STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LUCIO PADILLA, Complainant, vs. KENOSHA AUTO TRANSPORT CORPORATION, Respondent.	Case I No. 28659 Ce-1930 Decision No. 19081-B

Appearances:

Duane Arena, S.C., Attorneys at Law, by Mr. Phillip J. Ramthum, 212 Fifth Street, P. O. Box 774, Racine, Wisconsin 53401, appearing on behalf of the Complainant.

Matheson, Bieneman, Parr, Schuler & Ewald, Attorneys at Law, by Mr. C. John Holmquist, Jr., 100 West Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48013-2768, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lucio Padilla, having filed a complaint with the Wisconsin Employment Relations Commission alleging that Kenosha Auto Transport Corporation had committed unfair labor practices within the meaning of 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Edmond J. Bielarczyk, Jr., a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5) of the WEPA; and hearing on the matter having been delayed, pursuant to the Complainant's request that the parties attempt to voluntarily resolve the matter; and following unsuccessful attempts to resolve the matter, hearing having been held on August 20, 1982 in Kenosha, Wisconsin; and that during the course of the hearing the Respondent having moved that the complaint be dismissed on the basis that there was not a breach of duty of fair representation and moving to bifurcate said hearing on the basis that there was a substantial question as to whether the Commission would assert its jurisdiction in this matter; and the Examiner having granted said motion to bifurcate the hearing; and hearing having been held on the issue of fair representation; and the parties having filed post-hearing briefs in the matter by October 19, 1982 and the Respondent having filed a reply brief on October 29, 1982; and the Examiner having considered the evidence, arguments and briefs of the parties and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Lucio Padilla, hereinafter referred to as the Complainant, is an employee of Kenosha Auto Transport Corporation as an advanced journeyman

4. That at all times material herein, the Respondent has recognized the Union as the exclusive bargaining representative of certain of its employes including the Complainant; and that at all times material hereto the Respondent and the Union have been parties to the National Transport Automobile Transporters Agreement which requires that grievances which are not settled at the Local Level Step of said agreement's grievance procedure be submitted to the Wisconsin Joint Auto Transport Committee; that no local rider agreement was introduced into the record; that said Committee is required to contain an equal number of designated representatives of Employers and Unions who are parties to said agreement; and, that said agreement contains among its provisions the following which are material hereto:

ARTICLE 7.

Grievance Machinery

Section 1. The parties agree that all grievances and questions of interpretation arising from the provisions of this Agreement shall be submitted to the grievance procedure for determination.

. . .

Section 3. Grievance Procedure

Disputes and grievances, shall first be taken up by the employee involved, and if no settlement is reached, then taken up between the Steward or Business Agent of the Local Union involved and the Employer representative. Disputes and grievances shall be put in writing and presented to the Company within one (1) week, whenever possible, after the grievance arises, but in no case later than thirty (30) days after the grievance arises, except as may be otherwise provided in a Supplemental Agreement. The Company must reply to the written grievance in writing to the Local Union within fourteen (14) days . . . The dispute or grievance must be settled or deadlocked at the local level within five (5) days, excluding Saturday, Sunday and holidays, after the Business Agent has taken it up. After the five (5) days period, but not later than fifteen (15) days, either party has the right to file its grievance with the appropriate Local Committee or Joint Conference Arbitration Committee referred to in Section 4 unless extension is mutually agreed to by Company and Local Union. Time limits as set forth in this Section shall apply equally to the Employer and the Union.

. . .

Section 6. Rights of National, Joint Conference and Local Arbitration Committees

The (Wisconsin Joint Auto Transport) [sic] Committee shall have the right to investigate all facts pertaining to the dispute. Both parties shall be entitled to present such evidence and witnesses in support of their position as they see fit. A decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected. The Committees referred to above shall have the authority to order full, partial or no compensation in deciding disputes and/or grievances and rendering awards.

