STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| VANCE W. MASON, SR., Complainant, vs. OILGEAR COMPANY, a Wisconsin Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT #10, Respondents. | Case IV No. 16453 Ce-1469 Decision No. 11569-A |

Appearances:
Mr. William L. Weber, Attorney at Law, for the Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. Laurence E. Gooding, Jr., for the Respondent-Employer.
Gratz, Shneidman & Myers, Attorneys at Law, by Mr. Robert E. Gratz, for the Respondent-Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having authorized Stanley H. Michelstetter II, 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 Section 111.07(5) of the Wisconsin Employment Peace Act; and a hearing on such complaint having been held at Milwaukee, Wisconsin, on February 26, 1973 and continued March 15, 1973 before the Examiner, and the Examiner having considered the evidence, arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Vance W. Mason, Sr., hereinafter referred to as Complainant, is an individual presently residing at 3178 South 95th Street, Milwaukee, Wisconsin.

2. That Oilgear Company, hereinafter referred to as Respondent-Employer, is a corporation engaged in the manufacture of various metal products, with facilities located at 2300 South 51st Street, Milwaukee,

Wisconsin which business affects interstate commerce within the meaning of the Labor Management Relations Act, as amended.

3. That International Association of Machinists & Aerospace Workers, District #10, hereinafter referred to as Respondent-Union, is a labor organization having offices at 624 North 24th Street, Milwaukee, Wisconsin.

4. That at all times material herein, Respondent-Employer has recognized Respondent-Union as the exclusive bargaining representative of certain of its employes including Complainant and, in that regard, both Respondents have been signators to a collective bargaining agreement in effect at all relevant times concerning the wages, hours and working conditions of said employes and, among other provisions, providing as follows:

"ARTICLE III

Grievance Procedure

. . .

3.02 A grievance shall be (a) any differences arising between the Company and its employees, either individually or collectively as to the meaning and application of the provisions of this agreement, or (b) any other difference between the Company and its employees.

STEP 1: Any aggrieved employee may take up his complaint with his Foreman. If the employee desires, he may request the Union Committeeman working in such employee's department to participate in the discussion or on his request any Union Committeeman shall be called to participate in the discussion. The Foreman will use his best efforts to bring about a mutually satisfactory adjustment of the grievance.

There shall be no liability on the part of the Company to make any retroactive adjustment earlier than the date of reporting any grievance which is not reported within fifteen (15) days after the occurrence of the incident or when the employee had knowledge of the fact.

STEP 2: The complaint, if unsettled after forty-eight (48) hours, shall then be reduced to writing on an approved grievance form, signed by the aggrieved employee, countersigned by the Union Committeeman and then delivered in duplicate by a member of the Shop Committee to the Superintendent. If the complaint is not settled by the Superintendent, the Committeeman and Chairman within twenty-four (24)

hours, it shall be brought before the Management and the Shop Committee at their next meeting.

STEP 3: The Shop Committee shall meet with the Management with the view of arriving at a mutually satisfactory settlement. If requested by either party, the Business Representative of the Union shall meet in conjunction with the Shop Committee and Management. Any settlement reached shall be in writing.

In the event of any question or dispute between the Company and the Union as to whether or not a grievance is under (a) or under (b) of Section 3.02, the determination of such question shall be made by application to the Circuit Court of Milwaukee County pursuant to Section 269.56, Wisconsin Statutes.

. . .

ARTICLE IV

Seniority

4.01 All seniority shall be based upon continuous service with the Company. Continuous service shall mean uninterrupted employment, but shall include absences under written leave of absence, absences due to strikes or lockouts in the Company's plants, periods of layoff and periods of absence due to illness or accidents.

. . .

4.04 When a reduction of the working force in any occupational group is necessary, the Company shall transfer the affected employees to jobs which such employees are qualified on the basis of prior experience to fill in other occupational groups in which there are employees with less seniority. The employees to be displaced will be those with the lowest plant-wide seniority in jobs which the transferring employees are qualified to fill. All recalls from layoff shall be by plant-wide seniority, provided the recalled employees are qualified to fill the open jobs.

. . .

