STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BURTON E. NIEMUTH, Complainant, vs. C & J TRANSPORT COMPANY and E. R. SCHNEIDER, Respondents.	Case I No. 16440 Ce-1467 Decision No. 11558-A

Appearances:
Mr. Burton E. Niemuth, Complainant, appearing on his own behalf.
Mr. E. R. Schneider, Executive Vice President and General Manager, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of unfair labor practice having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as an examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on such Complaint having been held at Milwaukee, Wisconsin, on February 5, 1973, before the Examiner, and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Burton E. Niemuth, hereinafter referred to as the Complainant, is an individual residing at West Bend, Wisconsin.

2. That C & J Transport Company, hereinafter referred to as Respondent-Employer, is a corporation engaged in the business of transporting motor vehicles by truck and has a terminal located at 639 East Polk Street, Milwaukee, Wisconsin.

3. That E. R. Schneider, hereinafter referred to as Respondent-Schneider, has been, at all times material hereto, Vice President and General Manager of Respondent-Employer.

4. That Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, is a labor organization and maintains offices at 6200 West Bluemound Road, Milwaukee, Wisconsin.

5. That at all times material herein, Respondent-Employer has recognized the Union as the exclusive collective bargaining representative of certain of its employes; that in said relationship, the Union and Respondent-Employer, at all times material herein, have been parties to a collective bargaining agreement covering wages, hours and conditions of employment of such employes, which agreement became effective June 1, 1970; and that said agreement included a multi-step grievance procedure culminating in final and binding arbitration of grievances that are not resolved in a lower step in said procedure.

6. That at all times material herein, Complainant was an employe of Respondent-Employer and a member of the collective bargaining unit covered by the aforesaid collective bargaining agreement.

7. That the aforesaid collective bargaining agreement read, in pertinent part as follows:

"NATIONAL MASTER AUTOMOBILE TRANSPORTERS AGREEMENT

. . .

ARTICLE 7.

. . .

Section 2. Grievance Procedure — Disputes and grievances shall first be taken up by the employee involved, and if no settlement is reached, then taken up between the Steward or Business Agent of the Local Union involved and the Employer representative. Disputes and grievances shall be put in writing and presented to the Company within one (1) week, whenever possible, after the grievance arises, but in no case later than thirty (30) days after the grievance arises, except as may be otherwise provided in a supplemental agreement. The Company must reply to the written grievance in writing to the Local Union within fourteen (14) days. . . . After the dispute or

grievance is reduced to writing, the said Company representative will make available for inspection by the Business Agent and/or Steward, time sheets and such other records as are pertinent to the handling of the specific dispute or grievance. This does not preclude nor prevent an oral attempt on the part of the Business Agent or Steward to settle such dispute or grievance before a request is made for such record. The dispute or grievance must be settled or deadlocked at the local level within five (5) days, excluding Saturday, Sunday and holidays, after the Business Agent has taken it up. After the five (5) day period but not later than fifteen (15) days, either party has the right to file its grievance with the appropriate Local Committee or Joint Conference Arbitration Committee referred to in Section 3 unless extension is mutually agreed to by Company and Local Union. Time limits as set forth in this Section shall apply equally to the Employer and the Union. The following procedure shall then apply:

. . .

[Joint Conference Arbitration Committees and Joint City Automobile Transporters Grievance --Central and Southern Conference Areas and National Joint Arbitration Committee provisions deleted.]

. . .

Section 6. Board of Arbitration

(a) If any grievance or disagreement is deadlocked by the National Automobile Transports Joint Arbitration Committee as provided above, then both the Union and the Employer, shall submit the grievance to a Board of Arbitration consisting of three (3) members:

One (1) member to be appointed by the Union;

One (1) member, by the Employer; and the

Two (2) together appointing a third disinterested arbitrator.

All grievances submitted to the Board of Arbitration must be heard and disposed of within thirty (30) days. The findings and decision of a majority of the Arbitration Board shall be final and binding on the parties and the employees involved.

(b) It is agreed that the arbitrator is empowered to hear and decide the deadlocked case, even

if only one of the parties submits to arbitration, or, if either party fails to appear at the hearing, or to present evidence. The arbitrator shall have the authority to interpret and apply the provisions of this Agreement or Supplements thereto where appropriate, but shall not have the authority to amend or modify this Agreement or Supplements thereto, or establish new terms and conditions under this Agreement or Supplements thereto.

The cost of the arbitrator shall be shared equally by both the Local Union and Employer involved.

Section 7. (a) It is agreed that all matters pertaining to the interpretation of any provision of this National Master Agreement, whether requested by the Employer or the Union, must be submitted to the National Automobile Transporters Joint Arbitration Committee, which Committee, after listening to testimony on both sides, shall make a decision.

(b) It is agreed that all matters pertaining to the interpretation of any provision of a Conference (area) Supplement or Local Rider thereto, whether requested by the Employer or the Union, must be submitted to the appropriate Conference (area) Joint Arbitration Committee, which Committee, after listening to testimony on both sides, shall make a decision.

(c) Any decision of any of the Joint Arbitration Committees referred to above, shall be final and conclusive and binding upon the Employer and the Union, and the employees involved.

. . .

CENTRAL AND SOUTHERN CONFERENCE AREAS

SUPPLEMENTAL AGREEMENTS

TO THE

NATIONAL AUTOMOBILE TRANSPORTERS AGREEMENT

. . .

ARTICLE 38

Lodging Comfortable, sanitary loding shall be provided by the Employer in all cases where an employee is required to take a statutory rest period away from home terminal provided bona fide receipt is given to Employer by employee. Employer has the right to designated or provide suitable places of lodging to be mutually agreed upon.

The Employer shall promptly reimburse the driver at the completion of his trip for all bona fide lodging receipts submitted to the authorized company personnel on duty."

8. That the "statutory rest period" referred to in "Article 38" above is set forth in The Motor Carrier Safety Regulations of the United States Department of Transportation - Federal Highway Administration (August, 1970); said Regulations provide, in pertinent part, as follows:

"PART 393--DRIVING OF MOTOR VEHICLES

Subpart A--General

. . .

Section 392.3 Ill or fatigued operator.
No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or to any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle. However, in a case of grave emergency where the hazard to occupants of the vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the motor vehicle to the nearest place at which that hazard is removed.

. . .

PART 395--HOURS OF SERVICE OF DRIVERS

. . .

Section 395.3 Maximum driving and on-duty time.
(a) Except as provided in paragraphs (c) and (e) of this section and in Sec. 395.10, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive more than 10 hours following 8 consecutive hours of duty or drive for any period after having been on duty 15 hours following 8 consecutive hours off duty: . . ."

9. That at 8:00 p.m. on October 24, 1972 Complainant delivered automobiles in Peru, Illinois, checked into a hotel there and rested until 8:00 a.m. the following morning, at which time he resumed his series of deliveries; that during the day on October 25, 1972, Complainant encountered a number of delays in his delivery schedule; that when he reached the south side of Chicago, he picked up a load of cars consigned to Waukesha and Brookfield, Wisconsin and did certain paperwork;

that thereafter, at 6:00 p.m., he departed northward; that since the hour was too late to permit deliveries to the Waukesha and Brookfield consignees, Complainant, prior to reaching the Wisconsin border, spoke by phone with George Cabunac, an authorized agent of the Respondent-Employer, for interim delivery instructions; that Cabunac instructed Complainant to return to the Respondent-Employer's Milwaukee terminal and to complete the deliveries on the morning of October 26; that Complainant thereupon informed Cabunac that the D.O.T. rules required him to stop driving when he was fatigued and that he was, in fact, beginning to feel fatigued but that he would try to comply with Cabunac's instructions; that thereafter, Complainant was delayed one hour at the State-line weigh scale and, feeling tired and fatigued by the time he reached the Kenosha, Wisconsin area at 9:00 p.m., Complainant took lodging at a motel there and delivered the consignments to Waukesha and Brookfield on October 26, 1972, returning his truck thereafter to Respondent-Employer's Milwaukee terminal.

10. That on or about October 26, 1972, Complainant presented the bill for said Kenosha lodging to Respondent-Employer for reimbursement; and that an authorized agent of Respondent-Employer refused to reimburse Complainant for such bill.

11. That on October 27, 1972, Complainant grieved the Respondent's aforesaid refusal to reimburse by filing a written complaint form with Gilbert Wozniak, Union Steward; that Complainant asked Wozniak about the status of said grievance on or about October 31 and November 3, 1972; that on each occasion Wozniak replied simply, "[w]e're working on it."; that on or about November 6, 1972, Complainant again inquired of Wozniak as to the status of his grievance; that Wozniak, in a hostile manner and tone of voice, replied that he had discussed Complainant's grievance with Union officials and that the Union had decided ". . . to drop the issue" and that he (Wozniak) had done all that he could concerning Complainant's grievance; that, upon close questioning by the Complainant, Wozniak gave no additional reason for the Union's decision to "drop the issue"; that Complainant also discussed his grievance with members of the Union "Yard Committee" but that they deferred to Union officials for a determination concerning the grievance; that subsequent to the November 6, 1972 discussion with Wozniak, Complainant has received no communication, oral or written, from the Union concerning

the status of his grievance; and that on or about November 16, 1972, Complainant presented Wozniak with a letter for transmittal to Respondent-Schneider in which letter Complainant indicated discontent with the alleged inadequacy of certain of Respondent-Employer's equipment and further indicated Complainant's intent to stop on the highway as he did on October 25, 1972 to rest in the event that he becomes tired during future driving work.

