

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARGARET L. PETERSON,

Complainant,

vs.

EAGLEKNIT INC., and TEXTILE  
WORKERS OF AMERICA, LOCAL 1567 1/

Respondents.

Case I  
No. 18988 Ce-1601  
Decision No. 13501-A

Appearances:

Ms. Margaret L. Peterson, Complainant, appearing on her own behalf.  
Mr. David Gerner, Personnel Director, appearing for Respondent  
Employer.  
Mr. William Crutcher, Business Agent, 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 Shawano, Wisconsin, on May 13, 1975, 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 Margaret L. Peterson, hereinafter referred to as the Complainant, is an individual residing at 201 W. Richmond, Shawano, Wisconsin.

2. That Eagleknit Inc., hereinafter referred to as Respondent Employer, is a company engaged in the business of the manufacture and sale of knit headware, with facilities located at Shawano, Wisconsin.

3. That at all times material herein, the Respondent Employer has recognized Textile Workers of America, Local 1567, 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 November 27, 1972, to and including November 25, 1975, covering wages, hours and working conditions of said employes and, among other provisions, provides:

1/ The Respondent Union moved at the hearing, without objection from the parties, to intervene in the proceedings.

No. 13501-A

"ARTICLE IV. -- GRIEVANCE AND  
ARBITRATION PROCEDURE

SECTION 1. There shall be a President and not to exceed six (6) Stewards, and a Grievance Committee composed of the President and Steward or Stewards involved, recognized by the Company, whose names shall be furnished to the Company upon execution of this Agreement, as well as all changes therein, if any, as made from time to time.

SECTION 2. The President and Stewards will be permitted to leave their work after reporting to their Foreman and recording their time for the purpose of checking up grievances. Upon entering a department other than his own, in fulfillment of his duties, the President or Steward shall notify the Foreman of that department of his presence and purpose. Upon their return to their department, they shall again report to their Foreman.

SECTION 3. Complaints of employees shall be adjusted in the following order and manner:

FIRST STEP: Between the Foreman and the Employee or between the Foreman, Employee and Steward.

SECOND STEP; If the complaint is not settled in the First Step within two (2) working days, an attempt shall be made to settle the same between the Plant Manager and the President and the Steward.

THIRD STEP: If the complaint is not settled in the preceding Step in three (3) additional working days, it shall be reduced to writing, signed by the President, and shall then by [sic] taken up with the Plant Manager, or his appointee, and other representatives of the Company by the Grievance Committee, with or without representatives of the International Union present, which meeting shall be held within seven (7) days after receipt by the Company of such written complaint. The Company shall answer in writing any Grievance in the Third Step.

Decisions on grievances not appealed from within thirty (30) days of the date thereof in any of the foregoing Steps, or within thirty (30) days from the date of the written answer made by the Company in the Third Step, shall be considered settled on the basis of the decision last made and shall not be the subject of further appeal.

SECTION 4. In case a complaint arises under this Agreement as to wages, hours or conditions of employment which cannot be settled between the Company and the Union, the matter shall be referred to arbitration. Upon a request of either Party to the other that a dispute be taken to arbitration, each Party shall select a member of the Arbitration Board. The third (3rd) member of the Arbitration Board, who shall be the Chairman, shall be appointed by the American Arbitration Association in accordance with its procedure for choosing arbitrators by submitting panel lists to the Parties. The arbitration shall be held under the Voluntary Labor Arbitration Rules, of the American Arbitration Association.

SECTION 5. The Parties by mutual agreement may in any case waive any step of the foregoing procedure.

SECTION 6. The Company agrees to pay members of the Grievance Committee for a reasonable amount of time lost

from their regular work schedule in meeting with representatives of the Company in the adjustment of grievances in the Third Step of the Grievance Procedure and to pay the President and Stewards for a reasonable amount of time lost from their regular work schedule in the adjustment of grievances in the Second Step of the Grievance Procedure and to pay the Stewards for a reasonable amount of time lost from their regular work schedule in the adjustment of grievances in the First Step of the Grievance Procedure. Such payment shall be made at the employee's guaranteed minimum rate of day workers and the straight time average for piece worders. [sic]

SECTION 7. The Union further agrees that neither it nor its members will transact Union business on Company time. Except such business as is mutually agreed upon by the Company and the Union. The Company agrees that it will not interfere with the conduct of the Union business so long as employees engage therein on their own time.

5. That the Complainant worked for Respondent Employer in the Finishing Department from October 25, 1972 until she was laid off in July, 1974; that in August, 1974, a job, doing button holing, in the Finishing Department became vacant; that the Respondent Employer recalled Ann Krysheski, a less senior employee than the Complainant, to perform said job; that the Complainant learned of the above recall in early October, 1974; that the Complainant spoke with the Secretary of the Respondent Union concerning her grievance over said recall; that later in October, 1974, the Respondent Employer offered the Complainant a chance to train for a job in the sewing department; that the Complainant refused said training and job offer.

