STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL L. SCAIFE, Complainant, vs. J. I. CASE COMPANY and UNITED AUTO WORKERS LOCAL 180, Respondents.	:	Case XVII No. 27178 Ce-1887 Decision No. 18324-B

ORDER AMENDING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Stephen Pieroni having, on November 20, 1981, issued Findings of Fact, Conclusions of Law and Order in the above entitled matter, wherein he concluded that (a) Complainant's failure to exhaust the internal procedure of the Respondent Union did not foreclose the Examiner from determining whether Respondent Union granted the Complainant fair representation in the processing of Complainant's grievance relating to the termination of employment, (b) Respondent Union had not violated its duty to provide such fair representation in the processing of said grievance and in its refusal to proceed to arbitration thereon, and (c) therefore the Examiner would not assert the Commission's jurisdiction to determine whether the Respondent Employer violated the collective bargaining agreement existing between the Respondents, with respect to the Complainant's discharge; and the Complainant having, on December 10, 1981, timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and the parties having filed argument in support of and in opposition to the petition for review, the last of which was filed on June 3, 1982; and the Commission having reviewed the decision of the Examiner, the entire record and the briefs and arguments of Counsel, and being fully advised in the premises, makes and issues the following

AMENDED FINDINGS OF FACT

1. That Daniel L. Scaife, hereinafter referred to as Scaife, is an individual, and resides at 1124 Lockwood, Racine, Wisconsin 53403.

2. That Respsondent J. I. Case Company, hereinafter referred to as the Employer, is a corporation engaged in the manufacturing of agricultural equipment in various plants in various states, including a plant at Racine, Wisconsin, the facility involved herein, where it employes various production and maintenance employes.

3. That Respondent United Auto Workers Local 180, hereinafter referred to as the Union, is a labor organization and has its offices at 7435 South Howell, Oak Creek, Wisconsin, 53514; that the Union, has been and is the collective bargaining representative of the production and maintenance employes employed by the Employer; that in said relationship the Union and the Employer have been parties to a collective bargaining agreement covering the wages, hours and working conditions of said employes, which agreement, by its terms, was in full force and effect from July 11, 1977 through at least June 30, 1980; that said agreement contained provisions, among others, providing that an employe "will not be suspended or discharged except for good cause...", and an Article providing a three step grievance procedure, and for final and binding arbitration of grievances not resolved in said three step procedure; and attached to and made part of said collective bargaining agreement, was an incorporated "Letter of Understanding", dated July 11, 1977, wherein the Employer and the Union agreed as follows:

> However, in those instances where the international Union UAW by either its Executive Board, Public Review Board, or Constitutional Convention Appeals Committee, has reviewed the disposition of a grievance and found that such disposition was improperly affected by the Union or Union representative involved, the UAW - J. I. Case Department will inform the

> Company's Director of Industrial Relations in writing that such grievance is reinstated in the grievance procedure at the step at which the original disposition of the grievance occurred.

4. That Scaife commenced his employment with the Employer on September 15, 1975, in a position in the collective bargaining unit represented by the Union, and continued in such employment until May 22, 1980, on which date his employment was terminated allegedly for refusing to comply with an order issued by his foreman; that thereafter, and in accordance with the contractual grievance procedure, the Union filed a grievance on behalf of Scaife, wherein it contended that the termination was not for cause under the agreement; that said grievance was processed by the Union through the first three steps of the grievance procedure; that the Employer denied said grievance at all three steps; and that representatives of the Union determined not to proceed to final and binding arbitration thereon.

5. That the constitution and by-laws of the International of the Union provide procedures for appeal of the disposition of grievances by representatives of Local Unions by the employes on whose behalf such grievances are filed; that on January 13, 1981, Scaife, by letter to Douglas Fraser, President of the Union's International, advised the latter of the Union's refusal to proceed to arbitration on his discharge grievance; that by letter, dated January 22, 1981, Fraser advised Scaife that a representative of the International would investigate the matter; and that on Februay 6, 1981, Phil Cabreros, an International Representative, who had originally been involved in the determination not to proceed to arbitration on the grievance, by letter to Scaife, set forth in detail the results of the grievance investigation, and the facts disclosed during said investigation, as well as the basis for not proceeding to arbitration, as follows:

> The basis for this decision was that you were found insubordinate on May 22nd, plus the fact that the Union has arbitrated insubordination discharge cases in the past and have lost them.

6. That prior to the close of the hearing herein the Union's International Representative, who appeared on behalf of the Union during the instant proceeding, testified that Scaife had utilized the internal remedy procedure of the Union.

7. That the Union, through the actions of its agents, did not process Scaife's termination grievance in such a manner so as to establish that its actions in regard thereto were arbitrary, discriminatory or made in bad faith; and that, to the contrary, the Union, in said regard, provided Scaife with fair representation with respect to its decision not to appeal said grievance to final and binding arbitration.

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

AMENDED CONCLUSIONS OF LAW

1. That United Auto Workers Local 180 did not commit any unfair labor practices within the meaning of any provision of the Wisconsin Employment Peace Act, by refusing to proceed to final and binding arbitration of the grievance involving the termination of Daniel L. Scaife by the J. I. Case Company on May 22, 1980.

2. That, since the above noted grievance was resolved by the good faith refusal of United Auto Workers Local 180 to proceed to final and binding arbitration thereon, the Wisconsin Employment Relations Commission will not exercise its jurisdiction to determine whether the J. I. Case Company violated the collective bargaining agreement existing between it and United Auto Workers Local 180, with respect to the termination of employment of Daniel L. Scaife on May 22, 1980, in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Amended Findings of Fact and Amended Conclusions of Law, the Commission makes and issues the following

ORDER 1/

That the Order issued by Examiner Stephen Pieroni, on November 20, 1981, dismissing the complaint filed in the instant matter, be and the same hereby is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of September, 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except

(Footnote 1 continued on Page 4)

(Footnote 1 continued)

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as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

J. I. CASE COMPANY, Case XVII, Decision No. 18324-B

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Background:

Before the Examiner, Scaife contended that Employer discharged him in violation of the existing contract between it and the Union. Scaife also maintained that the Union breached its duty to fairly represent him in protecting his employment, when it withdrew his grievance from the contractual grievance procedure, thereby failing to prosecute same to final and binding arbitration.

The Employer denied that Scaife was discharged in violation of the agreement and maintained that it satisfied the requisite contractual standards in the discharge. Both the Employer and the Union argued that Complainant failed to demonstrate that the Union violated its duty of fair representation and as a result, the Commission has no jurisdiction to entertain the merits of the discharge. Thus, the complaint against the Union and Employer should be dismissed. Furthermore, the Union claimed that the Commission should not invoke its jurisdiction in this matter because Scaife did not exhaust the internal Union appeal procedures, which were available to him as a means of resolving his claim that the Union failed to fairly represent him.

With regard to the issue of exhaustion of the internal Union appeal procedure, the Examiner stated as follows:

> The question concerning whether an employe must exhaust the internal union procedures available to him in cases such as this was exhaustively treated in J. I. Case Company, Decision Nos. 16992-A, 16993-A (2/80); enf'd Cir. Ct. Racine County Case 80-CV-0483 (6/81). See also Clayton vs. Auto Workers, US Sup. Ct. 1981, 107LRRM2385. Since the internal union procedures cannot reactivate the grievance or give the employe the complete relief he seeks under the law, there is no exhaustion requirement with respect to either claim against Respondent Union or Respondent Employer. Hence, whether or not Complainant exhausted the internal union procedures is immaterial to the issue of whether by failing to process Complainant's grievance to final and binding arbitration, Respondent Union violated its duty to fairly represent Complainant.

The Examiner proceeded with an analysis of the Union's representation of Scaife and ultimately concluded that the Union had not breached its duty to fairly represent him. Given this conclusion, the Examiner refused to assert the Commission's jurisdiction to determine whether the Employer had breached the collective bargaining agreement in violation of Section 111.06(1)(f), Stats., by terminating Scaife.

Petition for Review:

Scaife seeks reversal of the Examiner decision asserting generally that the Findings of Fact and Conclusions of Law are "arbitrary, capricious and are not supported by preponderance of the credible evidence nor law with regard thereto." He also specifically asserts that the Examiner failed to find that he did attempt to exhaust the internal union appeal procedure.

Positions of the Parties:

In his brief filed in support of the Petition, Scaife argues that the Union acted in a perfunctory and negligent manner by failing to supply its International Representative with sufficient information supportive of his case prior to the Representative's decision to withdraw the grievance. Scaife contends that under the holding in Hines v. Anchor Motor Freight, Inc., 424 US 554 (1976) such conduct constitutes a breach of the duty of fair representation, which should have required that the Examiner reach the merits of the violation of contract claim made against the Employer.

Scaife further alleges that the Examiner inaccurately characterized the holding of Clayton and argues that Clayton allowed the Examiner to reach the claim against the Employer, even if the Union acted in good faith. Scaife thus urges that the Commission reverse the Examiner.

As to Respondent Union's argument regarding the impact of Clayton and Richards v. UAW 108 LRRM 3262 (S. D. of Ind. 1981), Scaife argues that he did attempt to pursue his internal union remedies by making written complaint to the President of the International Union. He argues that International's referral of the matter to the same International Representative who withdrew the grievance shows the futility of any further pursuit of such remedies, and therefore Scaife argues that, under Clayton, he had no duty to exhaust the internal union procedure.

The Employer asserts that the Examiner's findings and conclusions were fully supported by the record and thus should be affirmed.

The Union argues that the Examiner correctly found its conduct not to be arbitrary, capricious or in bad faith. It contends that the record demonstrates its careful consideration of the merits of the grievance prior to the decision to withdraw same. It argues that its Representative was fully apprised of all pertinent facts when he made a reasoned decision to withdraw the grievance. To the extent that Scaife argues that it was guilty of negligent conduct, the Union alleges that even assuming the record could support such a finding, negligence does not constitute a breach of the duty of fair representation as there is no evidence that the Union intentionally caused harm to the grievant. Motor Coach Employees v. Lockridge 403 U.S. 274 (1971); Hoffman v. Lonza, Inc. 108 LRRM 2311 (7th Cir. 1981).

As to the issue of exhaustion of internal union remedies, the Union asserts that Scaife misconstrues the holding in Clayton, and that as the collective bargaining agreement at issue herein allows for the reactivation of grievances, Complainant's failure to pursue reactivation through internal union procedures required dismissal of the complaint. Richards, supra; Miller v. General Motors Corp. 110 LRRM 2281 (7th Cir. 1982). It argues that his letter to the International's President was not an attempt to invoke internal union procedures inasmuch as a different procedure is set forth in the Union's Constitution. Based upon the above cited precedent, which it contends binds the Commission, the Union urges that the Commission dismiss the petition for review.

Discussion:

As a competent state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce, the Commission must apply legal standards which are consistent with federal case law developed in Section 301 actions under the Labor Management Relations Act. Textile Workers Union v. Lehigh Mills 353 U.S. 448 (1957); Local 174, Teamsters v. Lucas Flout 369 U.S. 95 (1962; Dowd Box v. Courtney 368 U.S. 52 (1962); Tecumseh Products Co. v. WERB 23 Wis. 2d 118 (1963); American Motors Corp. v. WERB 32 Wis. 2d 237 (1966). Thus, as the Union points out, the Commission is obligated to follow Clayton and its progeny with respect to the internal union remedies issue.

In Clayton, the United States Supreme Court was confronted with the issue as to whether an employe pursuing a Section 301 action, which sought reinstatement from his employer and monetary relief from both the employer and the union, should be required to exhaust internal union procedures created by the union constitution. When considering said issue the court set forth the following test:

> . . . courts have discretion to decide whether to require exhaustion of internal union procedure. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under Section 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

In Miller, the Seventh Circuit U.S. Court of Appeals recently applied the rule of Clayton to a Section 301 suit which, like that at issue herein, alleged breach of the duty of fair representation against the union and breach of contract against the employer. In said decision the court considered the need to exhaust internal union procedures when (1) the union and the employer have contractually agreed that grievances may be reactivated through resort to said procedures and (2) the contractual agreement regarding reactivation limits the employer's back pay liability thus preventing the employe from receiving as full a back pay recovery as might be available in a Section 301 suit.

> The court in Clayton determined that an exhaustion requirement must be analyzed in terms of the national labor policy encouraging private, as opposed to judicial, resolution of disputes over collective bargaining agreements. That policy "complements the union's status as the exclusive bargaining representative" and "enhance(s) the union's prestige with employees." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 56 LRRM 2193 (1965). Employers also benefit from the policy because it imposes limitations on the employee's choice of remedies. Id. Permitting an employee to sidestep exclusive contract provisions for grievance resolution would "exert a disruptive influence upon both the negotiation and administration of collective agreements." Id., quoting Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103, 49 LRRM 2717 (1961). A grievance reactivation provision such as the one involved in this case links the internal union appeals procedure with the collectively bargained grievance resolution mechanism in a way that implicates this important policy:
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> "Where internal appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would enhance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases, the internal union procedures are capable of fully resolving meritorious claims short of the judicial forum. Thus, if the employee received the full relief he requested through internal procedures, his Section 301 action would become moot, and he would not be entitled to a judicial hearing. Similarly, if the employee obtained reactivation of his grievance through internal union procedures, the policies underlying Republic Steel would come into play, and the employee would be required to submit his claim to the collectively-bargained dispute-resolution procedures. In either case, exhaustion of internal remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues." Clayton, supra.
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> We believe the policies underlying Republic Steel and reiterated in Clayton are served by requiring exhaustion even if the employee may not be able to obtain the same relief in the reactivated grievance procedure as might have been available in a Section 301(a) suit. As long as the intra-union appeals process could result in the reinstatement of a grievance, thus bringing it back within the framework of the collectively negotiated procedure for settling contract disputes, final resolution of the employee's contractual grievance is possible through the preferred private means.

The Union accurately notes that Clayton and Miller are binding upon this Commission and that the collective bargaining agreement at issue herein contains a provision which allows for reactivation of grievances after resort to internal procedures. Thus the Examiner erred when he stated in his Memorandum that the parties' contract contained no such provision. However it must be remembered that Clayton set forth three standards which must be met before failure to exhaust internal union remedies becomes a valid defense. Reactivation is but one of the standards. As to the remaining two standards regarding the fairness of the internal procedure and the time it would take to exhaust same, the courts appear to have placed a heavy burden upon grievants to demonstrate that either of the

foregoing factors are present. Thus in Miller the court dealt with an argument regarding hostility in the following manner.

> (3) Finally, Miller argues that exhaustion should be excused because any resort to the procedure would have been futile. The futility is premised upon Mapes' representation that even if Miller were successful in having the grievance reinstated, Mapes would only withdraw it again. The district court dismissed this argument as too speculative, and we concur.

In Richards the appeals procedure set forth in the UAW Constitution was found on its face to meet the fairness requirement. As to the issue of delay the court in Richards had the following comment:

> The third and final factor under Clayton is that the exhaustion of internal union remedies not "unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim." 101 S. Ct. at 2095. In the present case, there are no facts to support a finding that plantiffs' claims would be unreasonably delayed. Mize and Carpenter made no attempt to even initiate an internal union appeal. Thus, whether exhaustion of the internal appeals procedure would have unduly delayed their resort to the courts is pure speculation in which this Court declines to engage.

The Union, in its answer, alleged as an affirmative defense that Scaife "failed to invoke or exhaust his intra-Union remedies under the UAW Constitution". However, no time during the course of the hearing, nor at any time during the pendency of the instant proceeding has the UAW Constitution been made part of the record in this proceeding. Thus the Commission, if it were so inclined, is unable to make a determination as to the fairness and length of the procedure. Further, the Union representative who represented the Union during the course of the hearing, and who questioned witnesses both on direct and cross examination, on the last day of the three days of hearing herein, made the following statement on the record, as set forth on page 460 of the hearing transcript:

> . . .If you recall, one of the allegations that the Union made is that Dannie Scaife had not followed the internal remedies of the Union under the constitution. With this document he has followed that remedy, and this is a response from Mr. Cabreros. 2/

Despite the above, Counsel for the Union, who became involved in the proceeding after the issuance of the Examiner's decision maintained in his brief that Scaife did not exhaust the Union's internal procedure. Under these circumstances the exhaustion argument is insufficient to support the dismissal of the complaint.

Therefore the Commission turns to a consideration of Scaife's attempt to exhaust the contractual grievance procedure, and whether his attempts in said regard were frustrated by any breach by the Union of its duty to provide Scaife with "fair representation". While we have revised the Examiner's Findings of Fact, we agree with his conclusionary finding that the Union did not breach such duty.

Such conclusion is fully supported by the record and the Examiner's Memorandum adequately and accurately discusses the specific evidence upon which said conclusion is reached. Contrary to Scaife's assertion, the record reflects that the International Representative was presented with sufficient information and input to allow for a reasoned good faith decision not to arbitrate the grievance. Based upon his findings the Examiner properly found the Union had not breached its duty to fairly represent Scaife. Applying Mahnke v. WERC 66 Wis. 2d 524 (1975) and parallel federal precedent, the Examiner correctly concluded that

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2/ Referring to Cabreros letter to Scaife of February 6, 1981, referred to in Findings of Fact 5.

the absence of a breach of the duty of fair representation precluded him from reaching the merits of the alleged breach of contract claim. We therefore find his dismissal of the instant complaint proper and have affirmed same.

Dated at Madison, Wisconsin this 29th day of September, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner