

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

No. 16501-A

5. At all times material hereto, Duo Safety Ladder Corporation and Local 352, Upholsterer's International Union of North America, were signatories to a collective bargaining agreement, effective from May 1, 1977 to April 30, 1979, covering wages, hours and working conditions of the aforementioned employees; and that said agreement includes the following pertinent provisions:

ARTICLE X - ADJUSTMENT OF GRIEVANCES

Section 1.

In the event of any differences, dispute or trouble, whether arising in the Plant or otherwise between the Company and the Union or any employee or employees concerning the meaning and application of the provisions of this agreement, an earnest effort shall be made to settle such differences in the following manner:

- FIRST: Between the aggrieved employee and the Superintendent, [sic] together with the Shop Steward. If not answered and satisfactorily settled, within one (1) working day, then
- SECOND: Between the Shop Committee and the Superintendent. If not answered and satisfactorily settled with in [sic] two (2) days, then
- THIRD: Between a representative or representatives of International or Local Union and the executives of the Company and/or their representatives. If not answered and satisfactorily settled within (5) five working days, then
- FOURTH: Grievances, except grievances relating to wage rates and job classification herein agreed to, which have not been satisfactorily settled under the foregoing procedure shall be referred to a Board of Arbitration; one representative to be selected by the Union, one representative to be selected by the Company, and the third member to be selected by the Company and the Union. In the event that representatives of the parties cannot agree with in five (5) days on the selection of the third impartial member, then, the third impartial member shall be appointed by the Wisconsin Employment Relations Board, at the written request of either party. The Board of Arbitration shall thereupon hold its hearings in Oshkosh, Wisconsin, and the award of the majority of the Board, which shall be reduced to writing, shall be final and binding upon both parties. The Company shall pay the expenses of the member selected by the Company, and the Union shall pay the expenses of the member selected by the Union. The expenses and remuneration of the third and impartial member shall be paid equally by the Company and the Union.

Jurisdiction of the Board of Arbitration shall be only in regard to the particular dispute before them and shall have no power or authority to add to, subtract from, modify or change any of the terms of this Agreement nor shall they have and [sic] power to establish wage scales, change any wages or rule on rates of pay, except rates set or changed hereafter pursuant to Article XIV, Section 5.

The Board of Arbitration shall have no power to pass upon products to be manufactured or methods of manufacture nor any other function or responsibility that rests with the Management, except as modified by the Agreement.

If any dispute submitted to the Board of Arbitration concerns [sic] matters not covered by this Agreement, it shall be returned to the parties without decision. [sic]

Section 2.

Grievance in the first step shall be handled orally. Grievances reaching the second step shall be reduced to writing, dated and signed by the aggrieved employees and/or the Shop steward and the Company representative involved.

Section 3.

Grievances in the first and second steps shall be appealed within two (2) working days. Grievances reaching the third step shall be appealed within five (5) working days. Grievances not appealed within the time limit specified above shall be deemed settled on the basis of the last answer given.

ARTICLE VII - VACATIONS

. . .

Section 3.

In order to qualify [sic] for the vacation defined in the foregoing sections, an employee must have worked not less than ninety per cent (90%) of the available days of work during the twelve (12) months immediately preceding the beginning date of his vacation. It is understood and agreed for this purpose that absence from work because of occupational accidents, holidays enumerated above, jury services, necessary appearances before Governmental Agencies, time spent in collective bargaining or authorized leaves of absence, or Company layoffs due to lack of work shall be considered as time worked.

. . .

ARTICLE VIII - LEAVES OF ABSENCE

Section 1.

The Company, in cases where production requirements permit or unusual circumstances warrant, may grant, at its discretion, written leaves of absence to employees upon written request and upon good cause being shown for such leave, for a definite period of not more than thirty (30) days, provided that in exceptional cases of illness, accident or military services, a longer leave may be granted. Seniority shall accumulate only for the first thirty (30) days in any leave of absence, except in the case of military service.

6. That beginning on December 6, 1977, Complainant was granted the first of a series of seven thirty-day leaves of absences in order to care for her terminally ill husband; that the last of these leaves expired on June 30, 1978; that on June 27, 1978 at a meeting at the Company's offices, during which Richard Schwab and Phillip Lautenschlager were present, Complainant made an oral request for an additional leave of absence which was denied; that at said meeting the

Complainant was told by Schwab that the Company had granted her requests for leave of absence in order to allow her continued health insurance coverage under the collective bargaining agreement but that as the Employer had been notified by its health insurance carrier that Complainant's coverage would cease on June 30, 1978 because said health insurance coverage was normally inapplicable to individuals on leave of absence her request for an additional leave of absence was denied.

7. That on or about July 27, 1978, Complainant telephoned Respondent Lautenschlager to discuss the Company's denial of an extension of her leave of absence and to request assistance in filing a grievance; that during that conversation Lautenschlager informed Complainant that it was his opinion that he had "no grounds" to file a grievance; that Lautenschlager refused to present Complainant's grievance at the first step of the grievance procedure.

8. That Complainant did not take any further action with respect to processing of said grievance.

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

CONCLUSIONS OF LAW

1. That Complainant did attempt to exhaust the contractual grievance procedure, but such attempt was frustrated by the Union's refusal to process the grievance.

2. That the conduct of Local 352, Upholsterer's International Union of North America, and Respondent Lautenschlager as agent of Local 352, Upholsterer's International Union of North America was not arbitrary, discriminatory or in bad faith; that Local 352 and Phillip Lautenschlager therefore did not violate their duty to fairly represent Complainant; and Respondent Lautenschlager, therefore, is not in violation of Section 111.06(2)(a) and (c) of the Wisconsin Employment Peace Act.

3. That because Local 352 of the Upholsterer's International Union of North America, and Respondent Lautenschlager did not violate their duty to fairly represent Complainant, and because of the total absence of conduct of an arbitrary, discriminatory or bad faith nature by Respondent Lautenschlager with respect to Complainant, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondents Richard H. Schwab and Philip W. Schwab as agents of Duo Safety Ladder Corporation, breached the collective bargaining agreement with Local 352, Upholsterer's International Union of North America in violation of 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 of Complainant Florence H. Bier be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 7th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James D. Lynch
James D. Lynch, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The complaint filed herein alleges that Respondents Schwab violated the collective bargaining agreement by denying Complainant benefits which she alleged she was entitled to regarding vacation pay, leave of absence and payment for time worked. The complaint further alleges that the Union, by its agent Respondent Lautenschlager, violated its duty of fair representation by failing to process her grievance through the steps of the grievance procedure. Respondents Schwab contend that the Company's denial of vacation pay was required by the terms of the collective bargaining agreement, that its denial of an extended leave of absence did not violate the collective bargaining agreement and that it owed Complainant no money for work performed. Local 352 and Respondent Lautenschlager contend that the Employer's actions did not violate the collective bargaining agreement and, further, that Complainant never pursued her rights to use the grievance procedure or the Union's internal appeal mechanism after Lautenschlager's initial refusal to process the grievance to the first step.

Exhaustion of the contractual grievance procedure is a condition precedent to the Examiner's assertion of his jurisdiction to determine the claim that the Employer breached the collective bargaining agreement unless Complainant has been frustrated in her attempts to exhaust the grievance procedure by the Union's breach of its duty of fair representation. 1/ Here the testimony establishes that during their July 27 conversation, Complainant requested Lautenschlager to file a formal grievance and that he declined to do so. 2/

Having shown that Complainant attempted to exhaust the grievance procedure, and that her attempt was frustrated by Lautenschlager's refusal to proceed with the grievance, Complainant must demonstrate by a clear and satisfactory preponderance of the evidence, 3/ that such refusal was arbitrary, discriminatory, or in bad faith. Absent

1/ American Motors Corporation, No. 2788-B (10/68).

2/ Parenthetically, it should be noted that although the complaint filed herein alleges that Complainant requested that a grievance be filed regarding the Company's alleged failures to pay vacation benefits and to pay for certain work performed by Complainant in addition to her grievance regarding the refusal to grant an extended leave of absence, the record establishes that the discussion which occurred during the phone conversation concerned only the refusal to grant an extended leave of absence. In this respect see Transcript at page 21 wherein Bier testified that "I asked him if he would please file a grievance against the Company for more leaves of absences or discrimination. He said no, it wouldn't work." To the same affect, see Lautenschlager's testimony at Transcript page 39. As Lautenschlager was never apprised by Complainant of the existence of any other complaints, the Examiner will not consider these other allegations as they relate to the Union's duty of fair representation, as it is clear that they could have played no role in the Union's decision regarding the merits of Complainant's grievance.

3/ Mahnke v. WERC, 66 Wis. 2nd 524 (1975); Section 111.07(3), Wis. Stats.

such conduct, the Union cannot be found guilty of breaching its duty of fair representation. 4/

Therefore, the critical inquiry regards Lautenschlager's motivation in refusing to process Complainant's grievance. In this respect, Complainant appears to place great weight upon the fact that the Union made its determination regarding the merits of Complainant's grievance without taking the matter to the first step of the grievance procedure and thereby failing to learn management's response to the request for an additional leave of absence. 5/ However, it should be noted that Lautenschlager was present during the June 27, 1978 meeting during which Schwab denied Complainant's request for an additional leave of absence. As such he was apprised of the underlying facts and the reasons for such Employer action. 6/ Thus, **there is no reasonable** basis for concluding that Lautenschlager's determination made during the July 27 phone conversation that the grievance **lacked** merit was not the product of a reasoned decision. Absent some **further** showing by Complainant, such as animus, this decision cannot be **said** to be arbitrary, discriminatory or in bad faith. Lautenschlager's knowledge of the circumstances surrounding the Employer's denial of Complainant's request for additional leave of absence rebuts any inference that the Union may have been guilty of such an alleged failure to investigate the merits of the grievance as would violate the Union's duty of fair representation. 7/

Having determined that Complainant failed to meet her burden with respect to the Union's conduct toward her, the Examiner finds it unnecessary to reach the question whether Complainant should have or did exhaust her internal Union remedy before bringing this action before the Commission.

The Examiner therefore concludes that Complainant did attempt to exhaust the contractual grievance procedure, but that she failed to sustain her burden of proving, by a clear and satisfactory preponderance of the evidence, that the Union's conduct toward her was arbitrary, discriminatory or in bad faith. Absent such conduct, the Union did not breach its duty to fairly represent Complainant.

Therefore, the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent's Schwab breached the collective bargaining agreement with Local 352 in violation of Section 111.06 (1)(f) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 7th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James D. Lynch, Examiner

4/ Mahnke v. WERC, supra.

5/ See Transcript at pp. 40-41 (questions asked of Respondent Lautenschlager by Complainant's attorney Schrank).

6/ See Transcript at pp. 29-30 (testimony of Philip W. Schwab) and pp. 30-31, 33 (testimony of Phillip Lautenschlager).

7/ In this respect see Hines v. Local 377, Teamsters Union, ___ F 2nd ___, 87 LRRM 2971 (6th Cir. 1974), rev'd on other grounds ___ U.S. ___, 91 LRRM 2481 (1976) in which the Court of Appeals held that an allegation that the Union failed to make an adequate investigation into the merits of an employee's grievance may give rise to a claim that the Union violated its duty of fair representation.