STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HERBERT J. PETERS, Complainant, vs. BADGER LUMBER COMPANY and CARPENTERS & JOINERS UNION LOCAL 3134, Respondents.	Case VIII No. 17551 Ce-1525 Decision No. 12451-A

Appearances:
Mr. Herbert J. Peters, Complainant, appearing on his own behalf.
Mrs. Marlene Peters, appearing for the Complainant.
Mr. John D. Sherer, Treasurer, appearing for Respondent Employer.
Mr. Floyd Haen, Recording Secretary, appearing for Respondent Union.

FINDINGS OF FACT, CONCLUSIONS 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 Herman Torosian, a member of its staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on such Complaint having been held at Oshkosh, Wisconsin, on February 20, 1974, 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Herbert J. Peters, hereinafter referred to as the Complainant, is an individual residing at 25 North Park Avenue, Fond du Lac, Wisconsin.

2. That Badger Lumber and Manufacturing Company, hereinafter referred to as Respondent Employer, is a company engaged in the business of supplying wood and wood products, with facilities located at Oshkosh, Wisconsin.

3. That at all times material herein, the Respondent Employer has recognized Local Union No. 3134 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereinafter referred to as the Respondent Union, as the exclusive bargaining representative of certain of its employes including the Complainant herein who was a member of the Respondent Union at all times material herein.

4. That at all times material herein the Respondent Employer and the Respondent Union have been signators to a collective bargaining agreement, effective from June 6, 1971 to June 6, 1974, covering wages, hours and working conditions of said employes and, among other provisions, provides:

"ARTICLE III - MANAGEMENT RIGHTS

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Section 2 - Discharge

Nothing in this agreement shall limit the right of the Company to discharge an employee for cause. When the Company terminates the services of any employee, the Company shall notify the shop steward of the Union in writing within three (3) working days of the day of discharge of employee.

. . .

ARTICLE VIII - GRIEVANCES

Section 1 - Definition

All individual complaints shall be taken to the department committeeman then to the shop steward, who will in turn investigate the complaint carefully, if, after investigation, the shop steward feels that there is a violation of the Agreement, the shop committee not to exceed three (3) members shall take up such violation with the Company management as a grievance.

In the handling of any grievance where it shall be necessary to examine work records of the Company, such records shall be made available for examination by the aggrieved and a representative of the Union.

Section 2 - Procedure

All grievances shall be presented in writing to the Company and will be answered in writing by the Company.

All grievances shall be settled during regular working hours of the Company when convenient to both parties. In the event no agreement can be reached it may be handled under the arbitration procedure at the request of either party.

Not more than two regular working days shall elapse before a statement of position is rendered on any grievance.

Section 3 - Discharge Hearing

If any employee has been discharged, the Union may, within five (5) working days of the day of discharge or the written notification of said discharge, whichever is later, ask for a review of the reasons.

Upon review, the discharge may be sustained, the employee may be reinstated with full pay for time lost, or any other action that seems just may be taken. In case the matter has not been settled within ten (10) days, either the Union or the Company may take the matter to arbitration.

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ARTICLE XII - ABSENCE

Section 1 - Notice of Absence

Any employee unable to report for work shall notify his foreman if possible before the start of his shift so as to not inconvenience other employees and the Company; if unable to contact foreman, day shift employees shall notify a responsible Company representative by 9:00 A.M., of the 1st day of absence. Any employee absent for three consecutive working days without permission from his foreman or a Company official shall be considered as subject to disciplinary action or discharge. After three (3) days absence of any employee the shop steward shall notify the Company of the absence and the cause thereof. However, upon proof to the Union and the Company that such failure was for cause beyond employee's control, he shall be reinstated with full seniority.

Section 2 - Notice of Return

When an employee returns to work after an absence due to sickness or other causes, he will give the Company one day's notice in order that a place can be made ready for him.

Section 3 - Absence, Excused

Employees will not jeopardize their rights as provided for in this Agreement in any way when absent from work due to their sickness or sickness or death in the immediate family, Union business, jury duty or from any other excused absence. Any absence for which proper approval has been obtained from the Company will be considered an excused absence and granting of any such leave, other than death in the immediate family and jury duty, is the sole and exclusive right of the Company and shall not be the subject to the Grievance Procedure.

. . .

An excused absence (without pay) of not more than six (6) months shall be granted to any employee who becomes ill and is unable to report for work when such illness is evidenced by a licensed physician's certificate. An employee returning from an excused illness absence shall be required to provide a licensed physician's certificate stating that he (the employee) is able to perform the full time duties

of the job that he left. The Company may at its discretion and expense require the employee to be examined by a physician of its choice. If the Company's designated physician does not recommend that the employee return to work, then the Company shall not be obligated to reinstate the employee at such time.

Section 4 - Absence Procedure

Any request for absence, except for leaves caused by illness, shall be submitted to the Company in writing at least two (2) weeks prior to the start of the time of such requested absence. The Company shall then submit a written reply to the employee within three (3) working days after his request is submitted.

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ARTICLE XIX - INSURANCE

Section 1 - Group Insurance

The Company will pay all premiums for the Group Plan as amended, between the Company and the employees. No benefits will be reduced under the Plan during the life of this contract. New employees shall come under the coverage of insurance after sixty (60) days of employment. Employees shall be covered by life insurance for thirty-one (31) days following lay-off. This section shall not apply to temporary, part time or seasonal workers.

Section 2 - Benefits

The Company agrees to provide for all employees covered by this Agreement a life, accidental death and dismemberment insurance policy in the amount of $5,000.00. Weekly sick benefits of $45.00 per week are to be provided. There will be no cost to employees for the Group Plan."

5. That the Complainant last worked for Respondent Employer on August 18, 1973. Afterwards, Respondent Employer placed Complainant on sick leave through August 29, 1973. On that day Complainant's father told Mr. Wenzel Bieble, a working Foreman for the Respondent Employer, that he better forget about the Complainant, and hire somebody in his place, because the Complainant was not coming back to work. Based on this conversation between the Complainant's father and the Foreman, the Respondent Employer considered the Complainant as a quit and terminated his relation with the Company as such.

6. That shortly thereafter, on September 5, 1973, the Complainant entered the Winnebago State Hospital where he received treatment in the alcoholic treatment unit until his discharge on January 25, 1974. While at the State hospital, the Complainant was sent out on a work therapy program during November, 1973. At this time the Complainant applied for, and was given, employment at a foundry in Oshkosh, Wisconsin. That during this time Complainant at no time advised the Respondent Employer of his whereabouts or status as an employe.

7. That after the Complainant worked for two weeks at the foundry he went back to the Winnebago State Hospital where he continued his treatment under the alcoholism program until his release whereupon he was placed in a half-way home in Fond du Lac, Wisconsin for a period of supervised rehabilitation and adjustment to the community.

8. That weekly sick benefits are paid to persons who qualify and who are covered by the terms of the collective bargaining agreement for a maximum of 26 weeks in the amount of $65.00 per week. That the Employer's insurance company, located in Chicago, Illinois, pulled Complainant's insurance card from the Respondent Employer's office on the 18th day of August, 1973. That the insurance company has a stipulation in their contract with Respondent Employer that the last day worked, in the event of a quit, is the last day covered and that employes are advised of said stipulation by Respondent Employer at the time said employes enroll in the insurance program.

9. That Complainant at no time prior to filing the instant complaint notified Respondent Union of its grievance of the alleged discharge by the Respondent Employer and the pulling of the insurance card by the insurance company. The reason Complainant did not contact Respondent Union was because of his belief that Respondent Union, over the last five years, had not represented him fairly in other grievances. From the record the only grievance filed by the Complainant during this period was a grievance claiming that he was entitled to a reclassification to a higher wage classification for performing work on the "shaper" machine. The Respondent Union in processing said grievance discussed the matter with Respondent Employer. Subsequently, the Respondent Union, in good faith, decided not to process said grievance any further on the basis of the Respondent Employer's position that Complainant's work record and absenteeism record did not entitle Complainant to a higher classification.

10. That during the time Complainant was in the State Hospital Respondent Union paid Complainant his sick benefit of $10 which is given to employes who are off sick for more than two weeks. Also, Respondent Union paid Complainant's Union dues for four months until the Union became aware that Complainant was working for another employer. Respondent Union assumed the Complainant was no longer an employe of the Respondent Employer and terminated the payment of Union dues on his behalf.

11. That at no time since August 18, 1973 has the Complainant attempted to process his grievance through any of the steps of the grievance procedure set forth in Article VIII of the collective bargaining agreement and that Respondent Union did not fail to fairly represent Complainant, nor was its conduct toward the Complainant in any way arbitrary, discriminatory, or in bad faith.

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

CONCLUSIONS OF LAW

1. That the conduct of Respondent Carpenters & Joiners Union Local 3134, in processing Complainant's, Herbert J. Peters, previous grievance over a higher classification and its conduct with regard

to Complainant's claim that he had been discharged by Respondent Employer, was not arbitrary, discriminatory, or in bad faith; and Respondent, therefore, did not violate its duty to fairly represent Complainant; and, therefore, is not in violation of Section 111.06 (2)(a) and (c) of the Wisconsin Employment Peace Act.

2. That because Local Union No. 3134 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, did not violate its duty to fairly represent Complainant, Herbert J. Peters, by not representing the Complainant and because of the total absence of conduct by the Union of an arbitrary, discriminatory or bad faith nature with regard to Complainant, the Examiner refuses to assert the jursidiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent Employer, Badger Lumber and Manufacturing Company breached its collective bargaining agreement with Respondent Union thereby violating Section 111.06 (1)(f) of the Wisconsin Employment Peace Act.

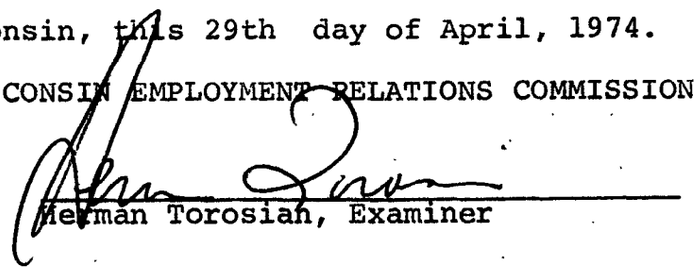
NOW, THEREFORE, it is

ORDERED

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

Dated at Madison, Wisconsin, this 29th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

DISCUSSION:

Before the Examiner will reach the merits of Complainant's claim that the Respondent Employer violated the applicable collective bargaining agreement between the Respondents in violation of Section 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/

EXHAUSTION OF GRIEVANCE PROCEDURE:

This Commission has required that individual complainants bringing such contract violation actions against employers conform to the requirement stated by the U. S. Supreme Court in Republic Steel v. Maddox (U.S. Sup. Ct., 1965, 58 LRRM 2193) that such complainants "must attempt use of the contract grievance procedure."2/ The Examiner concludes that the instant Complainant has not met this requirement.

The evidence clearly establishes that the Complainant did not request, either by written or verbal communication, Respondent Union's assistance in processing the grievance by the Complainant over the alleged discharge by the Respondent Employer. Complainant entered Winnebago State Hospital September 5, 1973, where he received treatment in the Alcoholic Treatment Unit until his discharge on January 25, 1974. While it is true that during this period the Complainant suffered from black outs and loss of memory associated with the disease of alcoholism, it is also true that after the Complainant received word in October from the insurance company that the Respondent Employer considered the Complainant as a quit there were over three months in which the Complainant could have contacted the Respondent Union concerning his grievance over the alleged discharge. In fact, throughout the Complainant's hospitalization period, whether confined to the hospital or out on a work or home-visit release, the Complainant could have written or telephoned his grievance to the Respondent Union many times. The Complainant chose not to do so because of the Respondent Union's alleged unwillingness to represent him fairly in the past. Both the Complainant's father and brother worked for the Respondent Employer and could have asked the Respondent

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1/ VACA v. Sipes 386 US 171, 64 LRRM 2369 (1967); American Motors Corporation (7988-B) 10/68.

2/ American Motors Corp., Decision No. 7488 (1966); American Motors Corporation, Decision No. 7798 (1966).

Union on behalf of the Complainant to act on the Complainant's grievance but neither one of them were so asked or chose to do so.

VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

The law concerning a union's obligation of fair representation is quite clear. The United States Supreme Court in Vaca v. Sipes,3/ 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, 4/ 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 should be pointed out 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 untainted by arbitrary, discriminatory, or bad faith motives. The Complainant bears the burden of proving the Union's failure to fulfill its duty to fair representation by a clear and satisfactory preponderance of the evidence. 5/ It is the Examiner's conclusion that the Complainant did not sustain his burden of proof.

The Complainant pursuant to Article VIII of the applicable collective bargaining agreement was entitled to present his own grievance to the department committeeman and then to the shop steward. If, after careful investigation, the shop steward felt there was a violation of the Agreement, the shop steward could take up the violation with the Company management as a grievance. With regard to the claim of the Complainant that the Respondent Union failed to represent him fairly in violation of Section 111.06(2)(a) and (b) Wisconsin Statutes, it has already been noted that the Complainant did not request, either in a written or verbal manner, Respondent Union's assistance in processing his grievance. The Complainant did not contact the Respondent

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3/ Supra, Note 1.

4/ 345 US 330, 338 (1953).

5/ See Section 111.07(3) of the Wisconsin Employment Peace Act.

Union because he felt that in the past the Respondent Union had not represented him fairly and, therefore, would not do so in the present situation. However, absent a showing of arbitrary or bad faith resolution of previous grievances, evidence of previous settlements, not themselves germane to the issue at hand, is irrelevant.6/

The only specific incident the Complainant points to as evidence of the Respondent Union's past failure at representing Complainant's interests fairly involved an attempt by the Complainant to get higher wages by a reclassification to a higher wage classification while he was working on the "shaper" machine. The Complainant states that "he tried to get the Union to do things to get the Class A wages" but fails to introduce any evidence to support this claim. To the contrary, the Respondent Union states that it spoke to the Respondent Employer concerning the matter but was unable to convince the Respondent Employer to go along with wage increase. The fact that the Respondent Union made this attempt to talk with the Respondent Employer concerning the Complainant's request for a higher wage, absent evidence by the Complainant that the Respondent Union did so in an arbitrary or bad faith manner, would seem to negate Complainant's defense for his failure to contact the Respondent Union concerning the present grievances of the alleged discharge. 7/

On the other hand, the Respondent Union demonstrated a concern for the Complainant, his interest and problems which runs counter to the allegations by the Complainant of unfair representation both prior to, and including the present incident. Throughout the Complainant's hospitalization period the Respondent Union inquired about the Complainant's status as an employe of the Respondent Employer. While the Complainant was in the State Hospital, Respondent Union paid Complainant his sick benefit of $10.00 which is given to employes who are off sick for at least two weeks. Likewise, Respondent Union paid Complainant's union dues for four months until it heard Complainant was working at the foundry in Oshkosh, Wisconsin. The Respondent Union assumed the Complainant was no longer an employe of the Respondent Employer and terminated payment of Union dues on his behalf.

Based on the aforementioned series of events, it is the conclusion of the Examiner that the Complainant did not offer sufficient evidence indicating that the Respondent Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith; and, therefore, did not meet his burden of proof concerning the alleged failure of the Respondent Union to fulfill its duty of fair representation.

6/ Cf., American Motors Corporation, (7283) 9/65.

7/ To hold otherwise would be contrary to Ford Motor Co. vs. Huffman (U.S. Sup. Ct., 31 LRRM 2548, 1953) in which it was held that a labor organization must, in its exercises of discretion as to which of its members it will favor in utilizing its resources, be given "a wide range of reasonableness

Therefore, the Examiner refuses to assert the jurisdiction of the Wisconson Employment Relations Commission for the purpose of whether the Respondent Employer breached its collective bargaining agreement with the Respondent Union in violation of Section 111.06 (1)(f) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin, this 29thday of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Examiner