6. That during this period the Complainant repeatedly spoke with representatives of the Respondent Union concerning her grievance; that the Complainant filed a written grievance which was presented by the Respondent Union to the Respondent Employer on December 2, 1974; that the Complainant stated the grievance, noted above, as follows:

"Called back employees with less seniority in my dept on my line.  
Hired new employees without calling old employees back.";

that Elnora Herm, the Steward of the Finishing Department and an agent of the Respondent Union, spoke with a representative of the Respondent Employer about the Complainant's grievance according to Step 1 of the grievance procedure; that the Respondent Union, by Steward Elnora Herm and President Patsy Haut, also an agent of the Respondent Union, next presented the written grievance to the Respondent Employer according to Step 2 of the grievance procedure; that on December 5, 1974, Plant Manager, Floyd Merkel, an agent of the Respondent Employer, denied said grievance at Step 2 as follows:

"Article XII Section 1 -- SENORITY [sic] states. 'Employees may exercise full seniority [sic] rights with the company, on any job which he is able to perform in a satisfactory manner in his dept.' Margaret Peterson is not capable of performing any job where employees were called back or where new employees were hired. In fact, Margaret Peterson was offered the opportunity to learn a new job so that she could come back to work and she refused to return to work for that purpose.";

that also on December 5, 1974, Steward Herm and President Haut, acting on behalf of the Respondent Union, accepted the Respondent Employer's denial of said grievance and settled it accordingly at Step 2 of the grievance procedure.

7. That after the Respondent Union settled the grievance at Step 2 of the grievance procedure as noted above, the Complainant wrote the Union that she was not satisfied with the settlement; that on February 11, 1975 the Respondent Union, represented by William Crutcher, Business Agent and Edward Todd, Midwest Regional Director, both agents of the Respondent Union, as well as the Local 1567 Executive Board and Local 1567 Grievance Committee, also agents of the Respondent Union, along with the Complainant, met with representatives of the Respondent Employer to discuss the grievance; that at this meeting the representatives of the Respondent Union, the Respondent Employer and the Complainant agreed that: 1) the Complainant would be offered a job in any other department when there was an opening; 2) that if she needed training for the job she would be offered a chance to train for it; 3) that she would remain on layoff status until such time as a job opened up that she took or a job opened in her own department that she could fulfill as according to the Union agreement; that following this meeting the Complainant wrote the Respondent Union a letter as follows:

"Dear Brother Todd.

I tryed [sic] to reach you before you left, but was unable too. [sic]

There was one thing that was not cleared up at the meeting.

Now I will have to copy a section from our union agreement so you know what I am talking about.

It refers to Article 4 Grievance and Arbitration [sic]

Section 3. Article 7 Discipline

If in the manner provided in Article 4 of this Agreement, it is found that an employee has been discharged, suspended, disciplined, or laid off without good cause, the employee shall be immediately reinstated to his former job without lose [sic] of seniority [sic] rights and shall be paid a sum of money by the company equal to straight-time hours lost from work at the Company times his regularly straight-time average hourly earnings.

Now I was laid off in violation of Article 12 Seniority, [sic] without good cause, that we proved. which [sic] caused me to lose almost a years [sic] wages, it also caused me to lose my unemployment benefits.

Now how do I go about Claiming back wages?  
This is what I wanted [sic] to ask you."

8. That the Respondent Union held its regular monthly meeting on March 18, 1975; that the Complainant was present at said meeting and expressed dissatisfaction with the settlement of the grievance; that the Union members present at the meeting discussed the matter and decided she had no grounds for her accusations; that after the Complainant heard this she left the meeting; that the Respondent Union took no further action on Complainant's grievance.

9. 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 Findings of Fact, the Examiner makes the following

#### CONCLUSIONS OF LAW

1. That Complainant Margaret L. Peterson by having requested that Respondent Union, Textile Workers of America, Local 1567, represent her

with respect to her grievance and by repeatedly expressing dissatisfaction with the resolution of the grievance, sufficiently attempted to exhaust the grievance procedure provided in the applicable collective bargaining agreement.

2. That the conduct of Respondent Union, Textile Workers of America, Local 1567, in processing Complainant Peterson's grievance over the Respondent Employer's alleged failure to recall her, by settling said grievance at Step 2 of the grievance procedure according to the Respondent Employer's denial of same, 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.

3. That because Textile Workers of America, Local 1567 did not violate its duty to fairly represent Complainant Peterson by not representing the Complainant and because of a 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, Eagleknit Inc. 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

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

Dated at Madison, Wisconsin this 15<sup>th</sup> day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Complainant, in her complaint, alleged that the Respondent Employer violated the collective bargaining agreement between the Respondent Employer and the Respondent Union. On April 21, 1975, the Respondent Union answered the complaint and denied the allegations contained therein. On May 1, 1975, the Respondent Employer denied all allegations made by the complaint. The Examiner held a hearing on May 13, 1975 on the threshold issue of whether the Respondent Union denied the Complainant fair representation in processing her grievance. At the close of the hearing the Respondent Employer contended that the Complainant was not treated any differently than any other employee in a similar situation; that her grievance was processed fairly through the grievance procedure and that the complaint should be dismissed. Likewise, at the end of the hearing, the Respondent Union moved to dismiss the complaint on the grounds that it had represented the complaint fairly when processing her grievance. The parties did not file briefs.

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 she 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. 2/

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 vs. Maddox (U.S. Sup. Ct., 1965, 58 LRRM 2193) that such complainants "must attempt use of the contract grievance procedure." 3/ The Examiner concludes that the Complainant has met this requirement.

The evidence clearly establishes that the Complainant requested and received Respondent Union's assistance through two (2) steps of the applicable grievance procedure, at which time the Respondent Union settled the grievance by accepting the Respondent Employer's denial of same. The Complainant also attended an additional meeting arranged by the Respondent Union with representatives of the Respondent Employer to discuss solutions to her grievance. The Complainant went to a Union meeting to complain about the resolution of her grievance. The record indicates that the Complainant repeatedly told the Respondent Union she was unsatisfied with the results of her grievance. Nevertheless, the Respondent Union took no further action on the Complainant's grievance after Step two (2) of the grievance procedure.

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

3/ American Motors Corp. 7488 (1966); American Motors Corp., 7798 (1966).

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 vs. Sipes 4/ 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. vs. Huffman 5/ 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 in purpose in the exercise of its discretion."

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. 6/ 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. However, the duty of fair representation is more than an absence of bad faith or hostile motivation. 7/ It confers upon the Union an affirmative responsibility with regard to the allocation of benefits the Union has secured for the employees in a collective bargaining agreement. 8/ This affirmative responsibility gives the employee a "right to fair and impartial treatment from his statutory representative." 9/

VACA provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. VACA also requires the union, in good faith and in a non-arbitrary manner, to make decisions as to the merits of each grievance. The Wisconsin Supreme Court seems to support the idea of the duty of fair representation as an affirmative responsibility when it suggests that at least

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4/ Supra, note 2.

5/ 345 U.S. 330, 338 (1953).

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

7/ See Retana vs. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO, 453 F.2d 1018, 1023, 79 LRRM 2272 (C.A. 9 1972); Griffin v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, 469 f.2d 181, 183, 81 LRRM 2485 (C.W. 4, 1972).

8/ See Teamsters, Local 317 (Rhodes & Jamieson, LTD.) 89 LRRM 1049, 1051, April 30, 1975.

9/ Miranda Fuel Co., Inc., 140 NLRB 181, 188, 51 LRRM 1584 (1962).

the union must in good faith weigh the relevant factors before making a determination whether a grievance should go to arbitration. 10/ The Court submits that such a decision should take into consideration such factors as the expense of arbitration, the monetary value of the claim, the affect of the breach of the employee and the likelihood of success in arbitration. 11/

The Complainant states she is unhappy with the resolution of the 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.

The Complainant in early October, 1974 spoke with the Secretary of the Respondent Union concerning her grievance over the failure of the Respondent Employer to recall her. The Respondent Union brought the matter up with the Respondent Employer and later in October, 1974 the Respondent Employer offered the Complainant a chance to train for a job in a different department which she refused. Next the Complainant filed a written grievance which was presented by the Respondent Union to the Respondent Employer on December 2, 1974. The Respondent Union processed the grievance through Step Two (2) of the grievance procedure at which time the Respondent Employer denied her grievance on the grounds that there was no contract violation. The Respondent Union agreed with the Respondent Employer's refusal and settled the grievance at Step Two (2). However, the Complainant was unsatisfied with the results of her grievance and the Respondent Union called an additional meeting on February 11, 1975 with the Respondent Employer and Complainant to discuss the grievance. The record shows all the above parties reached an agreement on the resolution of the Complainant's grievance at this meeting; however, later the Complainant again became unsatisfied with the resolution of her grievance. The Respondent Union held its monthly meeting on March 18, 1975 at which time the Complainant discussed the grievance with representatives of the Union and the members present. The Respondent Union took no further action on the Complainant's grievance.

As noted above the Respondent Union settled the grievance at Step Two (2) of the grievance procedure and although the Complainant was not satisfied with the resolution of the grievance, the record reveals no evidence to support a claim that the Respondent Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith. The record shows that the Respondent Union decided not to process the complainant's grievance further because it believed that said grievance lacked merit. The Respondent Union did go beyond the grievance procedure in an attempt to find a solution but to no avail.

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

Therefore, the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of

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10/ Mahnke vs. WERC, 66 Wis. 2d 524 (1975).

11/ Id. at 534.



determining 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 15th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan  
Dennis P. McGilligan, Examiner