STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL LANGNESE, Complainant, vs. MANITOWOC SHIPBUILDING COMPANY, INC. and LOCAL LODGE NO. 443, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, Respondents.	Case 61 No. 47484 Ce-2126 Decision No. 27577-A

Appearances:

Hinkfuss, Sickel, Petitjean & Long, Associated Attorneys, by Mr. James R. Sickel, 125 South Jefferson Street, P. O. Box 1626, Green Bay, Wisconsin 54305, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Clifford B. Buelow, 111 East Kil
Mr. Howard Cole, International Representative, 2400 East Devon, Suite 218, Des Plaines, Illinois 60018, appearing on behalf of Local Lodge No. 443, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On May 29, 1992, Complainant Daniel Langnese filed a complaint with the Wisconsin Employment Relations Commission alleging that Manitowoc Shipbuilding Company, Inc. and Local Lodge No. 443, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers had committed unfair labor practices in violation of the Wisconsin Employment Peace Act, respectively, by reducing his seniority in violation of the parties' collective bargaining agreement and by violating the duty of fair representation owed to Complainant. On March 5, 1993, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on May 6, 1993, in Manitowoc, Wisconsin. After the presentation of the Complainant's case, the Respondents made a Motion to Dismiss the complaint. The parties made oral argument with respect to said Motion, and after considering the evidence and arguments of the parties, the Examiner granted the Motion to

Dismiss. The hearing was transcribed, and the Examiner received the transcript on May 21, 1993. The Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Daniel Langnese, hereinafter referred to as the Complainant, is an individual whose address is 501 Chicago Street, Manitowoc, Wisconsin 54220.

2. Manitowoc Shipbuilding Company, Inc., hereinafter referred to as the Employer, is an employer within the meaning of Sec. 111.02(7), Stats., and its offices are located at 500 South 16th Street, Manitowoc, Wisconsin 54221.

3. Local Lodge No. 443, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, hereinafter referred to as the Union, is the collective bargaining representative of a bargaining unit consisting of the Employer's production and maintenance employes. The Union's address is c/o Mr. Howard Cole, 2400 East Devon, Suite 218, Des Plaines, Illinois 60018.

4. The Complainant has been employed by the Employer since March, 1974. From March, 1974 to December 10, 1989, the Complainant was a member of the bargaining unit represented by the Union. On December 10, 1989, the Complainant was promoted to a supervisory position and remained in that position until September 23, 1991, when he was returned to the bargaining unit.

5. The Employer and the Union are parties to a collective bargaining agreement in effect for the time period April 29, 1989 through April 30, 1994, which covers the Complainant and provides for a grievance procedure which culminates in final and binding arbitration. The collective bargaining agreement also contains the following provisions:

SUPERVISION

Article XIII.

. . .

Section 4. Employees advanced to a supervisor and/or a technical capacity will remain on the seniority list for a minimum of 180 calendar days or a period of time equal to fifty percent (50%) of such employee's active length of seniority after the 180 calendar day trial period.

Prior to 1987, Sec. 4. read as follows:

Section 4. Employees advanced with their consent to a supervisory and/or a technical capacity with the Company shall retain their employee status for a trial period not to exceed one hundred eighty (180) consecutive

> calendar days providing they remain in good standing of the Union. This is to apply only once during each year of the contract for any one employee.

In 1987, the Employer implemented the contract without the Union's agreement and Article XIII, Section 4, as it presently reads was imposed on the Union. In negotiations, the parties indicated that the intent of the language, "or a period of time equal to fifty percent (50%) of such employee's active length of seniority after the 180 calendar day trial period," meant that a supervisor who had completed the 180 day trial period and subsequently came back into the unit would have 50 percent of his/her departmental seniority restored for layoff and shift preference and 100 percent of his/her seniority for benefits such as vacation.

6. After the Complainant's promotion in December, 1989, and prior to the expiration of the 180 day trial period, the Complainant talked to Judy Ladwig, the Employer's Personnel Director, about how Article XIII, Section 4, is interpreted and she told the Complainant that it meant he would lose half his seniority. The Complainant asked Ladwig to check with the Employer's Chief Negotiator, Tom Musial, and she did and later confirmed that it meant he would lose half his seniority. The Complainant also spoke to his immediate supervisors, Bob Kaczmarowski and Lee Levenhagen, who indicated that the Complainant should not worry because they would put more leaders on and the supervisors would not go back on the floor.

7. On September 23, 1991, the Complainant was returned to the bargaining unit and his unit seniority date was 50 percent of his total seniority. The Complainant asked the Union's vice president and grievance committeeman for grievance forms and he was given them. The Complainant filled out the grievance form himself asserting a violation of Article XIII, Section 4 by the loss of half his seniority. The grievance committee signed the grievance which was denied by Lee Levenhagen at Step 1. The Employer and the Union agreed to combine Steps 2 and 3 and a grievance meeting was held. The Complainant presented his arguments at this meeting with the Union representatives saying little, if anything. After this meeting, the Employer denied the grievance. Subsequent to receiving the third step answer, the Union informed the Complainant that the Union would not take his grievance to arbitration.

8. The evidence failed to demonstrate that the Union was hostile or biased against the Complainant. The Union's handling of the Complainant's grievance was not shown to be perfunctory and the evidence indicates that the Union had a rational basis for its decision based on the facts and the mutual understanding between it and the Employer as to the meaning of the terms of the collective bargaining agreement. The Union did not act in an arbitrary, discriminatory or bad faith manner and, at all times material herein, it fairly represented the Complainant.

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

CONCLUSIONS OF LAW

1. The Union did not violate its duty of fair representation with respect to the processing of the Complainant's grievance, including its refusal to proceed to arbitration, and accordingly did not violate Sec. 111.06(2)(c), Stats.

2. Inasmuch as the Union did not violate its duty of fair representation to the Complainant, there is no jurisdiction to determine the allegations that the Employer violated Sec. 111.06(1)(f), Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 4th day of June, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/

Lionel L. Crowley, 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.

> (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

(footnote continued on Page 5)

1/ (footnote continued from Page 4)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT

In his complaint initiating these proceedings, the Complainant alleged that the Union had committed an unfair labor practice by violating its duty of fair representation to him by refusing to process his grievance to arbitration because of hostility toward Complainant for taking a supervisory position and the refusal was not in good faith but was in conspiracy and agreement with the Employer's decision on the grievance. The Complainant asserted that the Employer violated the collective bargaining agreement by reducing his seniority in half. The Employer denied any violation of the contract and the Union alleged it weighed the merits of the grievance and determined not to proceed to arbitration and denied any failure to properly represent the Complainant. At the hearing in this matter, the Respondents moved to dismiss the complaint after Complainant presented his case.

Employer's Arguments in Support of the Motion to Dismiss

The Employer argues that the evidence was overwhelming that there was no unfair representation by the Union. It submits that when the language of Article XIII, Section 4 was first put in the contract, the Union and Employer agreed that individuals leaving the bargaining unit would lose one half their seniority. It notes that no evidence contradicted this mutual agreement. It pointed out that the Personnel Director told the Complainant before he was made a supervisor that this section meant he lost one half his seniority, so he knew the interpretation and decided to run the risk. The Employer asserts that it didn't like the clause because supervisors should not lose any seniority but loss of half the seniority was all it could negotiate. It also alleges that the Union did not like it at all because it does not want supervisors to have any seniority. The Employer claimed that if it wanted to take advantage here, it could have granted full seniority to supervisors but that would not be appropriate.

It maintains that the Complainant wanted the Union to argue and support his grievance but that required the Union to argue something that it knew was not true. It stated that the Union did the honest thing and tried to tell the Complainant he was wrong. The Employer contends that there is no evidence of bad faith or any hostility toward the Complainant. It maintains that deference was given the Complainant and the complaint should not have been filed but should be dismissed.

Complainant's Response to the Motion to Dismiss

The Complainant contends that the Union violated its duty of fair representation. The Complainant contends the Union's actions were arbitrary because the grievance committee members merely signed the grievance and did nothing, not even advocate for the Complainant. It is asserted that the Union acted in bad faith because Complainant was a thorn in their side and there is personal animosity toward him, so they just sat back and did nothing. The Complainant argues that there is no past practice with respect to interpreting the language in question as this is the first time the contract language has been applied. The Complainant contends that the argument that Judy Ladwig told him he might lose seniority is undercut by his supervisor's telling him not to

worry because they will see to it that he won't return to the bargaining unit. The Complainant maintains that the contract is clear and the Union arbitrarily ignored a meritorious grievance and processed it in a perfunctory manner as the Union did not like the provision and was not going to enforce it. The Complainant claims that the Union acted in bad faith and breached its duty of fair representation.

Union's Position on Motion to Dismiss

The Union contends that it acted properly and is lily white. It insists that its duty is to counsel members and tell them that it doesn't believe they have a grievance when they don't. The Union points out that in negotiations and at the ratification meetings, it discussed the language of Article XIII, Section 4, and they understood that it meant that an employe lost half his seniority after the 180 day trial period. The Union agreed with the Company on the interpretation of the language and knew that high supervisory personnel were explaining to new supervisors what would happen if they accepted a supervisory position. The Union asserts that the grievant dug the hole he has fallen into and the complaint should be rejected.

Discussion

In Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967) and Mahnke v. WERC, 66 Wis.2d 524 (1974), the courts set forth the requirements of the duty of fair representation a union owes its members. A union must represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. The Union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. 2/ The Union is allowed a wide range of reasonableness, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 3/ As long as the Union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. 4/ Complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. 5/ A union is not under any absolute duty to pursue a grievance and a violation of the duty of fair representation is not established merely by proving that the underlying grievance was meritorious. 6/

Applying these principles to the instant case, it is necessary to determine whether the Union breached its duty of fair representation.

A review of the exact language of Article XIII, Section 4 would seem to

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2/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

3/ Ford Motor Co. v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953).

4/ West Allis - West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84) aff'd by operation of law, dec. No. 20922-E (WERC, 10/84); Bloomer Jt. School District, Dec. No. 16228-A (Rothstein, 8/80), aff'd by operation of law, Dec. No. 16228-B (WERC, 8/80).

5/ West Allis - West Milwaukee School District, Ibid.

6/ Stanley v. General Foods Corp., 88 LRRM 2862 (5th Cir., 1975).

indicate that an employe promoted to supervision would remain on the seniority list for a period of time equal to one half his/her seniority. However, both the Union and the Employer are in agreement that the language means that after the 180 day trial period an employe loses one half his seniority upon return to the bargaining unit. Arbitrators generally give effect to the mutual intent of the parties even though the words in the contract may not express that intent in a legal view. 7/ Here, the negotiations since 1987 have confirmed the parties' mutual intent as to the meaning of the language and the ratification discussions have supported this intent. Additionally, the Complainant was told by Judy Ladwig before accepting the supervisory position that the language meant that he would lose one half his seniority. The Complainant is now estopped from claiming otherwise.

The issue presented in this case is whether the Union acted in bad faith, was arbitrary or discriminatory in processing the Complainant's grievance. The Union signed the grievance and allowed the Complainant to process it through Step 3. The record establishes that the Union was completely opposed to allowing supervisors any seniority upon return to the unit and this language was imposed on them and they lived with the allowance of one half of seniority. The Union could have refused to allow the grievant to process the grievance but by letting him do so belies that it acted in bad faith. The Union knew what the language meant and had a clear understanding that it allowed only one half of one's seniority upon return to the unit. The Union could not argue otherwise because to do so would be dishonest, fly in the face of the agreement with the Employer and besides it was against their interest. Clearly, the Union was upholding its side of the bargain and was not processing the grievance in a perfunctory manner. The Employer could have taken advantage in this case by granting the grievance, but it too was honest and lived up to its agreement. Thus, there was no bad faith on the part of the Union.

The Union did not act in an arbitrary manner because it had a rational basis for its conduct because the Union knew and understood the mutual intent of the parties and was simply living up to that agreement. To do otherwise would mean that the Union was processing an unmeritorious grievance. The decision not to arbitrate the grievance was based on the understanding that there was no difference between it and the Employer over the interpretation of Article XIII, Section 4.

Finally, the evidence failed to prove any discriminatory conduct on the part of the Union. Although there was evidence that there had been disputes between the Union representatives and the Complainant when he was a supervisor, the record indicates that the grievance was processed through the third step with Complainant making whatever arguments he desired. The Union did not challenge the restoration of one half of his seniority which was the mutual agreement even though the Union representatives were of a mind that no seniority should be restored. Under these circumstances, no discrimination has been shown.

The evidence fails to show that the Union breached its duty to fairly represent the Complainant in the processing of his grievance and its decision not to take the grievance to arbitration, thus, the Union has not violated Sec. 111.06(2), Stats.

7/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 348.

Having concluded that the Union did not breach its duty of fair representation toward the Complainants, the Examiner has no authority to consider any breach of contract claims against the Employer. 8/

Therefore, the Motion to Dismiss the complaint has been granted.

Dated at Madison, Wisconsin, this 4th day of June, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

8/ Mahnke v. WERC, 66 Wis.2d 524 (1975) at 532.