

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 JUDSON W. MANGERSON, :
 :
 Complainant, :
 :
 vs. :
 :
 PRINTING AND PACKAGING PAPERS DIVISION, :
 ST. REGIS PAPER COMPANY, and UNITED :
 PAPERWORKERS INTERNATIONAL UNION, :
 LOCAL NO. 91, 1/ :
 :
 Respondents. :
 :

Case IV
 No. 18121 Ce-1549
 Decision No. 12880-C

Appearances:

- Mr. Judson W. Mangerson, Complainant, appearing on his own behalf.
- Mr. Robert E. Jackson, Attorney at Law and Manager, Labor Law Services, St. Regis Paper Company, appearing for Respondent Employer.
- Mr. Raymond Long, International Representative, 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, hereinafter referred to as the Commission, in the above-entitled matter; and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as 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 Rhinelander, Wisconsin, on September 12, 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 Judson W. Mangerson, hereinafter referred to as the Complainant, is an individual residing at 322 North Stevens Street, Rhinelander, Wisconsin; that he has been employed by the Respondent Employer for about eleven years, eight of those years in the Materials Handling Department; that during this period, the Complainant has been a Union Steward and in such capacity received and filed grievances.
2. That Printing and Packaging Papers Division, St. Regis Paper Company, hereinafter referred to as Respondent Employer, is a company engaged in the business of the manufacture and sale of paper products, with facilities located at Rhinelander, Wisconsin.
3. That at all times material herein, the Respondent Employer has recognized Local No. 91 of the United Paperworkers International Union, hereinafter referred to as the Respondent Union, as the exclusive bargaining representative of certain of its employees including the Complainant herein who was a member of the Respondent Union at all times material herein.

1/ In an Order issued on August 5, 1974, in response to a motion of the Respondent Employer filed on July 31, 1974, the Examiner made the above-mentioned Union a party in the complaint proceeding.

4. That at all times material herein, the Respondent Employer and the Respondent Union have been signators to a collective bargaining agreement effective from 1973 to 1975, covering wages, hours and working conditions of said employes and, among other provisions, provides:

"Section XX--Grievance and Arbitration

A. The unions, parties to this agreement, shall establish standing committees and the names of the members of the committees shall be furnished the company.

B. For the purpose of this agreement, the term 'grievance' means a dispute between the company and the union concerning interpretation, application or violation of this agreement.

C. If an employee shall feel aggrieved, he shall present the matter in accordance with the following procedure, and it shall be handled by the parties to this agreement in the following steps until a settlement is reached:

Step 1, Between the aggrieved employee and the foreman of the department or at the option of the aggrieved employee between him, one member of the standing committee, the steward, and the foreman of the department. If no satisfactory settlement is reached, it shall be taken within three (3) days to

Step 2. The Department Superintendent and the Standing Committee. The foremen, the shop steward in the department, and the aggrieved employee shall have the right to be present at this meeting. If no satisfactory settlement is reached, it shall be taken within three (3) days to

Step 3. The Mill Management and the Standing Committee. The superintendent, the foreman the shop steward and the aggrieved employee shall have the right to be present at this meeting. No grievance or complaint shall be handled at this stage unless it has been presented in writing, but the subject of discussion may extend to related matters not specifically set forth in the written statement. If no satisfactory settlement is reached, it shall be taken within five (5) days to

Step 4. The Resident Manager of the Company or his Representative and the President of the International Union or his Representative. Both persons shall have the right to bring such persons to the conference as they deem appropriate. If, within ten (10) days after the grievance has been referred to the highest officials of the company and the union, the matter has not been settled on a mutually satisfactory basis, it shall be taken to

Step 5. Federal Mediation and Conciliation Service. The parties will request the Federal Mediation and Conciliation Service to submit a panel of five (5) arbitrators from which one will be selected. Upon receipt of such list of arbitrators, the parties shall meet and upon failure to agree on the arbitrator, the parties shall alternately strike two (2) names from the list. The person whose name remains on the list after four have been stricken shall be the arbitrator. The Director of the Federal Mediation and Conciliation Service shall be advised on the choice of the parties, and request that such arbitrator be assigned to the matter. The arbitrator will convene to render a decision within fifteen (15) days to be final and binding upon both parties.

The company and the unions shall share equally the payments of the fees and expenses of the arbitrator.

D. Any employee who claims injustice over disciplinary action shall file a grievance or complaint within forty-eight (48) hours. The forty-eight (48) hour period shall begin from the time the employee received notice by registered mail of the disciplinary action and shall not include Sunday or holiday hours.

E. Adjustments such as changing of hourly rates, hours of work, working conditions and matters of like nature affecting the agreement shall meet the approval of all parties of this agreement."

5. That the Complainant worked for Respondent Employer at all times material herein; that on May 10, 1974 ^{2/} the Complainant submitted a grievance to the Respondent Employer as follows:

"I hereby charge the Rhinelander Division with violation of contract. Judson W. Mangerson, should replace his operator as the provisions [sic] of Proposal for the Southern Swing, Part A and Part B.";

and that on May 14, the Respondent Employer, by its agent Chet Kuhl, the Material Handling Department Supervisor, rejected the grievance at the first step of the grievance procedure.

6. That on May 15, the Respondent Employer, by its agent, Gail Stefonek, the Superintendent of Materials Handling Department, replied "no" to the grievance to Harley Savage, President of the Respondent Union; that on May 22, the Respondent Union President, Vice President, Committee and members of the Materials Handling Department held a meeting where the Complainant's grievance was discussed with the Complainant; that following this meeting, Dewaine Scott, Steward for the Respondent Union, took a vote of the members of the department to a question which read: "Should Jud Mangerson replace the cinder truck driver on vacation?"; that the response was an overwhelming "NO" with only a couple of "yes" votes; and that the parties thereby exhausted Step 2 of the grievance procedure.

7. That on May 24, the parties bypassed Step 3 of the grievance procedure.

8. That on May 28, the parties held a meeting according to the fourth step of the grievance procedure; that attending for the Respondent Employer were Robert N. Fischer, Personnel Manager, Robert Fires, Gail Stefonek; that attending for the Respondent Union were Harley Savage, Dewaine Scott, the Union Committee, Ray Long, International Union Representative; that the Complainant was also present; that the parties read and discussed the grievance but could not agree upon a solution; that someone suggested that the matter be taken back to the Union membership.

9. That shortly thereafter at the monthly meeting of the Respondent Union held on June 17 at the Labor Temple, the grievance was again discussed; that the Complainant there made a motion that Jud Mangerson should replace his cinder truck driver on vacation if he is on a swing shift; and that said motion carried, 14 ayes - 8 nays; that following this meeting, on June 18, the Respondent Union sent the foregoing letter to the Respondent Employer:

"Local #91 requests a change in the Materials Handling swing shift procedure, namely the Truck Helper will replace the Cinder Truck Driver on vacation only.

The above request is from the Local #91 Union Body as of June 17, 1974.";

^{2/} Unless otherwise indicated, all dates hereinafter referred to are in 1974.

that in response to the above letter, the Respondent Employer granted the Complainant's grievance to permit the Truck Helper (the Complainant) to replace the Cinder Truck Driver on vacation, which the Complainant now does.

10. That subsequent to all of the above, the Complainant stated the Respondent Employer's adoption of the Respondent Union's request "did not solve the grievance" and that he was unsatisfied with the result; that the Complainant said this despite the fact that Respondent Union had presented Complainant's grievance to the Respondent Employer and the Respondent Employer had adopted it exactly as the Complainant himself stated he so desired when he made the motion at the Respondent Union meeting; that at no time since July 18 did the Complainant exercise his options under the contract; to file a new grievance amending the first grievance (which the Respondent Union advised him to do) or to take the grievance to the fifth step of the grievance procedure (final and binding arbitration), Complainant's other alternative if he was unsatisfied with the resolution of the grievance at the fourth step; and that Respondent Union's conduct toward the Complainant was not 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, United Paperworkers International Union, Local No. 91, in processing Complainant Judson W. Mangerson's grievance over the Company's alleged failure to assign him to the truck operator position was not arbitrary, discriminatory, or in bad faith; and Respondent Union, 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 United Paperworkers International Union, Local No. 91 did not violate its duty to fairly represent Complainant Judson W. Mangerson 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 jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent Employer, Printing and Packaging Papers Division, St. Regis Paper 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 the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this *5th* day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant, in his complaint, alleged that the Respondent Employer violated the collective bargaining agreement between the Respondent Employer and the Union. By letter dated July 31, the Respondent Employer moved to dismiss the complaint on the grounds stated therein and moved to interplead the Respondent Union, United Paperworkers International Union and their affiliated Local No. 91. The Examiner, by Orders dated August 5, denied the motion to dismiss 3/ and granted the motion to interplead the Respondent Union. 4/ On August 6, the Respondent Union answered the complaint and denied the allegations contained therein. On August 12, the Respondent Employer denied all allegations made by the complaint. The Examiner held a hearing September 12 on the threshold issue of whether the Respondent Union denied the Complainant fair representation in processing his grievance. At the close of the hearing the Respondent Employer moved to dismiss the complaint on the grounds that the Complainant had not exhausted the grievance procedure and that the Respondent Union had fairly and properly represented the Complainant. Likewise, at the end of the hearing, the Respondent Union moved to dismiss the complaint on the grounds that it had represented the Complainant fairly and to the best of its ability when processing his grievance. The Respondent Union filed a brief on October 16; and the Complainant filed a brief on October 21. The Respondent Employer did not file a brief.

Upon reviewing the entire record, and for the following reasons, the Examiner hereby dismisses the complaint.

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. 5/

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." 6/ The Examiner concludes that the instant Complainant has not met this requirement.

The evidence clearly established that the Complainant did not exhaust or attempt to exhaust the grievance procedure. The Complainant filed his grievance on May 10. Thereafter, he followed his grievance through Step 4

3/ St. Regis Paper Co., 12880-B (1974).

4/ St. Regis Paper Co., 12880-A (1974).

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

6/ American Motors Corporation, 7488 (1966); American Motors Corporation, 7798 (1966).

of the grievance procedure, at which time the Respondent Employer granted the Complainant his grievance based upon the Respondent Union's request for same (which in turn was based on the Complainant's own motion at a Union meeting for the exact relief he desired to satisfy his grievance). 7/ Unsatisfied with this relief as granted by the Respondent Employer, the Complainant filed the instant complaint with the Commission but failed to complete the grievance procedure through the fifth step (final and binding arbitration) of the contract, 8/ or to file another grievance to correct any disagreement he had with the resolution of the first grievance. 9/ In choosing not to pursue his grievance through the fifth and final step of the grievance procedure or to amend his grievance by filing another one, the Complainant did not indicate that the Respondent Union would not continue to process his grievance or that he felt the Respondent Union would fail to cooperate with him. Instead, the Complainant failed to exercise his options under the contract because he chose not to.

Even assuming the Complainant attempted to exhaust the collective bargaining agreement's grievance procedure, however, the Complainant must show such attempt was frustrated by the Respondent Union's breach of its duty of fair representation.

VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

The law concerning a union's obligation of fair representation is quite clear. The U. S. Supreme Court in VACA v. Sipes 10/ 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 U. S. Supreme Court in Ford Motor Co. v. Huffman 11/ 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, the 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

7/ See Transcript, pps. 15, 17, 18 and 19.

8/ See Transcript, p. 23.

9/ See Transcript, p. 16 where Mr. Robert E. Jackson representing the Respondent Employer asks the Complainant: "You have the opportunity, do you not, to file another grievance to correct any discrepancies that remain?" The Complainant answered: "That is true."

10/ Supra, note 3.

11/ 345 US 330, 338 (1953).

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. 12/ It is the Examiner's conclusion that the Complainant did not sustain his burden of proof.

The Complainant, pursuant to the grievance and arbitration procedure of the collective bargaining agreement, filed the grievance on May 10. As noted above, he pursued his grievance through Step 4 of the grievance procedure at which time the Respondent Employer granted said grievance as requested by both the Respondent Union and the Complainant. 13/ Later, the Complainant decided he was unsatisfied with the result, yet chose not to go to the fifth step (final and binding arbitration) of the grievance procedure or file a new grievance which were his options under the terms of the contract.

The Complainant maintains that the Respondent Union did not really back him up on his grievance, yet can point to no instance throughout the grievance procedure where the Respondent Union failed to live up to its contractual obligations. To the contrary, the evidence indicates that the Respondent Union attempted to find a solution to the grievance. 14/ Throughout the grievance procedure, the Respondent Union assisted the Complainant in pursuing his grievance. At Step 2 of the grievance procedure, the Respondent Union met with the employees of the Complainant's work department to find out how they felt about the grievance. Despite an overwhelming no vote against the Complainant's position from the above employees, the Respondent Union took the matter to the Respondent Employer at a meeting held on May 28 where the Respondent Employer refused to grant it until the Union membership voted on it. At the Union meeting on June 17 the Complainant himself made the motion to resolve the grievance which was then presented by the Respondent Union to the Respondent Employer exactly as adopted by the Union membership. Despite the fact that it went against the company practice, the Respondent Employer granted the Union's grievance request. In addition, the Respondent Union indicated at the hearing that it advised the Complainant to file a new grievance to correct any displeasure he had with the resolution of the first grievance which the Complainant chose not to do.

The Complainant states that he is unhappy with the resolution of the grievance. Yet while attempting to lay the blame on the Respondent Union, the Complainant's own testimony indicates he was at fault in not securing the remedy he now seeks. 15/

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

13/ See Findings of Fact Nos. 5, 6, 7 and 8.

14/ See Transcript, pps. 18 and 19.

15/ See Transcript, p. 18 where Mr. Raymond Long, representing the Respondent Union, asked the Complainant about the motion he made at the Union meeting: "Was this motion that you made in haste or was it well thought out at the time?" To which the Complainant answered: "Kay, I thought it was well thought out but apparently, it wasn't." Following with this line of questioning Long asked the Complainant what happened as a result of the motion. The Complainant answered: "he (the Union President) responded to the motion, yes, and gave it to the Company and the Company responded, that's true." Long then asked whether the Complainant was not filling the job of Truck Driver on the cinder truck on vacations as requested by his motion, and the Complainant answered: "Yes, sir."

Based on the aforementioned, the Examiner finds that the Complainant did not attempt to exhaust the collective bargaining agreement's grievance procedure or prove that the Respondent Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith; and, therefore, Complainant did not meet his burden of proof concerning the alleged failure of the Respondent Union to fulfill its duty of fair representation.

Therefore, the Examiner refuses to assert the jurisdiction of the Wisconsin 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 5th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner