STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

RHODE ISLAND STATE LABOR RELATIONS BOARD

CASE NO: ULP-5459

-AND-

RHODE ISLAND RESOURCE RECOVERY CORPORATION

DECISION AND ORDER OF DISMISSAL

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") on an Unfair Labor Charge (hereinafter "Charge") dated and filed on March 30, 2000 by Thomas Pizzi (hereinafter "Employee")

The Charge alleged:

> "I was dismissed for loading an alleged rock on a truck and that it did damage to the vehicle. The driver's statement showed he never saw the rock in the bucket of my machine or on his truck. There was just a picture of a rock on the ground. R.I.R.R.C. said it was the rock I put on. Dennis aRusso told me I would be fired before the first of the year because Sherry was pissed off about the Union organization.
>
> In violation of 28-7-13 (#3 #8 #10)"

The Employer filed a Denial of Charge on April 5, 2000. Following the filing of the Charge, an informal conference was held on April 26, 2000 between representatives of the Employee and Respondent and an Agent of the Board. At that time, Mr. Pizzi was represented by Gregory Acciardo, Esquire; and the Employer was represented by Vincent Ragosta, Esquire.

The informal conference failed to resolve the Charge and the Board issued the instant Complaint on May 26, 2000. The Employer filed its Answer to the Complaint on June 12, 2000, denying the allegations contained in paragraphs 3 and 4 of the Complaint. The Employer also filed a Motion to Schedule Sequential Appearance of Subpoenaed Witnesses. Formal hearings on this matter commenced on June 29, 2000. Additional hearings were held on October 17, 2000; March 22, 2001; and March 29, 2001 Upon conclusion of the hearings, both the Employer and the Employee's Representative submitted written briefs. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within the post hearing briefs.

POSITION OF THE PARTIES

Mr. Pizzi alleges that he was fired without just cause and solely as retaliation for his involvement in an unsuccessful union organizational drive. Mr. Pizzi claims that, shortly after he became involved with the union drive, he was told by a number of other employees that he would be fired because of his union activity. Mr. Pizzi also claims that he was fired as an "example" of what happens to people who attempt to bring in a union.

The Employer maintains that there is absolutely no evidence to support the charge that Mr. Pizzi was terminated from employment for engaging in a union organization drive. The Employer maintains that because Mr. Pizzi is an "at-will" employee, the Employer does not have to establish that Mr. Pizzi was terminated from employment for "just cause". Notwithstanding the fact that the Employer does not have a burden of establishing "just cause" for Mr. Pizzi's termination, the Employer argues that it has established that it had more than sufficient "just cause" for Mr. Pizzi's termination because he engaged in intentional misconduct and insubordination. The Employer also notes that no unfair labor practice charge was filed during the union campaign, nor immediately after the vote, which took place on October 6, 1999. The Employer believes that the lack of filing, on a timely basis, supports the inference that there was no impropriety during the election process. The Employer notes that Mr. Pizzi was not fired until December of 1999, immediately following two specific incidents of insubordination and misconduct.

FACTUAL SUMMARY

On July 29, 1999, the International Union of Operating Engineers, Local 57, filed a Petition for Investigation and Certification of Representatives in an effort to become the exclusive bargaining agent of employees of the Rhode Island Resource Recovery Corporation. An "Agreement for Consent Election" was entered into on September 8, 1999 and an election by secret ballot was held on October 6, 1999. The Employees of the Corporation voted against unionization by a two-to-one margin, and this Board dismissed the Union's petition on October 12, 1999.

The Employer operates the Central Landfill site located in Johnston, Rhode Island. Employees at the landfill site operate heavy equipment and machinery to bury solid waste under a "cover material" consisting of loose gravel and dirt, which is typically purchased from a private vendor at offsite locations. The cover material is required to be a certain size, and to be

consistent from load to load. Rocks and boulders above a certain size are considered too large for use within the landfill; loads containing large materials are called "bony". Supervising employees at the landfill oversee the truckloads of material and notify haulers and employees of the corporation if loads are too "bony".

One of the off-site locations for the cover material is a gravel bank in Foster, Rhode Island, located approximately fourteen miles from the Central Landfill. The road between the landfill and the Foster gravel bank is long, windy and narrow, and travels through some residential neighborhoods. Trucks must be loaded and driven carefully in order to prevent spillage of materials. The Employer assigned employees to work at the gravel bank loading material onto trucks of private contractors, who in turn haul the material to the Central Landfill for use. Mr. Pizzi was one of the employees assigned to operate heavy loading equipment at the Foster gravel bank in December, 1999.[1]

On December 1, 1999, Mr. Pizzi and two other employees, Mr. Robert Rossi and Mr. Dale Crawford, were excavating cover material at the Foster gravel bank. While listening to their two-way radio, they heard Mr. David Russo, an Assistant Foreman at the Landfill, complain that the cover material coming in from the Foster gravel pit was too "bony". Thereafter, Mr. Stephen Tocco, Mr. Pizzi's supervisor, radioed to Mr. Pizzi twice to advise him that the material they were sending was too "bony" and to watch the type of material that was being sent. In response to Mr. Tocco's admonishments regarding the quality of the cover material, Mr. Pizzi decided (in his own words) to "break some chops". (TR 6/29/00 p. 38) So, he spray painted the words "Cry Baby David" on a rock which was at least 2 ft. x 2 ft. in size,[2] loaded it onto one of the trucks, and sent it down to the landfill with the cover material. Although this incident violated the Employer's policies for conduct, Mr. Pizzi was not immediately disciplined. Mr. Pizzi maintains that he intended the incident as a "joke" and that it was first received laughingly by his supervisor, Mr. Tocco.

Two days later, on Friday, December 3, 1999, a large boulder was dropped into a private hauler's truck in such a manner so as to damage the truck by causing an eight inch gash in a

[1] The evidence established that Mr. Pizzi had previously worked at the Foster gravel bank and had performed his duties there in a responsible fashion, earning high marks of praise from his supervisors. There was conflicting testimony as to whether or not Mr. Pizzi wanted to be re-assigned to the Foster gravel bank in December, 1999.
[2] There was some discrepancy in witness testimony as to the size of this rock, but it was, at minimum, 24 inches by 24 inches.

steel trailer bed. The Employer ended up paying a repair bill to the hauler for approximately $800.00. Mr. Pizzi disputed that he had been the one to drop the rock onto the truck and maintained that no one saw him do it. After this second incident, members of the Employer's management team met to discuss Mr. Pizzi's conduct and his employment status After receiving a recommendation for termination from Mr. Pizzi's immediate supervisors (Mr. Tocco and Mr. aRusso) and after reviewing investigative reports prepared by the Employer's Director of Security, the Executive Director, Ms. Sherry Giarrusso-Mulhearn, terminated Mr. Pizzi's employment on December 6, 1999. Mr. Pizzi then filed his charge of unfair labor practice on March 30, 2000.[3]

DISCUSSION

As noted by the Employer in its brief to this Board, when an employer is accused of discriminating against an employee for union activity, the Board must consider whether the employee's protected conduct was a substantial or motivating factor in the adverse action. NLRB v Transportation Management Corporation, 462 U.S. 393,401 (1983). In the event that the evidence establishes that the union activity was a substantial or motivating factor in terminating the employee, the burden then shifts to the Employer to show that it would have terminated the employee, irrespective of his or her union activity. If the Employer meets this burden, then it cannot be found to have committed an unfair labor practice in terminating the employee.

