STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

MICHAEL L. CLOSSON, Complainant, vs. SPOKANE TRANSIT AUTHORITY, Respondent.	CASE NO. 4557-U-83-742 DECISION NO. 2078 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

William J. Powell, Attorney at Law, appeared on behalf of the complainant.

Thomas F. Kingen, Attorney at Law, appeared on behalf of the employer.

On March 23, 1983, Michael L. Closson (complainant) filed a complaint charging unfair labor practices against the Spokane Transit Authority (employer) alleging violation of RCW 41.56.140(1), by interfering with, restraining and coercing complainant in the exercise of his rights to attempt to collectively bargain under the provisions of the statute. A hearing was held December 7, 1983 before Examiner Jack T. Cowan. The parties submitted post-hearing briefs.

BACKGROUND

Prior to March, 1981, the public transportation system in the City of Spokane was owned by the City of Spokane but was known as National City Lines and was operated under a management contract, by Washington Transit Management, Inc. During the period from 1978 to 1981, Washington Transit and Amalgamated Transit Union, Local 1015, were parties to a collective bargaining agreement which covered operating, maintenance and clerical employees of the transit system, including route supervisors. Mike Closson, one of the supervisors, was shop steward for the clerical department and the supervisors at that time. Prior to the 1981 expiration date, the parties negotiated a new agreement in which they agreed to exclude the route supervisors from the bargaining unit.

In March, 1981, the voters in an area which includes the City of Spokane and outlying cities of Spokane County approved the formation of a public

transportation benefit area which became known as Spokane Transit Authority for Regional Transportation (START). Jerry Haight began his employment as executive director of START on August 1, 1981.

The present dispute is rooted, in part, on incentives which were offered to the route supervisors to obtain their support for their exclusion from the bargaining unit represented by ATU Local 1015. In addition to retention of their seniority rights, the supervisors were supposedly offered an ongoing benefit program. Such offer was claimed to have come from the employer's negotiator, Jim Diaz of El Paso, Texas, who was a regional vice-president for National City Lines and also vice-president for Washington Transit Management. Of particular importance is a sick leave policy known as the "six and six" benefit.

Haight became aware of the supervisors' belief that they had been promised certain sick leave benefits payable at retirement and of their later belief that the only way they could receive these benfits was if they returned to driving. Washington Transit Management would not admit to having agreed to the six and six policy. Haight also stated in testimony that in conversation with Diaz, Diaz denied the existence of a "six and six" policy. After Haight's contact with the transit board concerning this matter, the board approved a means whereby the board could summarily pay for all the sick leave that had been accrued as an operator (driver) and allow sick leave to be accrued from that point forward on the basis of its previously adopted administrative policy.

In a meeting of several supervisors following their exclusion from ATU Local 1015, other supervisors queried Closson regarding organizing a new supervisory bargaining unit. Closson telephoned Mel Schoppert, ATU international vice-president, to obtain bargaining cards. Other involved supervisors included Gary Lane, Terry Davis and Daryl George. Prior to the arrival of the cards, Closson went on a vacation for approximately four weeks. The cards were picked up and distributed by Lane and Davis. Upon his return, Closson filled out a card and gave it to Lane.

On July 6, 1982, the Amalgamated Transit Union filed a petition with the Public Employment Relations Commission seeking certification as exclusive representative for a unit comprised of all supervisors and dispatchers employed by Spokane Transit Authority. The petition was signed by Mel Schoppert, international vice-president of the Amalgamated Transit Union.

Closson was demoted from supervisor to driver on July 23, 1982, immediately following a supervisory meeting in which Haight and Closson engaged in a heated discussion. Closson had accused Haight of having repudiated previously agreed sick leave committments. Closson had not previously been

reprimanded or disciplined during his eight and one-half years as a supervisor. He filed his unfair labor practice complaint with the Commission on March 23, 1983.[1/]

POSITIONS OF THE PARTIES

The complainant alleges that he was demoted because of his protected activities in attempting to organize a new supervisory bargaining unit and enforce previous promises concerning sick leave benefits.

The employer contends the complainant was demoted because of psychological tests, failure to keep private certain privileged information, disruptive behavior and difficulties with other supervisors, and that his demotion was not related to protected conduct.

DISCUSSION

The issue for determination here is whether the employer committed an unfair labor practice in violation of RCW 41.56.140(1) by demoting the complainant from supervisor to driver.[2/] Under Whatcom County, Decison 1886 (PECB, 1984), the elements of this type of unlawful action include employer knowledge that the employee is engaged in protected activity and employer motivation based upon the employee's protected activity. See also: Port of Seattle, Decision 1624 (PECB, 1983).

It appears from the record that Haight was well aware of the organizing effort. In his July 16, 1982 memorandum to the START Board, he advised the directors of the petition to form a new supervisors' unit. Whether Haight was aware of Closson's efforts in the organization process, whatever they might have been, appears questionable. Conflicting evidence was offered regarding Closson's involvement in the organizing of the new supervisory unit. Closson portrays himself as chief organizer, a recognized leader in the organizational process. Haight denied any knowledge of Closson's organizing activities, as did management officials Harmon and Schweim. Other testimony by peers indicated Closson had only limited involvement with

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1/ RCW 41.56.160 was amended, effective in July, 1983, to impose a six months statute of limitations on filing of unfair labor practice complaints. Previous to that, the Commission had applied the two year general limitation on civil actions found in RCW 4.16.030. METRO, Decision 1356-A (PECB, 1982).

2/ Washington Transit Management had bargained with the union under the National Labor Relations Act, which excludes supervisors from its coverage. START, by contrast, is a public employer subject to Chapter 41.56 RCW. The supervisors obtained collective bargaining rights in the transfer. See METRO vs. L & I, 88 Wn.2d 925 (1977).

the creation of the new union. While at least one supervisor saw Closson as a leader others felt his leadership was only partial or non-existent. Closson had, in fact, called Schoppert's office to request bargaining cards and had signed one of the cards, returning it to Supervisor Gary Lane.

A bargaining unit of supervisors and dispatchers was found to be appropriate in Spokane Transit Authority, Decision 1642 (PECB, 1983), and a representation election was ordered. The decision in that case is instructive testimony in that case established that a union steward had taken a poll among supervisors in September, 1981, following which the supervisors agreed to their exclusion from the existing Local 1015 bargaining unit. In the instant case, Closson was identified as the union steward who conducted that poll. The results of the poll were favorable to the employer and beneficial in achieving certain of the employer's bargaining objectives. Conduct of such a poll was not, in itself, an organizing effort and was not objectionable from the employer's point of view. On the other hand, the Executive Director pointed out in the decision that the polling of the supervisors by a steward (Closson) acting on the employer's behalf and subsequent polling at a joint meeting with the supervisors, representatives of the union and representatives of management could reasonably constitute coercive action and an unfair labor practice under state law. While Closson ceased to act as a union steward effective with his exclusion from the Local 1015 bargaining unit, the history of his union activity indicates the potential for the employer to have identified Closson as a leader in the supervisory organizational effort, which the employer hotly contested.

The timing of the demotion, in relation to Closson's assumption of a leadership role in asserting the rights of the supervisors, also suggests an inference against the employer.

In response to a question in this proceeding concerning his understanding as to what benefits the supervisors were to retain after their exclusion from the bargaining unit, John Leinen, president/business agent and negotiator for Local 1015, indicated the supervisors were to be entitled to all current benefits in the labor agreement and that the pension would be paid by management. According to Leinen, Diaz had pointed out that when people became exempt employees, they would automatically get a sick leave policy which gives them full pay for six months followed by one-half pay for the next six months ("six and six"). After the exclusion was negotiated, Closson had sat in on a meeting with representatives of Washington Transit Management where, according to the testimony of Charles Harmon, a member of the management, the supervisors were told by Diaz that they had the benefit of the six and six policy. Closson testified that Diaz had promised the six and six policy over the negotiating table in front of all the negotiators on both sides. The agreement across the negotiating table was that Diaz was to put something in writing prior to the ratification of the contract, but he did not do so.

Having been instrumental in getting the supervisors to agree to their own exclusion from the bargaining unit, Closson subsequently felt he had a responsibility to assure that the promised benefits were delivered. The proposed changes of direction, and the apparent disregard of the agreement reached in bargaining continued to weigh heavily on Closson at the time of the July 23, 1982 meeting. When queried at that meeting concerning the matter, Haight stated Diaz denied the policy existed. He further stated that anything not in writing was not valid; also that Harmon had said that there was not a written established policy on six and six. Closson vociferously opposed Haight on the matter, representing the interests of the supervisors.

What becomes apparent is that there was, in fact, a past practice of a six and six policy. For those in higher management, a one year and one year policy had existed. The union negotiators and the supervisors believed that a good faith offer had been made to them -- that the supervisors would receive or be entitled to the six and six policy. The employer's proposal on six and six was supported by consideration in the form of the supervisors' exclusion. Withdrawal of the policy after the supervisors' exclusion and without further negotiation constitutes sufficient detriment to the supervisors to support a conclusion that Closson was engaged in the assertion of substantial rights on behalf of the group during the July 23, 1982 meeting.

Under the "Interboro" doctine, NLRB vs. Interboro Contractors, Inc., 388 F.2d 495 (CA. 2 1967), the NLRB found that an individual employee who reasonably and honestly invokes a right contained in the collective bargaining agreement is engaged in "concerted" activity within the meaning of the NLRA. In ARO, Inc. vs. NLRB, 596 F.2d 713 (CA. 6 1979), the Court of Appeals held:

> For an individual claim or complaint to amount to concerted action under the Act, it must not have been made solely on behalf of an individual employee but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

In City of Seattle, Decision 489-A (PECB, 1978), the examiner emphasizes that RCW 41.56 contains no "concerted activities" clause, and states as follows:

> Considering that the Act was patterned in large part after the NLRA, I must presume that the absence of the "concerted activities" clause has significance and that "concerted activities for ... mutual aid or protection is not, per se, protected under the Act.

The examiner went on to rule the action of the complainant in that case was so remote as to not be protected under the rights protected by RCW 41.56.040. On the other hand, a violation was found in Valley General Hospital, Decision 1195-A (PECB, 1981), where an employee asserted rights under a collective bargaining agreement, and a violation was found in City of Olympia, Decision 1208-A (PECB, 1982), where an unrepresented employee was a leader in presenting employee grievances and seeking union representation.

The examiner concludes that the complainant has made out a prima facie case of anti-union discrimination, thus shifting the burden to the employer to show that its demotion of Closson would have occurred regardless of his protected activities.

The reasons offered by the employer for Closson's demotion do not constitute adequate justification for the action taken.

Psychological test results received from a personnel laboratory were identified by Haight as part of the rationale for Closson's demotion. The laboratory has developed a spectrum of certified tests to gauge, monitor or measure personality characteristics, mental abilities and reasoning powers. The testing system at START was implemented by Haight, who asked the laboratory to develop a test battery for the positions of unit supervisor and superintendent of transportation. When Closson applied for promotion to a "superintendent" position, he voluntarily submitted to the test. Supervisory evaluations were performed on August 10, 1982 by Charles Harmon, transportation superintendent, and Allen Schweim, director of transit operations. Other supervisors were tested at the same time, but the evidence is not convincing. Psychological tests designed and intended for one purpose were used as justification for another, and were used after the fact. Infrequent appraisals based on limited observations accomplished after the demotion were used to justify the demotion.

Additional reasons given for Closson's demotion included a failure to keep private certain privileged information, disruptive behavior exhibited at the July 23, 1982 and other supervisory meetings, and recent difficulties with another supervisor. Conflicting testimony is in evidence concerning the alleged failure to maintain confidential information. In the past, employees would have been warned or admonished regarding inappropriate conduct, not demoted. Closson had not been warned or admonished during his eight and one-half years as a supervisor. These circumstances lead back to the conclusion that the complainant's assertion of supervisor rights at the July 23, 1982 meeting (a protected activity in the context of the organization drive then going on) was the real reason for his demotion.

FINDINGS OF FACT

1. Spokane Transit Authority is a public employer within the meaning of RCW 41.56.030(1).

2. Michael L. Closson is a public employee within the meaning of RCW 41.56.030(2). Following service as a driver, he served as a road supervisor for approximately eight and one-half years.

3. Prior to 1981 the supervisors were included in the Amalgamated Transit Union Local 1015 bargaining unit, Closson served as the union steward. Prior to the completion of Local 1015's negotiations for a succeeding bargaining agreement in 1981, Closson conducted a poll among the supervisors to determine whether they would voluntarily agree to be excluded from the existing bargaining unit.

4. In 1982, Closson telephoned the international vice-president of ATU to obtain bargaining cards to facilitate organizing a new supevisory bargaining unit. A petition was filed with the Commission on July 6, 1982.

5. Closson was demoted to driver following a July 23, 1982 supervisors' meeting at which he asserted certain supervisor rights while engaged in a heated discussion with the executive director of START. The decision to demote Closson was motivated by anti-union discrimination.

CONCLUSIONS OF LAW

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

2. By demoting Michael L. Closson from supervisor to driver, Spokane Transit Authority discriminated against the complainant because of the claimaint's protected activities and violated RCW 41.56.140(1).

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to RCW 41.56.160 of the Public Employees Collective Bargaining Act, it is ordered that Spokane Transit Authority, its officers and agents shall immediately:

1. Cease and desist from:

a. Demoting any employee engaged in a protected activity because of anti-union discrimination.

2. Take the following affirmative action to remedy the unfair labor practices and effectuate the policies of the Act:

a. Restore Michael L. Closson to the position of road supervisor.

b. Pay Michael L. Closson all lost wages and benefits from July 23, 1982 until the date of complaince with this order.

c. Post in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Such notice shall,after being duly signed by an authorized representative of the Spokane Transit Authority, be and remain posted for sixty (60) days. Reasonable steps shall be taken by Spokane Transit Authority to ensure that such notices are not removed, altered, defaced or covered by other material.

d. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith and at the same time provide the Executive Director with a signed copy of the notice required by the proceding.

DATED at Olympia, Washington, this 17th day of December 1984.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JACK T. COWAN, Examiner

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

PUBLIC EMPLOYMENT RELATIONS COMMISSION

"APPENDIX A"

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against any employee engaged in a protected activity.

WE WILL restore Michael L. Closson to the position of road supervisor and pay Closson all lost wages and benefits from July 23, 1982.

SPOKANE TRANSIT AUTHORITY

BY: _____
AUTHORIZED REPRESENTATVE

DATED: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Buidling, Olympia, Washington 98504. Telephone (206) 753-3444.