of the state of Washington and is a public employer within the meaning of RCW 41.56.030(1).

2. Amalgamated Transit Union, Local 1384 is a bargaining representative within the meaning of RCW 41.56.030(3) which has been recognized as exclusive bargaining representative of an appropriate bargaining unit of transit bus drivers employed by Intercity Transit.

3. Harold R. Cooper has been employed by Intercity Transit as a bus driver since 1979 and has been the shop steward for Amalgamated Transit Union, Local 1384 since 1985.

4. On October 16, 1985, a bus driven by Cooper struck a blind pedestrian while the pedestrian was crossing a street within a marked crosswalk. Cooper had been talking to persons on the opposite side of the bus and had not seen the pedestrian cross in front of the bus.

5. Following a review by the Intercity Transit Accident Review Committee under established procedures for such situations, and based upon the recommendation of said committee that the accident was "chargeable", Cooper was given a written warning which was to remain in effect for three years. Under the terms of that warning, Cooper was subject to discharge for further incidents of this nature.

6. In the process of disciplining Cooper, Intercity Superintendent of Operations Henry White stated that he believed that, as shop steward, Cooper should know the rules concerning appropriate driver response in the case of an accident.

7. The disciplinary action taken by Intercity Transit was appropriate to the breach of rules by Cooper and was not based on anti-union animus.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By disciplining Harold R. Cooper, as described in the foregoing Findings of Fact, Intercity Transit did not violate RCW 41.56.140(1).

ORDER

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

DATED at Olympia, Washington, this 26th day of December, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WALTER M. STUTEVILLE, Examiner

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