In this case, the parties presented conflicting witness testimony on several issues. Mr. Pizzi steadfastly maintains that he and Mr. Vincent Russo were both ardent supporters of the unionization drive and met with Mr. James White, the union field representative, on several occasions Mr. Russo maintains that he did not "meet" with Mr. White, but was only present on one occasion when Mr. Pizzi and Mr. White were meeting. Mr. White testified that he did in fact meet with Mr. Russo and Mr. Pizzi on several occasions and that both were involved heavily with the Union organizational drive in the beginning. Despite the fact that Mr. Russo disclaimed any real interest in the union when testifying, Mr. White testified that Mr. Russo was the first employee to sign a union card. Clearly, there is untrue or confused testimony before this Board on this issue The question is why? Are employees afraid of retaliation as is alleged by Mr. Pizzi? Are there other "loyalties" swaying the testimony? Are some of the witnesses in this case

[3] Although Mr. Pizzi engaged in intervening litigation concerning unemployment benefits, those proceedings have nothing to do with the present matter since the issue before each tribunal is decidedly different.

lying? The Board believes that the truth lies somewhere in the middle and that all of these factors play some role in this case.

The first question the Board must resolve is whether Mr. Pizzi's protected conduct in the union organizational drive was a substantial or motivating factor in the Employer's decision to terminate him In support of his allegation that he was discharged solely for his union conduct, Mr. Pizzi points to a number of factors: (1) The alleged existence of a "hit list" of employees to be fired because they were union supporters (2) The fact that he was not immediately disciplined. (3) The fact that Mr. McQueeney did not question Mr. Pizzi during the investigation. (4) The fact that other employees have damaged trucks without being fired. The fact that his long-time friendship with Mr. Dennis aRusso, a member of the Employer's management team, deteriorated and disintegrated at the time of the union organization. (6) The fact that management came to the decision to fire him without first affording him any type of hearing.

The Board shall address each of the foregoing factors, in regards to the evidence of the record as a whole. The first issue we shall address is the so called "hit list". This particular allegation is the most serious of the charges. Indeed, this type of conduct is perhaps one of the most insidious practices that an Employer can engage in when attempting to "dissuade" union activity. This type of activity is also one of the hardest to prove without the "smoking gun". In this case, the Board relies upon the testimony of Mr. Michael Tortorella, a reluctant witness who testified only under subpoena. He testified that Dennis aRusso repeatedly warned Mr. Pizzi, Mr. Vincent Russo, and him that they could all lose their jobs because of their union activity. Tortorella testified that, as a result of these "warnings", he went to see the Executive Director himself to reassure her that he was not involved with the union, and to make sure that he was not on the "hit list". The Board finds Mr. Tortorella's testimony on this subject to be the most credible of all the witnesses to testify on this subject. Although he was Mr. Pizzi's friend and thus could be biased, if there was in fact a "hit list" as he testified, he took the greatest personal risk with his testimony In contrast, Mr. aRusso would perhaps be at the greatest risk if he admitted to having made those types of statements. The Board is less certain that there actually existed a "hit list", but is fairly convinced that Mr. aRusso *said* there was a list and did so with the intention of scaring employees and discouraging union activity. Even if the Executive Director of the Employer may not have known of such threats to the employees, the Employer is

responsible for the adverse conduct of its management employees during an election campaign. Since the Board finds that there did exist some discriminating conduct on the part of the Employer, the burden shifts to the Employer to otherwise defend its termination of Mr. Pizzi from his employment.

Before we review that question though, we shall also address the other factors raised by Mr. Pizzi. The Board finds nothing unusual in the fact that Mr. Pizzi wasn't disciplined immediately upon either the December 1st or 3rd incidents. In fact, it seems prudent to the Board that his supervisors would first gather all the facts and consult with each other before deciding on a course of action, particularly given the fact that Mr. Pizzi did not have an unblemished disciplinary record. Likewise, there is nothing unusual in the manner that Mr. McQueeney conducted his investigation. He testified that in his experience, there was no reason to question Mr. Pizzi and that he was confident that he had sufficient information to come to a conclusion in his investigation. The Board notes that Mr. McQueeney was an experienced investigator with the Rhode Island State Police for many years prior to his employment with RIRRC. There was no suggestion of bias raised by Mr. Pizzi concerning Mr. McQueeney's investigation, and the Board is satisfied that there was none.

Mr. Pizzi's comparison of his punishment to others who have damaged equipment but not lost jobs does not sustain his charge of union discrimination. The Employer is not obligated to have a set course of disciplinary measures in response to infractions and is not required to act the same way, even if all other circumstances were exact. It is not up to this Board to set a fair disciplinary policy. Likewise, the Employer is not required to have a "hearing" before terminating an employee. Although the conduct of the Employer in regards to these two issues may not be the fairest or most sensible method for dealing with the issue, these issues are not properly before this Board. Indeed, meddling in such affairs is beyond the jurisdiction of this Board. Therefore, these issue are non-issues for the purposes of this case.

Finally, the Board will address the issue of Mr. Pizzi and Mr. aRusso's broken friendship as it relates to this action. The testimony on this issue was conflicted, as might be expected. Mr. Pizzi claims that the relationship, which had been significant for its length, breadth and closeness, broke off because of Mr. Pizzi's union support and Mr. aRusso's support for management. Mr. aRusso, however, claims that the relationship began cooling off or becoming more strained several months earlier. Mr. aRusso claims that he did not want to be associated

with Mr. Pizzi any longer because of certain undesirable acts on Mr. Pizzi's part. The real truth is unimportant to this action, despite the importance placed upon this issue by the parties. An Employer is not responsible for the existence or non-existence of friendship between employees.

Having concluded our discussion of the factors raised by Mr. Pizzi, and having determined that there was some untoward conduct on the part of the Employer during the election, we also find that there was probably insufficient time from the election to Mr. Pizzi's termination for him to have shed the "taint" of his union activity. The Board also notes that some of Mr. Pizzi's conduct during the election, particularly his vulgar characterization of the Executive Director, was unlikely to have been forgotten in the two short months after the election. Therefore, it is likely that Mr. Pizzi was skating on thin ice with his employment. distinction, however, is that he was indeed still in the game; he had not been terminated for his union activities -- even when at his crudest.

The burden in this case now shifts to the Employer, that notwithstanding its likely adverse predisposition to Mr. Pizzi because of his union activities, to establish that it had a legitimate business purpose to terminate Mr. Pizzi's employment. We now look to the circumstances surrounding Mr. Pizzi's termination. By the time December 1, 1999 rolled around, Mr. Pizzi already had one suspension under his belt. On this day, his supervisor had to warn him twice concerning the quality of the cover material that Mr. Pizzi was either loading, or allowing to be loaded, for transport to the landfill. Having received the warnings, Mr. Pizzi's dance with "thin ice" turned dangerous when he decided to "bust some chops". Mr. Pizzi's decision to perch a large boulder with the words "Cry Baby David" (directed at a supervisor) on a full load of gravel, and then send it on its way to the landfill was ill advised, at best. When the same resulted in property damage for which his Employer had to pay, the end result probably inevitable. When a similar act occurred two days later and investigation revealed that Mr. Pizzi was once again involved, the writing was on the wall for Mr. Pizzi's career with this Employer.

The Board's function is not to weigh all of Mr. Pizzi's indiscretions and determine whether the punishment fits the crime. The Board's job is to determine whether the Employer took its action regardless of Mr. Pizzi's prior union activity. The Board believes that it did. testimony on this subject centered on management's frustration that it just didn't know what to do with Mr. Pizzi anymore and that he couldn't be managed. Moreover, the Executive Director

expressed concern that if the Employer didn't take such an action, then it was sending a message to all the other employees that this kind of conduct was going to be acceptable. If Mr. Pizzi was made "an example of" to other employees, it was an exercise of his own doing.

The Board concurs with the Employer that, in order to sustain this case, Mr. Pizzi seeks to capitalize upon and leverage his previous union activity by using it as a shield to immunize indefensible misbehavior. The Board hereby rejects Mr. Pizzi's attempt to wrap himself in the cloak of protected activity when engaging in clear misconduct and insubordination. To do otherwise would be to make a mockery of the protections of the State Labor Relations Act.