4.06 An employee transferred to a classification in another occupational group pursuant to the provisions of Section 4.04 or 4.07 shall be given an opportunity to retransfer to his regular job when work thereon is available.

4.07 The parties recognize that in applying the foregoing sections, a reduction in working force may result in some occupational groups being manned entirely by employees who are not able to adequately carry on the work necessary for the occupational group and that under such circumstances, the Company may transfer such employees to work for which they are suited, regardless of the seniority of such employees.

. . .

APPENDIX

Job Classifications

. . .

Boring Mill--A

. . ."

5. That on November 21, 1948 Respondent-Employer hired Complainant and assigned him to operate a 61-inch Bullard boring mill machine which machine Complainant primarily operated during the first shift until it was replaced prior to 1970 by a 62-inch King Mill boring mill machine.

6. That thereafter Complainant operated such 62-inch machine during the first shift until the spring of 1970 when Respondent-Employer transferred Complainant to its turret lathe department in the course of laying off, permanently or temporarily transferring all of its employes in its boring mill department except Clarence Zillisch, who remained to operate all machines in that department.

7. That in September, 1971 Complainant was recalled to the boring mill department in his previous classification, Boring Mill A, and assigned to operate a 42-inch King Mill boring machine during the first shift and that at all relevant times after September, 1971, Clarence Zillisch, the employe in such department with the most plant-wide seniority, operated the aforementioned 62-inch King Mill boring mill machine during the first shift.

8. That on or about October 19, 1972, Complainant submitted to Bernard Bryant, a member of Respondent-Union's grievance committee, a signed grievance requesting re-assignment to the aforementioned 62-inch King Mill boring mill machine during the first shift. Bryant in turn submitted such grievance to Richard Leslie, shop chairman and member of such committee.

9. That Richard Leslie upon receipt of said grievance discussed same with Respondent-Union's shop committee who voted not to process said grievance because such was without merit.

10. That on October 20, 1972 Richard Leslie returned said grievance to Bernard Bryant who in turn returned it to Complainant unsigned and informed him that such grievance was without merit.

11. That immediately thereafter Complainant took the aforementioned grievance directly to Leslie who refused to process such on the

basis that it was without merit, whereupon Complainant, without Respondent-Union's assistance, took said grievance to his foreman who refused to comment thereon.

12. That thereafter, but prior to November 10, 1972, Complainant's Attorney, William L. Weber, called George Lajsic, business representative for Respondent-Union, with respect to the aforementioned grievance who refused to discuss the matter and referred Complainant's Attorney to Respondent-Union's Attorney, Robert E. Gratz.

13. That on November 10, 1972, Complainant discussed the aforementioned grievance with his Attorney who added to said grievance the following claim:

> "On the 2nd shift an employee, Bernard Bryant, was given my machine job without asking me if I wanted this 2nd shift job even though I have 3-1/2 yrs. more in plant seniority than does Bryant. The 2nd shift job is a higher paid job than the one I now have."

which amended grievance was received on or about November 11, 1972 by Floyd D. Schaefer, an industrial relations representative of Respondent-Employer, Richard Leslie and George Lajsic.

14. That thereafter, Respondent-Union processed said added claim in such grievance, Respondent-Employer accepted such claim and effective November 20, 1972 assigned Complainant to operate the 62-inch King Mill boring mill during the second shift which assignment Complainant has retained at all relevant times thereafter.

15. That at all relevant times Complainant maintained to Respondent-Union's knowledge that he was entitled to operate the 62-inch King Mill boring mill during the first shift and Respondent-Union refused to process such grievance to Complainant's knowledge on the basis that such was without merit, and that Complainant did not exhaust any further internal union procedures.

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

## CONCLUSIONS OF LAW

1. That Complainant, Vance W. Mason, Sr., by having processed his own grievance concerning reassignment to the 62-inch King Mill boring machine first shift after September, 1972, through Step 1 of the applicable grievance procedure and by having requested that Respondent-Union, International Association of Machinists & Aerospace Workers,

District #10, process his grievance pursuant to said grievance procedure, sufficiently attempted to exhaust such grievance procedure.