Section 7. Board of Arbitration

(a) If any grievance or disagreement is deadlocked by the National Joint Arbitration Committee as provided above, then both the Union and the Employer shall submit the grievance to a Board of Arbitration consisting of three (3) members:

One (1) member to be appointed by the Union;

One (1) member, by the Employer; and the

Two (2) together appointing a third disinterested arbitrator.

. . .

PART V GARAGE

ARTICLE 80.

. . .

Section 2. (a) In case of layoffs, employees who have more Company Garage seniority than other employees in the same wage rate group or a lower classification, may transfer into these classifications provided that they are qualified to perform the duties of the classifications, except to the classification of Advanced Apprentice. No journeyman mechanic may be laid off while advanced apprentices are still working, unless otherwise agreed to in local Rider. Layoffs must be in writing.

(b) A laid-off employee may exercise Company Garage seniority to return to work in his same wage rate group or lower classification other than his regular one, provided, that he is qualified to perform the duties of the classification. However, this option shall be waived if the opportunity is offered to the employee and is refused by him. Such waiver shall be in writing with a copy to the Union.

(c) A laid-off employee who elects to take a younger employee's job in his same wage rate group or lower classification which he is qualified for shall remain in that classification as long as he has more Company seniority than any other employee in that classification and he is not recalled to his regular classification or circumstances provided for in Article 5, Section 3(b) occur.

. . .

5. That Respondent laid off the Complainant from January 16, 1981 through April 7, 1981 and April 24, 1981 through May 4, 1981; that prior to April 6, 1981, Union Steward James Erdman informed the Complainant that Max Bloomquist, who is employed in the Helper classification, was performing work similar to an advanced apprentice, that with the Complainant on layoff status this was a violation of the collective bargaining agreement and suggested that the Complainant file a grievance; that on April 6, 1981, the Complainant filed the following grievance:

DATE GRIEVANCE OCCURRED MARCH 30, 1981

COMPLAINT IN DETAIL: I am filing this grievance because I feel that our Company is in complete violation of Article 80. Section 2A. On March 30. 1981, our tireman was told by the Company that he will assume some of the duties of a mechanic. Our tireman, whom is Max Blomquest, is starting his 33rd year with the Company.

In the past, Max Blomquest has performed all the duties of a tireman. In addition to his regular duties, he has done all the snowplowing in the winter, has chased for parts for the mechanics, has put fuel in the trucks and brought rigs into the shop for the welders. He has also cut the grass and cleaned up in the yards. He has unloaded equipment brought in by other carriers. He has been one of the most dedicated and hardest working employees in the garage. Now, after all these years, the Company feels that he should also be doing my job.

Article 80, Section 2A. reads as follows: "No journeyman mechanic may be laid off while advanced apprentices are still working."

The tireman is not an advanced mechanic. I feel that what the Company is doing is the same thing as taking a man off the street and giving him my job.

The biggest problem in our shop is the lack of manpower. The mechanics on numerous occasions, are doing the welders' work. The supervisor, on numerous occasions, is doing the mechanics' work. He has been told several times by the Steward to stop doing this work, but he tends to ignore his warnings.

The drivers claim that they can't hardly ever get the work done to their rigs that they want done. This only happens about 99% of the time. I feel that there is enough mechanic's work for me to be working for quite some time. I am, therefore, asking to be paid for all the work that is being done by the tireman.

The employees who are now working hardly ever have any time to clean up the shop. Although, the Company was bringing in a couple of scabs to do this work for $5.00 an hour. This is another job that couild be done by the tireman if the Company feels he isn't doing enough work.

