STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CARL E. PYKA, Complainant, vs. NEILLSVILLE CO-OP TRANSPORT, Respondent.	:	Case I No. 20230 Ce-1662 Decision No. 14404-A

Appearances:
Mr. Carl E. Pyka, Complainant, appearing on his own behalf.
Trimberger and Vazquez, Attorneys at Law, by Mr. Frank R. Vazquez, appearing for Respondent Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, in the above-entitled matter; and a hearing on such complaint having been held at Neillsville, Wisconsin, on March 24, 1976, Stephen Schoenfeld, Hearing Officer, being present; and the Commission 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 Carl E. Pyka, hereinafter referred to as the Complainant, is an individual residing at Route 2, P.O. Box 309-K, Neillsville, Wisconsin; that Complainant has been employed by Neillsville Co-op Transport for approximately three years as a mechanic.

2. That Neillsville Co-op Transport, hereinafter referred to as the Respondent, is engaged in the operation of a trucking business with facilities located at Neillsville, Wisconsin; and that Laverne H. Fankhauser is the general manager of the Respondent.

3. That at all times material herein, Respondent has recognized General Drivers and Helpers Union, Local 662 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, as the exclusive bargaining representative of certain of its employes including the Complainant herein who was a member of said Union.

4. That at all times material herein Respondent and the Union have been signatories to a collective bargaining agreement effective from May 1, 1975, to April 30, 1977, covering wages, hours, and working conditions of said employes, including the Complainant; and that said agreement contains the following:

"ARTICLE 8

GRIEVANCE PROCEDURE AND ARBITRATION

Section 1. All disputes and grievances which arise by employees and/or their representatives or the Employer shall be processed in the following manner and sequence except that Employer or

Union representative grievances shall proceed immediately to the fourth step:

(1) The employee originating the grievance shall discuss the matter with the foreman, under whom he is working, or he may submit the grievance to the Steward or member of the Shop Committee assigned to his department, who shall, in the presence of the employee, discuss the matter with the foreman.

(2) If the issue is not resolved in Step (1) above, the employee shall reduce his grievance to writing and sign same, then the employee or Steward shall present the written grievance to the Employer.

(3) Within seven (7) days from the receipt of the written grievance by the Employer, the Shop Committee and/or Steward and the employee submitting the grievance, shall meet with a designated representative of the Employer, to discuss the grievance. If the issue is resolved, settlement reached shall be noted in the written copy of the complaint, and the copy, so completed, shall be filed.

(4) Any grievance remaining unsettled after having been cleared through Steps (1) through (3), shall then be taken up between the Employer and the Union, within three (3) days, if possible. All time limitations in this Article may be extended if either party is not available to meet.

Section 2. Any grievance, not resolved as a result of the above-listed steps or any violation of this Agreement, is arbitrable and shall be submitted to arbitration by either party as provided in Section 3 of this Article.

Section 3. Arbitration. Any grievance or violation, which cannot be adjusted by the procedure of Section 1 or 2, shall be referred by either party hereto, within ten (10) days after the conference between the Employer and the Union, as set forth in Section 1 or 2, to a Board of Arbitration composed of one (1) representative of the Union, and one (1) representative of the Employer, a third neutral member to be selected by the first two (2). In the event agreement cannot be reached in naming the third member, either party shall apply to the Wisconsin Employment Relations Commission, which shall then appoint the third member. Said Board of Arbitration shall then meet within five (5) days of the selection of such third neutral member; if necessary, shall conduct hearings and receive testimony relative to the dispute or misunderstanding submitted to them and render their decision in writing within one (1) week after the final submission to them of the dispute. A vote of two (2) of the three (3) members of this Board (unless the Wisconsin Employment Relations Commission is the sole arbiter) shall be binding upon the parties of such dispute. The expense of the neutral member shall be divided equally between and paid by the Employer and the Union. There shall be no strike or lockout during or after the period of arbitration because of the dispute arbitrated, unless either party fails to comply with the award. The Board of Arbitration shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

. . .

ARTICLE 23

WORK WEEK - MECHANICS AND DOCKMEN

Section 1. For all mechanics and dockmen the guaranteed work day shall be eight (8) hours and the guaranteed work week shall

be forty (40) hours. All time worked in excess of forty (40) hours per week shall be paid for at the rate of time and one-half (1 1/2). The forty (40) hours guaranteed work week shall also apply in weeks in which holidays occur. The Employer agrees to minimize work as much as possible on Sundays and holidays.

Section 2. All employees required to work seven (7) consecutive days in a calendar week, Sunday through Saturday, shall be paid double time for the seventh (7th) day. Days off shall be consecutive unless otherwise mutually agreed. Insofar as is practicable, days off shall be rotated. All employees shall be paid on regular established pay days.

Section 3. Except in cases of emergency or where it is unavoidable, no employee shall work weekly overtime until all employees on the seniority list have worked the full quota of regular hours."

5. That in November, 1975, Complainant, due to personal problems, desired to be excused from working on Saturdays and discussed the matter with his shop foreman, Francis Zilk; that Zilk was unable to resolve the matter to the Complainant's satisfaction; that Complainant subsequently met with Fankhauser in order to be relieved of his Saturday responsibilities; that Fankhauser said that he would attempt to obtain such an excuse but that it would be difficult to find a replacement on a permanent basis, since Saturday constituted one of the busiest days of the week for mechanics in that the trucks are serviced on Saturdays.

6. That during the period from mid-November, 1975, through mid January, 1976, Complainant worked only one or two Saturdays; and that Complainant frequently notified the Respondent on the Saturday he was due to work or the preceding Friday that he would not report to work.

7. That Complainant's absences from work on Saturdays and Respondent's inability to obtain a permanent replacement for Complainant caused Fankhauser to meet with Complainant to issue the following letter on January 15, 1976:

"SUBJECT: CONDITIONS OF EMPLOYMENT

PURSUANT TO OUR CONVERSATION THIS DATE, ACCEPT THIS LETTER AS A STATEMENT OF OUR POLICY CONCERNING YOUR CONTINUED EMPLOYMENT WITH NEILLSVILLE CO-OP TRANSPORT.

AS WAS RELATED TO YOU WHEN YOU WERE FIRST HIRED, IT IS IMPERATIVE THAT WE HAVE OUR FULL TIME MECHANICS WORK EVERY SATURDAY AS FRIDAYS AND SATURDAYS ARE THE ONLY DAYS THAT OUR TRUCKS ARE ALL IN. IN VIEW OF RECENT DEVELOPMENTS, WE FIND IT NECESSARY TO RESTATE THIS POLICY AS IT SPECIFICALLY RELATES TO YOUR EMPLOYMENT. IT IS A CONDITION OF YOUR CONTINUED EMPLOYMENT THAT YOU WORK A MINIMUM OF 8 HOURS EVERY SATURDAY. THE ONLY EXCEPTIONS TO THIS REQUIREMENT ARE: (1) SICKNESS, WHICH WILL REQUIRE A WRITTEN DOCTOR'S STATEMENT RELATING HIS PROFESSIONAL OPINION AS TO YOUR FITNESS TO WORK. (2) WRITTEN PERMISSION BY MYSELF OR RON DASHNER EXCUSING YOU. (3) FUNERAL LEAVE, VACATION, OR HOLIDAYS.

SO THAT THERE BE NO MISUNDERSTANDING ABOUT OUR POSITION IN REGARD TO YOUR EMPLOYMENT, WE OFFER TO LET YOU TAKE WEDNESDAYS OR TUESDAYS OFF DURING THE WEEK IF YOU DESIRE EMPLOYMENT NOT TO EXCEED 40 HOURS PER WEEK. WHICHEVER DAY YOU CHOSE WOULD BE AT YOUR CONVENIENCE BUT MUST BE THE SAME DAY EACH WEEK.

PERMISSION HAS BEEN GRANTED TO YOU FOR EXCUSE FROM WORK THIS SATURDAY, JANUARY 17, 1976.