FINDINGS OF FACT

1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) Mr. Thomas Pizzi is an individual qualified to bring a charge of unfair labor practice under the State Labor Relations Act.
3) Following the filing of the Charge, an informal conference was held on April 26, 2000 between representatives of the Employee and Respondent and an Agent of the Board. At that time, Mr. Pizzi was represented by Gregory Acciardo, Esquire; and the Employer was represented by Vincent Ragosta, Esquire.
4) The informal conference failed to resolve the Charge, and the Board issued the instant Complaint on May 26, 2000. The Employer filed its Answer to the Complaint on June 12, 2000, denying the allegations contained in paragraphs 3 and 4 of the Complaint.
5) On July 29, 1999, the International Union of Operating Engineers, Local 57, filed a Petition for Investigation and Certification of Representatives in an effort to become the exclusive bargaining agent of employees of the Rhode Island Resource Recovery Corporation. An "Agreement for Consent Election" was entered into on September 8, 1999, and an election by secret ballot was held on October 6, 1999. The Employees of the Corporation voted against unionization by a two-to-one margin, and this Board dismissed the Union's petition on October 12, 1999.
6) Mr. Pizzi and Mr. Vincent Russo were originally the union organizers. After a while, Mr. Russo dropped out of the union proceedings and withdrew his support.
7) Dennis aRusso repeatedly warned Mr. Pizzi, Mr. Vincent Russo, and Mr. Michael Tortorella that they could all lose their jobs because of their union activity.

8) The Employer operates the Central Landfill site located in Johnston, Rhode Island. Employees at the landfill site operate heavy equipment and machinery to bury solid waste under a "cover material" consisting of loose gravel and dirt which is typically purchased from a private vendor at offsite locations. The cover material is required to be a certain size, and to be consistent from load to load. Rocks and boulders above a certain size are considered too large for use within the landfill; loads containing large materials are called "bony".

9) One of the off-site locations for the cover material is a gravel bank in Foster, Rhode Island, located approximately fourteen miles from the Central Landfill. The road between the landfill and the Foster gravel bank is long, windy and narrow, and travels through some residential neighborhoods.

10) Mr. Pizzi was one of the employees assigned to operate heavy loading equipment at the Foster gravel bank in December, 1999

11) On December 1, 1999, Mr. Pizzi and two other employees, Mr. Robert Rossi and Mr. Dale Crawford, were excavating cover material at the Foster gravel bank. While listening to their two-way radio, they heard Mr. David Russo, an Assistant Foreman at the Landfill, complain that the cover material coming in from the Foster gravel pit was too "bony. Thereafter, Mr. Stephen Tocco, Mr. Pizzi's supervisor, radioed to Mr. Pizzi twice to advise him that the material they were sending was too "bony" and to watch the type of material that was being sent.

12) Mr. Pizzi painted the words "Cry Baby David" on a rock which was at least 2 ft. x 2 ft. in size, loaded it onto one of the trucks, and sent it down to the landfill with the cover material. Although this incident violated the Employer's policies for conduct, Mr. Pizzi was not immediately disciplined.

13) On December 3, 1999, a second boulder incident occurred. An investigation concluded that Mr. Pizzi was involved with this incident as well.

14) Mr. Pizzi was terminated from employment on December 6, 1999.

15) The Employer had a legitimate business purpose to terminate Mr. Pizzi's employment.

16) Mr. Pizzi filed his charge of unfair labor practice on March 30, 2000.

CONCLUSIONS OF LAW

1) The Employee has not proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (3).

2) The Employee has not proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (8).

3) The Employee has not proven, by a fair preponderance of the credible evidence, that the Employer has committed a violation of R.I.G.L. 28-7-13 (10).

ORDER

1) The Unfair Labor Practice Charge and Complaint in this matter are hereby dismissed.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Frank J. Montanaro, Member

Joseph V. Mulvey, Member

Gerald S. Goldstein, Member

Ellen L. Jordan, Member

John R. Capobianco, Member

Elizabeth S. Dolan, Member

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: December 11, 2001

By:
Joan N. Brousseau, Administrator