2. That the Respondent-Union, having in good faith, with the knowledge of all relevant facts, determined that the aforementioned grievance lacked merit and, on that basis, having refused to further process said grievance did not violate its duty to fairly represent Complainant.

3. That on the basis of the foregoing Conclusion of Law, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent-Employer, Oilgear Company, breached its collective bargaining agreement with Respondent-Union, thereby violating Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that the Complaint of unfair labor practices filed in the instant matter be, and the same is, dismissed.

Dated at Milwaukee, Wisconsin, this 27th day of November, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

After a period of reassignment due to lack of work, Complainant was reassigned his previous classification of Boring Mill A and returned to the boring mill department. However, because Clarence Zillisch, an employe with more plant-wide seniority, was operating the machine previously operated by Complainant, he was assigned to operate another machine. Complainant attempted to have Respondent-Union file a grievance seeking reassignment to such machine for the first shift, but it refused to do so.

DISCUSSION

Before the Examiner may reach the merits of Complainant's claim that the Respondent-Employer violated the applicable collective bargaining agreement between Respondents in violation of 111.06(1)(f) of the Wisconsin Employment Peace Act, the Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that such attempt was frustrated by the Respondent-Union's breach of its duty of fair representation. 1/

Complainant presented his grievance to his foreman at Step 1 and no party contests the exhaustion of that step. Two questions are presented by the argument of Counsel: whether Complainant made sufficient efforts to get Respondent-Union to process his grievance and whether, in having refused to process Complainant's grievance, Respondent-Union acted arbitrarily, discriminatorily or in bad faith. The uncontroverted evidence establishes that Complainant tried unsuccessfully to get two members of Respondent-Union's shop committee to process his grievance concerning reinstatement to the 62-inch King Mill during first shift and, thereafter, processed the same through the first step himself. The uncontroverted evidence further establishes that Complainant's attorney contacted Respondent-Union's business representative by telephone and by letter with respect to processing such grievance and that the business representative refused to discuss the matter referring Complainant's Attorney to Respondent-Union's Attorney. There

---

1/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); American Motors v. WERB, 32 Wis. 2d 237, 145 N.W. 2d 137, 63 LRRM 2226 (1966).

is no evidence that Complainant ever knew or was told of any internal union procedures or evidence as to the nature of such procedures. All relevant responsible Union officials knew Complainant wished to have his grievance processed and all unequivocally refused to process such grievance. The Examiner concludes that Complainant reasonably concluded that his grievance could and would not be processed by the Union within the time limits of the contractual grievance procedure and therefore sufficiently attempted to get the necesssary assistance from Respondent-Union to further process his grievance in accordance with the contractual grievance procedure. 2/

The evidence adduced by Complainant, if believed, tended to indicate that Respondent-Union had previously interpreted the words "his regular job" in Section 4.06 of the instant Agreement to mean the machine previously operated during the shift and that upon Complainant's return in September, 1972 to his department, Respondent-Union changed its position to hold that such words merely mean job classification. No evidence whatsoever was adduced to show what motivation Respondent-Union had for such change.

The Complainant argues that the Respondent-Union's interpretation is wrong and that by taking different positions at different times is arbitrary in itself. The Examiner may not reach the merits of the dispute with respect to interpretation of the Agreement without a showing that Respondent-Union acted arbitrarily, discriminatorily or in bad faith. 3/ Thus, the only question presented by the evidence is whether a change in position, if such occurred, is, by itself, arbitrary conduct. This Commission has previously held that it is well within a union's power to, in good faith, agree with the employer to vary the terms of a collective bargaining agreement in a particular instance. 4/ The Examiner can only conclude that it must also be well within Respondent-Union's power to, in good faith, change its view of what constitutes proper enforcement of the agreed-upon layoff provision or

---

2/ Orphan v. Furnco Construction Corporation, 81 LRRM 2058 (CA7, 1972), American Motors Corporation (7488) 2/66.

3/ Vaca v. Sipes, supra.

4/ American Motors Corporation (6955) 3/67.

conclude that previous enforcement thereof was inconsistent with the collective bargaining agreement. Therefore such change in position is not arbitrary in itself.

Dated at Milwaukee, Wisconsin, this 27th day of November, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner