

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID J. BUTLER,
Complainant,
vs.
HARNISCHFEGER CORPORATION and
SHOPMEN'S LOCAL 814 of the
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND
ORNAMENTAL IRON WORKERS,^{1/}
Respondents

Case XIX
No. 20785 Ce-1688
Decision No. 14898-C

Appearances:

Gimbel, Gimbel & Reilly, Attorneys at Law, by Mr. Richard E. Reilly,
for the Complainant.
Whyte & Hirshboeck, Attorneys at Law, by Mr. Martin R. Browning and
Mr. Robert Salinger, for Respondent-Employer.
Podell & Ugent, Attorneys at Law, by Ms. Nola Hitchcock Cross, for
Respondent-Union.

FINDINGS OF FACT, CONCLUSION 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 appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5), Wis. Stats.; and a hearing on such complaint having been held at Milwaukee, Wisconsin, on October 11, 1976 before the examiner, and the examiner having considered the evidence, arguments of counsel and being fully advised in the premises, makes and files the following

FINDINGS OF FACT

1. That at all relevant times David J. Butler, herein referred to as Complainant, was an individual residing at 3802 East Cudahy Avenue, Cudahy, Wisconsin.

2. That at all relevant times Harnischfeger Corporation, herein referred to as Respondent-Employer, was a manufacturer with offices

1/ During the course of the hearing Complainant amended its complaint to allege the proper name of Respondent-Union. Respondent-Employer's "cross complaint" seeking contribution from Respondent-Union should there be a finding it violated a duty of fair representation owed Complainant in this matter is consolidated with this matter and not treated separately.

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located at 4400 West National Avenue, Milwaukee, Wisconsin; and that Respondent-Employer is an employer within the meaning of both the Wisconsin Employment Peace Act and the Labor Management Relations Act, as amended, over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.

3. That Shopmen's Local 814 of the International Association of Bridge, Structural and Ornamental Iron Workers, herein referred to as Respondent-Union, is a labor organization within the meaning of the Wisconsin Employment Peace Act and Labor Management Relations Act, as amended.

4. That at all relevant times Respondent-Employer has recognized Respondent-Union as the exclusive collective bargaining representative of certain of its employees including at the relevant times Complainant, and that at all relevant times Respondents were party to a collective bargaining agreement with respect to said employees which provided in relevant part:

" . . .

SECTION 4.0

Management Prerogative - Shop Rules

4.1 . . . Subject to the provisions of this agreement, the Company shall have the right to . . . demote, suspend, discipline or discharge for proper cause, . . . it being understood, however, the Company shall not discipline or discharge an employee except for proper cause or otherwise improperly discriminate against an employee.

SECTION 14.0

Seniority

14.1 . . . The continuous service and seniority status of an employee shall not be affected or interrupted as a result of layoffs, injury, illness, leaves of absence, or other cause not due to the voluntary act or fault of the employee; however, the continuous service of an employee and his or her seniority status shall be terminated for any of the following reasons, unless the Company and the Union by agreement in writing, determine otherwise: . . .

14.1.3 Discharge of an employee for proper cause.

SECTION 16.0

Grievance Procedure

16.1 A Chief Shop Steward; an Assistant Chief Shop Steward; and, one Shop Steward for each department on each shift shall be appointed by the Union from among its members employed by the Company. The Union shall keep the Company informed of the names of its members who have been appointed as Stewards.

16.2 The Chief Shop Steward, Assistant Chief Shop Steward and one Departmental Shop Steward shall constitute the Shop Committee. In the absence of the Chief Shop Steward, or Assistant Chief Shop Steward, whichever is present and two (2) Departmental Shop Stewards shall constitute the Shop Committee. Shop Stewards shall not be discriminated against for performing their duties as hereinafter provided for, nor shall any employee be discriminated against for presenting a grievance or dispute or consulting with a Shop Steward about any complaint or grievance he or she may have. After a grievance or dispute has been presented, as provided for in Subsection 16.3 hereof, no Foreman, Supervisor or other representative of the Company shall discuss such grievance or dispute with the employee(s) unless the Shop Steward is present during such discussion.

16.3 Should a grievance or dispute arise between the Company and the Union in connection with the application, interpretation, or alleged violation of any provision of this agreement, the complaining or aggrieved party shall serve notice thereof, in writing, on the other not later than five (5) work days from the date the grievance or dispute occurred or comes to the attention of the complaining or aggrieved party; and within the five (5) work days or such other time acceptable to the parties but not to exceed ten (10) work days immediately following receipt of such written notice, a designated representative(s) of the Union and a designated representative(s) of the Company shall make an earnest effort to settle such grievance or dispute; and failing to do so, the matter shall, upon written notice of either party to the other, be submitted to arbitration in accordance with the arbitration provisions hereinafter set forth in this agreement, provided such written notice is given within fifteen (15) work days immediately following the aforementioned ten (10) work day period. Should a grievance or dispute arise between the Company and an employee(s), an earnest effort shall be made to settle such grievance or dispute in the following manner:

- Step 1. The employee(s) shall submit his grievance or dispute, orally, by himself, or if he so desires with his Shop Steward, or Chief, or Assistant Chief Shop Steward, to the employee(s) [sic] Foreman within five (5) regular working days from the date of the occurrence of the event which gave rise to the grievance or dispute. If not settled, the grievance or dispute shall be processed as provided for in Step 2.
- Step 2. By a representative of the Union, the Shop Committee, and a designated representative(s) of the Company. The Company's representative shall render a decision in writing, within three (3) work days following the day on which the grievance or dispute is presented in this Step 2. Such decision shall be considered as satisfactory and the grievance or dispute considered settled unless the Union or Company notify each other, in writing, within fifteen (15) work days after the three (3) day period of consideration, as hereinabove provided for in this Step 2, that it is the desire of the Union or the Company that the grievance or dispute be submitted to arbitration in accordance with the arbitration provisions hereinafter set forth.

In the event a grievance or dispute between the Company and an employee(s) is not settled as provided for in Step 1 above, the grievance or dispute shall be reduced to writing, on forms furnished by the Company, and approved by the Union, and signed by the aggrieved employee or the Departmental or Chief Shop Stewards, and shall

be taken up on some one day of each week which shall be Thursday. The processing of grievances or disputes shall be during regular scheduled work hours without loss of pay to the persons involved in Steps 1 and 2 above, it being understood that such privilege shall not be abused.

16.4 The Shop Stewards provided for and mentioned in this Section 16.0 shall have and possess power and authority to act for and bind the Union only in connection with those functions, rights, obligations and matters provided for in this agreement. They shall not have, or be deemed to have, any other authority to act for or bind the Union. Specifically, no Shop Steward has any authority, real or apparent, to act for or in behalf of the Union, in any manner contrary to or in violation of any applicable section or provision of the Labor-Management Relations Act, 1947, in the matter of hiring or firing employees, or disciplining, demoting or punishing employees, or discriminating against employees or altering, suspending, or terminating all or any part of this agreement, or calling or causing or inducing strikes, work stoppages or picketing, or establishing boycotts. Nor shall the fact that any such Shop Steward has, on one or more occasions, assumed authority to act for the Union in connection with matters for which he is not hereby authorized to act in behalf of the Union, be deemed evidence of any real or apparent authorization by the Union of such activities by the Shop Steward, unless the Company shall have given the Union written notice of such activity or activities of the Shop Steward and the Union, within a reasonable time thereafter, has failed to post notices on the Bulletin Boards located on the Company's premises directing such Shop Steward to cease and desist from such activities and proclaiming that he has acted beyond the scope of the authority granted him by the Union.

SECTION 17.0

Arbitration

17.1 Any grievance or dispute between the Company and the Union or between the Company and an employee(s) that has been processed in accordance with the provisions of the preceding section of this agreement but not satisfactorily settled shall, upon the written request of either party to this agreement, be submitted to arbitration by an impartial arbitrator to be selected by mutual agreement of the parties. If, within five (5) work days after receipt of such written request, the parties are unable to agree upon an arbitrator, the Director of the Federal Mediation and Conciliation Service shall be requested to submit the names of five (5) disinterested persons qualified and willing to act as impartial arbitrators. From such list, the Company and the Union shall each alternately strike one name until four (4) names have been eliminated and the person whose name remains on the list shall be selected to act as the impartial arbitrator. The procedure to be followed in submitting the difference or dispute to the arbitrator shall, unless agreed upon by the parties within three (3) work days after the selection of the arbitrator, be determined by the arbitrator himself. The arbitrator shall submit his decision, in writing, within thirty (30) days after the conclusion of the hearing, or hearings, as the case may be, and the decision of the arbitrator so rendered shall be final and binding upon the employee(s) involved and upon the parties to this agreement and judgment thereon may be entered in any court having jurisdiction. The compensation and

necessary expenses of the arbitrator shall be borne equally by the Company, and the Union.

17.2 The foregoing provisions for arbitration are not intended and shall not be construed as in any wise qualifying or making subject to change any term or condition of employment specifically covered by this agreement, nor shall they apply to any dispute as to the terms or provisions to be incorporated in any proposed new agreement between the parties. The arbitrator shall not have the right to add to, subtract from, modify or disregard any of the terms or provisions of this agreement. However, the arbitrator is hereby authorized and empowered to make his decision and award retroactive, if, in his judgment, circumstances justify such an award. Any dispute between the parties as to the interpretation or construction to be placed upon the award made as hereinabove provided for shall be submitted to the impartial arbitrator who made the award, who may thereupon construe or interpret the award so far as necessary to clarify the same, but without changing the substance thereof, and such interpretation or construction shall be binding upon all parties."

5. That Respondent-Employer continuously employed Complainant as a spray-painter in the period October 4, 1965, to January 22, 1976; that on January 22, 1976 Respondent-Employer discharged Complainant for what it asserted to be "excessive absenteeism".

6. That thereafter on January 22, 1977, Complainant requested Respondent-Union's assistance in processing a grievance concerning the instant discharge; that in response thereto Respondent-Union processed said grievance through all of the steps of the applicable grievance and arbitration procedure short of arbitration in a genuine and substantial effort to obtain a satisfactory resolution thereof; that during the course of processing said grievance Respondent-Union learned all of the facts relevant to its determination as to whether to process said grievance further; that during the course of processing said grievance, Respondent-Union provided it with whatever information he deemed material; that thereafter, upon detailed, good-faith consideration of the relevant agreement provisions and the facts known to it, Respondent-Union concluded the instant grievance was without any merit whatsoever; that Respondent-Union's processing of the instant grievance, including, but not limited to, its decision not to seek arbitration thereof, was not arbitrary, discriminatory or in bad faith.

7. That Complainant has failed to exhaust all applicable grievance and arbitration procedures with respect to his discharge of January 22, 1977.

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

CONCLUSION OF LAW

That since Complainant David J. Butler has failed to exhaust the applicable, exclusive grievance and arbitration provisions with respect to the matters alleged and since Respondent-Union, Shopmen's Local 814 of the International Association of Bridge, Structural and Ornamental Iron Workers, did not violate its duty of fair representation by refusing to process Complainant's grievance concerning his discharge to arbitration, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission to determine the merits of his complaint.