12. That by letter dated November 9, 1972 Union Business Representative Henry Kucera sent Complainant's written grievance to the Respondents by certified mail; and that Kucera's cover letter read, in pertinent part, as follows:

"RE: BURTON NIEMUTH

Dear Sir:

Enclosed please find copy of a Grievance I received from Gil Wozniak.

I am referring it to you for your settlement of the grievance. Please let me know within five (5) days, the disposition of same."

13. That on November 13, 1972, Respondent-Schneider sent a written reply to Complainant's grievance to Complainant and to the Union; and that said reply letter read, in pertinent part, as follows:

"Mr. G. Wozniak.

Re: Mr. Burt Niemuth
Grievance of 10/27/72

Mr. Niemuth was paid a motel bill for layover at destination in Illinois. He was then 225 miles from his home terminal via Chicago.

The following evening he called our Mr. George Cabunac and wanted to know what he should do, inasmuch as he could not deliver his Chicago load that night because of the late hour. Mr. Cabunac, (after conferring by phone with me) told him to return to the terminal at Milwaukee and finish delivery in the AM. Mr. Niemuth laid over in Kenosha after telling Mr. Cabunac that he was tired and D.O.T. rules required him to stop driving when he was fatigued. It is also the drivers obligation to report for work only if he is in fit condition to drive the allowable hours for any particular day.

Mr. Niemuths log shows 4 1/2 hours driving time to Chicago from Peru, Illinois. He then shows 3 hours on duty at

Chicago. He shows leaving Chicago at 6 PM and driving 3 hours to Kenosha. His total driving time for the day was 7 1/2 hours. The total distance from Peru, Illinois to Kenosha, Wis. is 225 miles, of which almost 90% was on Interstate divided highways or tolls road or Freeways. Mr. Niemuth had 2 1/2 hours of driving time left when he arrived at Kenosha and could have come into his home terminal at Milwaukee.

I cannot set a precedent and pay two layover motel bills on a 387 mile round trip, merely because the man says he is tired.

Mr. Niemuth does not live in Milwaukee and this fact might have a bearing on the case. Attached are his logs for the day under discussion."

14. That thereafter, some time late in November, the aforesaid Kucera and Respondent-Schneider engaged in a discussion (conducted at the office of Respondent-Employer) of certain grievances then pending between the Union and Respondent-Employer; and that during said discussion, Kucera told Respondent-Schneider that the Union had chosen not to carry Complainant's grievance to a further step, but rather that the Union accepted the Respondent-Employer's reasons for its refusal to reimburse Complainant for his Kenosha motel stay.

15. That it has not been shown by a clear and satisfactory preponderance of the evidence that the Union failed to fairly represent Complainant or that its conduct toward Complainant was in any way arbitrary, discriminatory or in bad faith.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That because Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has not been found to have violated its duty to fairly represent Complainant Burton Niemuth when it failed to process said Complainant's grievance through the joint committee step of the grievance procedure, and because of the absence of conduct by the Union of an arbitrary, discriminatory or bad-faith nature with regard to Complainant, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining

whether Respondent-Employer C & J Transport Company and/or Respondent-Schneider breached the latter's existing collective bargaining agreement in violation of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

NOW, THEREFORE, it is

ORDERED

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 5th day of June, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant, in his Complaint, alleged that Respondent-Schneider, on behalf of Respondent-Employer, violated the collective bargaining agreement between the Respondent-Employer and the Union. [1/] Though the Complaint did not specify a statutory section allegedly violated, it may be fairly read to allege violation of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act. [2/]

Respondents did not file a written answer; instead, Respondents, without objection by Complainant, answered the allegations of the Complaint orally on the record. [3/] In essence, Respondents denied the allegation that the Union did nothing by way of processing Complainant's grievance and denied that Respondents' refusal to reimburse Complainant for his Kenosha lodging constituted either a violation of the collective bargaining agreement between Respondent-Employer and the Union or an unfair labor practice under the Wisconsin Employment Peace Act.

In order for Complainant Niemuth to sustain the aforesaid charge based upon an alleged violation of a collective bargaining agreement

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[1/] The Union referred to in this Memorandum is Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; said Union was mailed a notice of hearing and a copy of the Complaint in the instant matter, but was neither named as, nor officially made a party to the instant proceeding and did not appear at the hearing.

[2/] Section 111.06(1)(f) provides as follows: "It shall be an unfair labor practice for an employer individually or in concert with others: . . . [t]o violate the terms of a collective bargaining agreement. . ."