In closing, I hope that this will be stopped in the future. I also feel that the Company is discriminating against me because of my nationallity. (sic)

Lucio Padilla

that after filing the instant grievance the Complainant requested to bump less senior employe Poppie, the parts man; that said request was denied by the Respondent; that Complainant was informed by the Union that the Union could do nothing about said denial; that the Union did not raise the denial of Complainant's request to bump during the processing of said grievance; that thereafter in accordance with said grievance procedure the Union, along with the Complainant, met informally with the Respondent and attempted unsuccessfully to resolve said grievance; that thereafter the Union, along with the Complainant, met with the Respondent in accordance with said grievance procedure's Local Level Step and attempted unsuccessfully to resolve said grievance; that during said Local Level Step meeting the Complainant raised the contention that he be allowed to bump the less senior partsman; that on July 16, 1981, the Union and Respondent presented said grievance before the Wisconsin Joint Auto Transport Committee; that the Complainant was present at said Committee meeting; that at said Committee meeting the Union read the grievance and stated the position that the Complainant's layoff violated Article 80, Section 2, a, the Respondent then stated the Employer's position, the Union then responded to the Respondent's position and the Complainant then voiced his position; that in voicing his position to said Committee the Complainant raised the contention that he be allowed to bump the less senior partsman; that said Committee meeting on the instant matter took approximately fifteen to twenty minutes; that in addition to the instant matter, said Committee heard at least five other grievances, four (4) of which were settled and withdrawn and one of which was denied; that the Complainant was not represented by an attorney during the grievance process; and, that said Committee denied said grievance on July 16, 1981 and issued the following:

81-86
LOCAL #43 vs. KENOSHA AUTO TRANSPORT - Lucio Padilla alleging violation of Art. 80,. Sec. 2a

DECISION: Motion made and carried. The claim of the union is denied based on the facts and testimony presented which established Art. 80, Sec. 2A, was not violated. Further, the lay-offs were due to a decline in business, therefore, the allegation of discrimination has no merit.

6. That on September 23, 1981, the Complainant filed the instant complaint with the Commission wherein Complainant alleged his layoff was a breach of the collective bargaining agreement between the Union and the Respondent and that the Respondent violated Section 111.06(1)(4) of the Wisconsin Employment Peace Act; that during the course of the hearing the Complainant alleged that the Union in the processing of said grievance on the Complainant's behalf, breached its duty of fair representation in their processing of said grievance on Complainant's behalf by the Union's failure to present Complainant's contention that he be allowed to continue working by bumping another worker with less seniority in a lower job classification; and, that the Complainant did not amend its complaint to include the Union as a Respondent.

7. That the Union's decision to argue that the Complainant was improperly laid off while an employe in a lower classification was performing his duties and the Union's failure to raise Complainant's said contention was neither arbitrary, capricious or in bad faith.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That the Union in the processing of a grievance on the Complainant's behalf did not violate its duty to fairly represent Complainant, Lucio Padilla, by its failure to present Complainant's contention that he should be allowed to continue working by bumping another worker with less seniority in a lower classification.

2. That the Commission will not assert its jurisdiction to review the merits of Respondent's alleged breach of the collective bargaining agreement 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

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 6th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk Jr.
Edmond J. Bielarczyk, Jr., Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.
(Continued on Page 6)

1/ (Continued)

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that the Respondent laid him off in violation of the collective bargaining agreement existing between the Respondent and the Union. Complainant also contends that the Union breached its duty of fair representation in the processing of Complainant's grievance. During the hearing on the instant complaint, Complainant specifically alleged that the Union failed to raise the contention that the Complainant be allowed to continue working by bumping another employe with less seniority in a lower job classification.

Respondent's answer to the instant complaint denies that the Complainant was laid off in violation of the collective bargaining agreement and contends affirmatively that the Complainant is bound by the decision of the Wisconsin Joint Auto Transport Committee. Said Committee's decisions are final and binding upon the Union and Respondent and said Committee is composed of an equal number of designated representatives of the Employers and the Unions who are parties to the National Master Automobile Transporters Agreement. The Union, although notified of the hearing on the instant complaint, did not intervene or attend the hearing. However, Complainant's Union Steward did testify.

The Complainant herein seeks to have the Commission exercise its jurisdiction to review the merits of his layoff under the provisions of 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA). However, where there has been a final and binding decision on the alleged violation of the collective bargaining agreement, the Commission will not exercise its jurisdiction to hear the merits of the alleged breach de novo unless there is a showing that the Union breached its duty to fairly represent Complainant in processing his grievance. 2/ To conclude otherwise would impair the finality and ultimate viability of the method chosen by Union and Respondent for the final adjustment of disputes arising over the application or interpretation of the collective bargaining agreement.

However, if it can be proven by a clear and satisfactory preponderance of the evidence 3/ that (1) the Union acted arbitrarily, capriciously or in bad faith, or in other words failed to provide the Complainant with fair representation in the grievance process 4/ and (2) that said breach of duty materially affected the decision, said decision is not binding and the Commission will review the merits of the alleged violation of contract. 5/

Complainant does not argue that decisions of the Joint Auto Transport Committee are not final and binding decisions. However, Complainant argues that the Union, which is not a party to the proceeding and therefore must in effect be defended by the Respondent, breached its duty of fair representation because it did not present in the grievance process the Complainant's contention that he be allowed to continue working by bumping a less senior employe in a lower classification. Complainant argues that the Union's failure to present the Complainant's contention resulted in said Committee's denial of his grievance, that the Union's failure to present the Complainant's contention was arbitrary, capricious or in bad faith, and therefore, the Commission should review the merits of the alleged breach of contract.

The record demonstrates that the Complainant's Union Steward informed him that the Respondent was utilizing an employe in the Helper classification to perform work that was similar to work performed by an advanced apprentice. The Union Steward suggested that the Complainant file a grievance as it was the said

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2/ Manke v. WERC 66 Wis 2d 524 (1975).

3/ Section 111.07(3) of WEPA.

4/ Vaca v. Sipes 386 U.S. 171 (1967).

5/ J. I. Case Decision No. 13869-A (1976).

Steward's belief that this was a violation of the collective bargaining agreement. It is significant to note that the Union maintained this position throughout the entire processing of the grievance. The record demonstrates the Union did fail to raise his contention that he be allowed to exercise bumping rights. However, such a failure is at most poor judgement on the Union's presentation of its position. As the Respondent points out in its brief, the U.S. Circuit Court of Appeals for the 7th Circuit in Cannon v. Freightways Corp. stated:

> Further, since the Joint Committee must have believed Weber's account of the St. Louis incident rather than plaintiff's, we fail to see how the Union breached its duty to represent plaintiff by not arguing to the Joint Committee that the sobriety rule should have been formally promulgated. At most, the failure to raise the defense was an act of neglect or the product of a mistake in judgment. However, "proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." 6/

Thus, even if the Complainant demonstrates that the Union acted negligently or exercised poor judgement in failing to raise the Complainant's contention, such proof is not enough to support a claim of unfair representation.

There has been no showing that the Union acted dishonestly or intentionally misled the Complainant, or that its decision not to raise the Complainant's contention was based on capricious or arbitrary factors. Further, the record demonstrates that the Complainant was present at all the steps of the grievance procedure where his grievance was discussed, including the hearing before said Committee, and that the Complainant voiced his contention concerning bumping at the Local Level meeting and at said Committee hearing.

> Q. Did you have an opportunity to speak at that time?
>
> A. Yes.
>
> Q. And what did you tell the Committee?
>
> A. Well, just that I thought the Company was wrong by doing this.
>
> Q. And did you tell them of the difficulty that you had in bumping?
>
> A. Yes. 7/

Thus, even though the Union did not present the Complainant's contention to said Committee, said Committee was aware of it when it rendered its decision. Because the Complainant has failed to demonstrate that the Union breached its duty of fair representation, the Complainant is bound by the final and binding decision of the Wisconsin Joint Auto Transport Committee.

Therefore, based upon the above and foregoing, and the record as a whole, the undersigned concludes that the Union did not fail in its duty to fairly represent Complainant and that therefore the complaint should be dismissed.

Dated at Madison, Wisconsin this 6th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Edmond J. Bielarczyk, Jr.
Edmond J. Bielarczyk, Jr., Examiner

6/ Cannon v. Consolidated Freightways Corp., et al., (U.S. Court of Appeals, 7th Cir. 1975), 90 LRRM 2996 at 2999.

7/ Transcript, p. 61.