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

ORDER

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

Dated at Milwaukee, Wisconsin, this 29th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On January 22, 1976 Respondent-Employer discharged Complainant for what it termed was "excessive absenteeism". At his request, Respondent-Union processed his grievance through all of the grievance and arbitration procedures short of arbitration, but prevented Complainant from exhausting the applicable procedures by withdrawing its request for arbitration. In view of the issues framed by the complaint, answers and Respondent-Employer's Employer's motion to dismiss for want of jurisdiction, I limited hearing to the duty of fair representation issues and issues raised by Respondent-Employer's motion to dismiss.^{2/}

POSITIONS OF THE PARTIES

With respect to the duty of fair representation, Complainant admits Respondent-Union's processing of his grievance was neither discriminatory nor in bad faith, but does allege it was arbitrary. He alleges Respondent-Union made a minimal effort to settle the grievance and made a minimal investigation which failed to reveal the legitimacy of Complainant's absences, family circumstances requiring Complainant's absences, the effects of discharge upon him and his family, and substantial errors in Respondent-Employer's absence records. He also alleges its determination not to seek arbitration failed to take into account his financial situation, the monetary value of his claim, the effect of the discharge upon him and his family, his seniority, his service award, the appropriateness of the penalty and the facts not disclosed by Respondent-Union's investigation.

Respondent-Employer was the only respondent to file a brief. With respect to the fair representation issue it urged that Respondent-Union did not violate its duty of fair representation because it made good faith, substantial efforts at trying to obtain a settlement of the grievance, and made a good faith determination not to proceed based upon careful consideration of the relevant facts and the factors specified in Mahnke vs. W.E.R.C. 66 Wis. 2d. 524, @ p. 534, 88 L.R.R.M. 3199 (1975).

^{2/} Decision numbers 14898-A and 14898-B. Respondent-Employer's later filed "Cross-Complaint" is rendered moot by the result herein.

DISCUSSION

Since Complainant's action is one for violation of collective bargaining agreement within the meaning of Section 301 of the Labor Management Relations Act, as amended, the State through this Commission is not Constitutionally preempted from asserting its jurisdiction.^{3/}

Contrary to Complainant's position, Respondent-Union engaged in substantial, good faith efforts to obtain a settlement favorable to Complainant. Thus, it exhausted all of the steps of the grievance procedure short of arbitration. A nonexhaustive representative example of the tenor of its efforts is its handling at the second step. For that meeting it sought the assistance of its experienced International Representative, Palma. In turn, he adopted tactics for the meeting reasonably calculated to have Respondent-Employer's agents make concessions with respect to this grievance, despite their inflexible position on the merits. When these efforts proved somewhat successful, it is Complainant, not Respondent-Union, who prevented further pursuit of settlement. This processing was hardly arbitrary.

In the course of processing the instant grievance, Respondent-Union ascertained all of the facts and positions relevant^{4/} to its decision as to processing the grievance further and sufficient facts to support its ultimate position as to the meaning of the agreement under the particular circumstances. Grievant had more than an adequate opportunity to present Respondent-Union with any information he deemed relevant.

After settlement efforts were exhausted, Respondent-Union's Executive Committee reconsidered its decision to seek arbitration of this grievance. At this meeting, it considered Complainant's seniority^{5/}, his absence record, his relevant disciplinary record, the relevant provisions of the agreement, Attorney Ugent's advice, and other information in a detached

^{3/} Vaca vs. Sipes, 385 U.S. 395, 64 L.R.R.M. 2369, (1967). No question of jurisdiction has been raised with respect to Respondent-Employer's claim for contribution (its "Cross-Complaint").

^{4/} The errors of Respondent-Employer's records alleged by Complainant, even if relevant, were insignificant in view of the Respondent-Union's ultimate position.

^{5/} Seniority was the sole basis of Complainant's service award.

and good faith manner. I am satisfied that upon their careful consideration of all of the information before it, the Executive Committee concluded the instant grievance was without any merit whatsoever, including, but not limited to, a conclusion an arbitrator would almost assuredly sustain the instant discharge. Mahnke requires no more. I conclude Respondent-Union did not arbitrarily, discriminatorily or in bad faith process Complainant's grievance or decide not to seek arbitration thereof within the meaning of Vaca and Mahnke. Accordingly, the instant complaint has been dismissed.

Dated at Milwaukee, Wisconsin, this 29th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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