[3/] The proceedings and testimonial evidence adduced at the hearing in the instant matter were stenotyped by a member of the Commission's staff pursuant to Sec. 111.07(3) of the Wisconsin Employment Peace Act. Both parties consented to the issuance of an Examiner's decision in the instant matter prior to the preparation of a transcript of said stenotype notes. The Complainant has, however, requested that he be provided with a transcript of the proceedings. Such a transcript will therefore be provided to the parties upon its completion.

providing for final and binding arbitration of disputes arising thereunder, he must first prove that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. [4] Only after he has proved the aforesaid will the Commission consider whether the Respondent-Employer has violated the terms of the collective bargaining agreement. [5]

DISCUSSION

The law concerning a union's obligation of fair representation is quite clear. The United States Supreme Court in Vaca v. Sipes, [6] stated:

> "A breach of the statutory duty of fair representation occurs only when a Union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."

In addition, the United States Supreme Court in Ford Motor Co. v. Huffman, [7] stated:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the Union it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Thus, Complainant must prove that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. This burden of proof is coupled with the fact that the Union is given a wide range of reasonableness in serving the individuals it represents.

It must be noted that the Union's duty of fair representation does not necessarily require that it carry any given grievance through all the steps of a contractual grievance procedure. Instead, the Union must investigate and prosecute each grievance in a manner that is

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[4] Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2639 (1967); American Motors Corp., Dec. No. 7955 (3/67); Kroger Company, Dec. No. 10004 (11/70).

[5] American Motors Corp., supra, note 4; Kroger Company, supra, note 4.

[6] Supra, note 4.

[7] 345 U.S. 330, 338 (1953).

untainted by arbitrary, discriminatory or bad-faith motives. The Complainant bears the burden of proving the Union's failure to fulfill its duty of fair representation by a clear and satisfactory preponderance of the evidence. [8/]

Schneider testified that Kucera told him in late November that the Union agreed with the Respondent-Employer concerning the proper interpretation of the contract language in question and the appropriate resolution of the grievance based thereupon. The Examiner is, therefore, willing to conclude that the Union decided not to process Complainant's grievance further because it believed that said grievance lacked merit. [9/]

Although the evidence suggests that the Union reached that conclusion before it received the Respondent-Employer's detailed and documented denial of Complainant's grievance [10/], that fact does not, in and of itself, establish that the Union was acting without reason or in bad faith. It is noted, in this regard, that the Union did not communiciate its view that the grievance lacked merit to the Respondent-Employer until late November, i.e., after receipt of the Employer's

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[8/] See Sec. 111.07(3) of the Wisconsin Employment Peace Act.

[9/] Though it was notified of the hearing by mail by the Examiner, the Union did not appear at the instant hearing. Henry Kucera was not called as a witness by either party and was not present at the hearing. Nevertheless, Complainant raised no objection at the hearing concerning the hearsay element in Schneider's testimony described above. Moreover, Complainant himself relied upon a similar element of hearsay by relying upon his own testimony (that the Union steward gave no reason for the Union's decision to drop the grievance when Complainant pressed him to do so) in his attempt to prove that the Union decided to drop his grievance for no reason, i.e., arbitrarily.

For those reasons, and because Schneider's testimony impressed the Examiner as forthright, objective and complete, the Examiner has credited Schneider's report of Kucera's remarks as reflective of the true reason for the Union's decision not to go further with Complainant's grievance.

[10/] Complainant testified that the steward told him on or about November 6 that the Union had decided to "drop" his grievance. The Employer's written response to the grievance was dated November 13.

denial of the grievance. Thus, the Union at least gave the Employer a chance to grant the relief implicitly requested in the grievance before indicating to the Employer that the Union considered the grievance to be without merit.

Furthermore, the record facts do not establish that the Union steward failed to obtain from Complainant the basic fact situation underlying his grievance.

Moreover, the Union's failure to involve Complainant in discussions of his grievance with the Employer does not seem discriminatory since (as Schneider testified) the parties' practice has been to involve individual grievants in such discussions only when the nature of the grievance makes such involvement appropriate. The instant grievance presented no apparent factual disputes whatever, but rather only a dispute as to the appropriate interpretation of the collective bargaining agreement. Thus, the involvement of the Complainant does not appear to have been necessary for an adequate consideration of the merits of the grievance by the Union and by the Employer. For the same reason, the Union's decision does not seem arbitrarily reached even though the evidence does not establish that the Union carefully interviewed Grievant in order to establish the underlying facts in great detail and clarity.

For the foregoing reasons, and based upon the record as a whole, the Examiner finds that the Complainant has not shown by a clear and satisfactory preponderance of the evidence that the Union's decision to drop his grievance arose out of arbitrary, discriminatory or bad-faith motivations.

The Examiner must, therefore, conclude that the Union has not been shown to have failed to fairly represent Complainant. Therefore, neither the merits of the grievance nor the (implicit) allegation that Respondents violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act can be reached for consideration in this case.

Dated at Milwaukee, Wisconsin, this 5th day of June, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner