STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 120, AFL-CIO, Complainant, vs. PORT OF EDMONDS, Respondent.	)	CASE NOS. 2142-U-79-301 and 2172-U-79-305 DECISION NO. 1191-C - PECB DECISION OF COMMISSION

Michael McGrorey, Research Director, appeared on behalf of the complainant in the proceedings before the Examiner. Hafer, Cassidy & Price, by Lawrence Schwerin, Attorney at Law, filed the brief in opposition to the petition for review.

Richard Cole, Attorney-at-Law, appeared on behalf of the respondent.

In 1979, Service Employees International Union, Local 120, filed two separate complaints with the Public Employment Relations Commission, alleging that the Port of Edmonds committed unfair labor practices during decertification proceedings initiated by employees of the Port. The complaints were consolidated for hearing and assigned to Examiner Rex L. Lacy, who issued a decision (No. 1191 PECB, July 7, 1981) favorable to the union on several issues, and favorable to the Port on others. The Port seeks review of that portion of the Examiner's decision finding that it had committed unfair labor practices, and also challenges the jurisdiction of the Commission to hear this case.

The facts pertaining to the issues on review concern the efforts by then Port employees Ronald Wilander and William Thornton to obtain decertification of the union. The Examiner's first finding of unfair labor practices arises from numerous contacts between the decertification petitioners and Cabot Dow, an independent contractor acting as labor representative of the Port. The second unfair labor practice finding was made because the Port paid decertification petitioner Thornton his full wages during the hearing on decertification, while not according the same benefit to a Port employee who was acting as a union witness. The third unfair labor practice finding occurred as a result of a unilateral wage increase instituted by the Port while the decertification petition was pending.

DISCUSSION:

Jurisdiction

The Port argues that the Commission lacks statutory power to entertain unfair labor practice charges involving port districts. We disagree, having disposed of that issue in another case involving the same parties, Port of Edmonds, Decision No. 844-B (PECB, 1980), and we will not review our rationale here. See also, Port of Seattle, Decision No. 599-A (PECB, 1979).

The Unfair Labor Practices

We will cover the unfair labor practice issues in the aggregate, rather than treating them separately as the Examiner did. We are taking this approach because, after review of the record, there are facts that mitigate the Port's offenses, at least as to the first two unfair labor practice findings. Nevertheless, when the Port's actions are considered cumulatively, we have no doubt that the Port unfairly interfered in the decertification process.

We agree with the Examiner that the Port's unilateral wage increase during the pendency of a decertification petition interfered with employee rights under RCW 41.56. A decertification petition raises a question concerning representation. Accordingly, the same standards applied to employer conduct during a representation campaign should also be applied during the pendency of a decertification petition. The Examiner's rationale, that any action disruptive of the status quo during the pendency of a representation petition tends to disturb the laboratory conditions for exercise of employee free choice, is correct. See: Walgren Co., 221 NLRB 1096 (1978).

We next consider the finding of the Examiner that the Port unfairly assisted in the decertification process because of its contacts with the decertification petitioners, particularly William Thornton. As a preliminary matter, the Port complains that the charge was not properly pleaded by the union in its complaint. We agree with the Port that the complaint is not a model of clarity. Nevertheless, the issue was clearly defined at the hearing and the Port does not claim that it was unprepared to try the issue or prejudiced in any way. Therefore, allowing amendment to the pleadings to conform to the evidence is proper.

Turning to the substance of the issue, there were a substantial number of contacts, (approximately 12) between William Thornton and Cabot Dow, with Dow being clearly receptive to them, and offering friendly counsel at no charge. We agree with the Examiner that Dow's involvement was not insignificant. On the other hand, Thornton initiated all the contacts, which were by telephone, paying all toll charges. He simply asked questions about the decertification process. While Dow responded, he offered no active assistance, and several times he referred Thornton to PERC.

When the decertification petitioners approached Port management for advice, they were referred to PERC. Finally, there is no evidence that the other employees knew of the contacts between Thornton and Dow, and there is no evidence of what effect, if any, those contacts had on the decertification process.

Case precedent from the National Labor Relations Board does not clearly define the Board's criteria for finding an unfair labor practice for employer assistance in a decertification case. In Shenango Steel Buildings, Inc., 231 NLRB 586 (1977) the Board stated:

> An employer can lawfully respond to employees questions about such matters as decertification petitions... provided there is no coercion of the employees of any sort. 231 NLRB 586, 589.

Cf., Axelson, Inc., 251 NLRB No. 44; 105 LRRM 1027 (1980). This suggests a Board policy that a threat of reprisal or force or a promise of benefit is a necessary evidentiary element to this Section 8(a)(1) violation. On the other hand, Placke Toyota, Inc., 215 NLRB 395 (1974) states flatly that the employer may not lend any assistance to the decertification process except to refer inquiring employees to the Board. See also: Suder Beverage Distributors, 240 NLRB 63 (1979). A middle ground is hinted at in Berbiglia, Inc., 233 NLRB 1476 (1977), where a background of anti-union animus and numerous unfair labor practices was emphasized, but employee coercion otherwise was not. The kinds of offenses committed in two illustrative NLRB cases were: Allowing use of company letterhead, circulation of petition as a company document, and otherwise giving employees the impression of open support of a petition, Placke Toyota, Inc., supra; and head of the company helped draft and type decertification petition, loaned a car and paid employee who delivered the petition to the NLRB, Dayton Blueprint Company, Inc., 193 NLRB 1100, 78 LRRM 1510 (1971).

We are unwilling to establish a per se rule such as that suggested in Placke Toyota. But we believe that requiring hard evidence of employee coercion is too rigorous a standard. Rather, we prefer to view the employer's actions in the context of fairness and impartiality, to consider the background of the employer's friendliness or hostility directed toward any particular union, and the background of other unfair labor practices, in order to enable us to evaluate the overall effect of the employer's actions on the laboratory conditions needed for a proper decertification procedure.

If the contacts between Dow and Thornton were all the union had to complain about in this case, a very close question would be presented. However, we must consider the Port's actions in the context of other events, including the Port's unilateral contracting out bargaining unit work which we found to constitute an unfair labor practice in Port of Edmonds, Decision No.844-B (PECB, 1980), and in the context of the other events complained of herein. Thus, these contacts further support an unlawful interference finding.

The final event for review is the Examiner's holding that it was an unfair labor practice for Thornton to be paid a full day's wage on the day he participated in the hearing on the decertification petition, while union witness, Ron Dillon, was paid only slightly more than for the time worked that day. The Port points out that Thornton put in several more working hours than Dillon on that day, and that the difference in ratios of over-payment proportionate to time worked was small. The back pay award made by the Examiner, even with interest, will be far less than it costs to process this case. Nevertheless, the obvious partiality on the part of the employer, the overall context of the case, and the certain effect this would have on other employees prevents us from viewing this offense as "de minimis", which the Port urges to do.

WAC 391-08-330 provides:

> Witnesses summoned before the agency shall be paid by the party at whose instance they appear the same fees and mileage that are paid to witnesses in the superior courts of the State of Washington.

Nothing in the rules of the Commission or in the applicable collective bargaining statutes would have obligated the employer to compensate either Thornton, as the representative of the decertification petitioner, or Dillon, as a potential witness for the union, for the time they spent attending the PERC hearing on the decertification petition. Conversely, had the employer compensated both employees equally for their time spent at the representation hearing, no discrimination could be found. Just as an employer cannot assist a decertification petition by paying the wages of an employee to deliver the petition to the administrative agency, Dayton Blueprint Co., Inc., supra, the Port was precluded from paying an employee supporting the decertification petition while denying similar compensation to an employee sympathetic to the union. We view this as an act supportive of a finding that the employer engaged in a course of conduct of interference unfair labor practices, and we affirm the Examiner's backpay award to Dillon.

AMENDED FINDINGS OF FACT

1. The Port of Edmonds is a port district organized pursuant to Title 53 RCW, and is a municipal corporation and political subdivision of the State of Washington.

2. Service Employees International Union, Local 120, AFL-CIO, an employee organization within the meaning of RCW 53.18.010 and a bargaining representative within the meaning of RCW 41.56.030(3), is the certified exclusive bargaining representative of certain employees of the Port of Edmonds.

3. On December 6, 1978, Port employee Ronald Wilander filed with the Public Employment Relations Commission a petition for investigation of a question concerning representation of employees of the Port of Edmonds, seeking decertification of Service Employees International Union, Local 120 as exclusive bargaining representative. Port employee William Thornton assisted Wilander with the filing and processing of that decertification petition. Said petition was docketed as Case No. 1872-E-78-338.

4. During the pendency of the decertification petition, Thornton initiated at least twelve telephonic conversations with Cabot Dow, the labor relations consultant retained by the employer for its dealings with Local 120. The content of those conversations included Thornton's efforts to obtain information concerning procedures for decertification of the union. In addition to referring Thornton to the Commission, Dow provided Thornton with substantial professional advice and assistance.

5. Hearing was held on April 25, 1979 and May 4, 1979 on the decertification petition. The employer compensated Thornton for all time spent attending the April 25, 1979 representation hearing as spokesman for the decertification petitioners but did not compensate its employee, Ronald Dillon, for all time spent attending the April 25, 1979 representation hearing as a witness called by the union.

6. On June 14, 1979, the employer unilaterally increased the wage rates of William Thornton and Riki Vesoja to $7.66 per hour, at a time when a petition was pending raising a question concerning representation. The effect of the employer's action was to interfere with the freedom of choice of employees in selection of an exclusive bargaining representative or no representative.

7. The employer did not condition the June 1, 1979 unilateral wage increase upon withdrawal of unfair labor practice charges by Riki Vesoja or Service Employees International Union, Local 120, or upon withdrawal of Riki Vesoja's membership in Service Employees International Union, Local 120.

8. The employer altered Vesoja's shift hours for sound business reasons. Vesoja did not object to the employer concerning the change of shift hours. The change in shift hours was not in retaliation for Vesoja's union activities.

AMENDED CONCLUSIONS OF LAW

1. The Port of Edmonds is a public employer within the meaning of RCW 41.56.030(1), and the Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 53.18 RCW.

2. By implementing a change of wages for its employees Thornton and Vesoja while a question concerning representation was pending, the Port of Edmonds interfered with the exercise by its employees of the rights conferred by RCW 41.56.040 and thereby violated RCW 41.56.140(1).

3. By compensating Thornton for time spent representing the decertification petitioners in a representation hearing before the Public Employment Relations Commission while denying Dillon similar compensation for time spent attending the same representation hearing as a witness on behalf of the union, the Port of Edmonds discriminated against Dillon in regard to his exercise of rights conferred by RCW 41.56.040 and thereby violated RCW 41.56.140(1).

4. By a course of conduct including the matters stated in paragraphs 4, 5 and 6 of the foregoing findings of fact and paragraphs 2 and 3 of these conclusions of law, the Port of Edmonds assisted the filing and processing of the petition seeking decertification of Local 120 as exclusive bargaining representative and interfered with the exercise by its employees of the rights conferred by RCW 41.56.030, in violation of RCW 41.56.140(1).

5. The employer did not violate RCW 41.56.140 with regard to the matters described in paragraphs 7 and 8 of the foregoing findings of fact.

ORDER

1. The Order issued by Examiner Rex L. Lacy is affirmed and adopted as the order of the Commission.

2. The Port of Edmonds shall notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this Order, as to what steps have been taken to comply with the Order issued by Examiner Rex L. Lacy in this matter, and at the same time shall provide the Executive Director with a signed copy of the notice required by said Order.

DATED this 18th day of January, 1982.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson
JANE R. WILKINSON, Chairman

Robert J. Williams
R. J. WILLIAMS, Commissioner

Mark C. Endresen
MARK C. ENDRESEN, Commissioner