BY YOUR REPORTING FOR WORK ON MONDAY JANUARY 19, 1976, IT WILL BE UNDERSTOOD THAT YOU INTEND TO WORK SATURDAYS AS REQUIRED. FAILURE TO WORK SATURDAYS EXCEPT AS HEREIN PROVIDED WILL BE SUBJECT TO PENALTY AS FOLLOWS:

FIRST OFFENSE - WRITTEN REPRIMAND
2ND OFFENSE - 3 DAY LAYOFF WITHOUT PAY
3RD OFFENSE - DISCHARGE

SIGNED:

LAVERNE H. FANKHAUSER, MANAGER"

8. That pursuant to Article 8, Section 1(1) of the collective bargaining agreement, Complainant in November, 1975, had discussed his desire to be relieved of Saturday work with his foreman, Francis Zilk; that the issue was not resolved and on January 15, 1976, Complainant submitted a written grievance to Donald Burger, Business Representative of the Union, without submitting same to any agent of the Respondent; that said grievance provided:

"On November 17, 1975, I had a conference with Laverne Fankhauser, manager of Neillsville Co-op Transport. Whereas I had asked permission to be relieved of Saturday work, because of marital problems, also to travel out of town, due to illness in the immediate family, Mr. Fankhauser had assured me at this meeting other arrangements could be made. When I asked to leave a week later, he was very upset about my absence on a Saturday. For weeks on end, since our conversation, he has ignored my request, saying that it would be impossible for him to hire extra help for Saturday work and he could not find anyone suitable.

On January 12th, I was approached and asked what my intentions were as to Saturday work. I then told him I would be willing to work Fridays as late as possible to compensate for my absence for Saturday work. His answer to this was that he had to have a man here for six days a week and would not change company policy for one man and told me he was running this show and we are going to do things his way or not at all, leaving me no recourse in this matter and asked for an answer on Thursday, January 15, 1976.

After confronting him today, he openly challenged me to refuse work, with a witness present, so he would have grounds for my dismissal. In other words he has encouraged me to resign my employment which in no way am I about to do. I have a sick wife and five children to support.

Your immediate attention to this grievance will be appreciated in regards to Article 23, Section 2. A mutual agreement has not been made as to consecutive days off. This is what we cannot agree upon. Now he requests to work a 40 hour work week, taking Tuesday or Wednesday as my day off. To me this is an unfair labor practice on the part of the employer to the employee."

9. That Complainant failed to present said grievance in writing to the Respondent as required in Article 8, Section 1(2) of the collective bargaining agreement; that, consequently, Complainant and a representative of Respondent never met to discuss the grievance, as provided for in Article 8, Section 1(4) of the labor agreement.

10. That Burger discussed the grievance with Complainant and thoroughly investigated it prior to meeting with Fankhauser; that pursuant to Article 8, Section 1(4) of the collective bargaining agreement, Fankhauser and Burger attempted to resolve the Complainant's grievance; that Burger ultimately concurred with Fankhauser's conclusion that the contract permitted the Respondent to require mechanics to work on Saturdays and that Complainant's grievance was without merit; that Burger communicated the aforesaid resolution to Complainant; that Respondent did not raise any objection concerning Complainant's failure to submit the grievance in writing to it and treated the dispute as if all the procedural requirements of the grievance procedure had been complied with.

11. That Complainant was not satisfied with the disposition of the grievance, and Burger and Pyka discussed the possibility of submitting the matter to arbitration, wherein Burger indicated that there was little likelihood of success in arbitration; and that Complainant did not request Burger to submit the grievance to arbitration.

12. That there is no evidence that the Union or any of its representatives in processing Complainant's grievance acted arbitrarily, discriminatorily or in bad faith; and that the Union, by Burger, provided Complainant with fair representation in attempting to resolve the grievance.

Upon the basis of the above and forgoing Findings of Fact the Commission makes the following

CONCLUSIONS OF LAW

1. That General Drivers and Helpers Union, Local 662 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, and its agent, Donald Burger, did not wrongfully refuse to proceed to arbitration in the grievance of Complainant Pyka, and, therefore, the conduct of said union and its agent, Donald Burger, in processing Complainant Carl E. Pyka's grievance over the Respondent Neillsville Co-op Transport's alleged failure to abide by Article 23 of the collective bargaining agreement, was not arbitrary, discriminatory, or in bad faith; and the Union, therefore, did not violate its duty to fairly represent Complainant.

2. That, since General Drivers and Helpers Union, Local 662 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, did not violate its duty to fairly represent Complainant Carl E. Pyka with request to his grievance, and since said grievance was resolved by said Union and the Respondent Employer, the Wisconsin Employment Relations Commission has no jurisdiction to determine the merits of said grievance.

Upon the basis of the above and forgoing Findings of Fact and Conclusions of Law the Commission makes the following

ORDER

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

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman.

Herman Torosian, Commissioner

Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant, in his complaint, alleged that Respondent Employer violated the collective bargaining agreement between the Respondent Employer and General Drivers and Helpers Union, Local 662 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. A hearing was conducted on March 24, 1976. Respondent did not file an answer, and at the hearing attempted to establish that it had not violated the collective bargaining agreement and argued, by way of affirmative defense, that the Commission should dismiss the complaint because no written grievance was filed by the Complainant with the Employer as required in the collective bargaining agreement, and because Complainant failed to pursue arbitration as set forth in the collective bargaining agreement. Both parties waived the filing of briefs.

Respondent Employer argues that the complaint should be dismissed because Complainant failed to file a written grievance with the Employer pursuant to Article 8, Section 1(2) of the collective bargaining agreement. Although Complainant submitted the written grievance (see Finding of Fact 8) to the Union, instead of to the Employer, Respondent entertained the grievance by discussing same with Burger at Step 4 without objecting to any procedural defects. Since the Respondent raised no objection concerning the manner in which Complainant processed the grievance prior to the hearing, the Commission finds that the Respondent waived any objections it had about the manner in which the grievance was processed.

Before the Commission will exercise its jurisdiction to determine the merits of Complainant's allegation that Respondent Employer breached the collective bargaining agreement 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 he was frustrated in his attempt by the Union's violation of its duty of fair representation. 1/ The record establishes that the Complainant requested and received the Union's assistance through Step 4 of the applicable grievance procedure. The Union advised the Complainant that his grievance was without merit after discussing it with the Employer's agent. The Complainant did not request the Union to proceed to arbitration on the grievance.

The Complainant avers that he is unhappy with the resolution of the grievance and maintains that the Respondent Employer continues to violate the contract by coercing him to work on Saturdays. The Complainant must establish that the Union violated its duty to fairly represent him in order for the Commission to determine his grievance on the merits.

While it is inequitable to allow an employe's grievance to go without remedy because of the Union's wrongful refusal to process it, the U.S. supreme Court, in Vaca v. Sipes, made it clear that a "wrongful refusal" occurs only when the Union breaches its duty of fair representation and that:

1/ Vaca v. Sipes 386 U.S. 171, 1967; F. Dohmen Co. (8419-A, B) 9/68 (aff. Dane Co. Cir. Ct., 6/70); Ozite Corp. (10298-A, B) 2/72.

"A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 2/

A union has a considerable flexibility in deciding whether to pursue a grievance.

". . . Just as a union must be free to sift out wholly frivolous grievances which could only clog the grievance process, so it must be free to take a position on the not so frivolous disputes . . . ." 3/

The Union's duty of fair representation does not necessarily require it to carry any grievance through all steps of the grievance procedure, especially if the Union concludes after investigation that there is little likelihood of success. In the instant case, Burger, after thoroughly investigating the grievance, concurred with Fankhauser's interpretation of the collective bargaining agreement and concluded that Complainant's grievance was without any merit. The evidence shows that the Union investigated and processed the grievance in a manner that was untainted by arbitrariness, discrimination or bad motives, and, further, that Pyka did not request that Burger proceed to arbitration.

The Complainant did not establish that the Union did not adequately assist him concerning the processing of the grievance. The Complainant bears the burden of proving that the Union failed to represent him fairly. 4/ The Commission finds that the Complainant did not sustain his burden of proof. On the contrary, the record establishes that the Union properly discharged its duty of fair representation.

Therefore, the Commission will not determine the merits of the grievance and, as a result, has dismissed the complaint.

Dated at Madison, Wisconsin this 2nd day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

2/ Supra, at page 190.

3/ Humphrey v. Moore (1964) 375 U.S. 335, 349, 84 Sup. Ct. 363, 11 L. Ed. 2d 370; also, see Ford Motor Co. v. Huffman (1953), 345 U.S. 330, 338.

4/ Section 111.07(3), WEPA, provides, inter alia, that the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.