United Steelworkers of America, AFL-CIO (Bucyrus-Erie Company) *and* Donald Watson. Case 30-CB-1182

September 18, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On May 26, 1978, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommmended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER PENELLO, concurring:

I continue to protest the senseless wasting of the Board's resources by the formal processing of meaningless cases like this through complaint and hearing. Essentially, the complaint alleges a trivial, isolated violation of the Union's duty of fair representation.[1] Moreover, the adverse consequences resulting therefrom were based on pure speculation.[2] In such matters of a minor or isolated character, the General Counsel should exercise his discretion under Section 3(d) of the Act to refuse to issue a complaint and proceed to a hearing. See my comments in *Bureau of National Affairs, Inc.*, 235 NLRB 8, fn. 2 (1978); *Peerless Food Products, Inc.*, 236 NLRB 161 (1978), concurring opinion.[3] As the U.S. Court of Appeals for the District of Columbia Circuit stated in *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Local No. 705 of the International Brotherhood of Teamsters [Johns-Mansville Products Corporation]* v. *N.L.R.B.*, 509 F.2d 425, 428 (1974), referring to my dissent in the underlying Board case: "The Board has latitude not to burden itself and the courts with 'infinitesimally small abstract grievances.'" This case appears to be one of those trivial grievances to which the court referred. The Board's resources are not limitless and its caseload (projected to 61,000 cases in the next fiscal year) is expanding dramatically, resulting in a severe backlog of crisis proportions of cases awaiting hearing. In sum, the Board should concern itself with substantial or significant violations of the Act rather than with cases involving such trivia.

[1] The facts of this case are as follows: The Charging Party, Watson, approached his union steward, Miller, and stated that he wanted to file a grievance merely involving which of the Employer's officials Watson was required to report to upon returning from sick leave. (Only 3 months earlier, Watson had threatened Miller with physical harm in an unrelated incident.) Miller offered to prepare the grievance. However, Watson demanded that he himself write out the grievance, despite Miller's protestations that the proper procedure was for a steward to fill out the form. In an effort to accommodate Watson, Miller suggested that he mail a grievance form to Watson. However, the next day, Miller learned that Watson had been discharged. Consequently, Miller did not mail the form to Watson, who neither subsequently contacted the Union again about his grievance nor attempted to file a grievance regarding his discharge. Thus, at worst, the steward made a simple error in judgment in thinking that Watson's discharge obviated the need to send him a grievance form. As the Administrative Law Judge stated, the General Counsel failed to demonstrate that Miller acted arbitrarily in not sending the grievance form to Watson.

[2] The General Counsel intimates in its brief to the Board that Miller's failure to mail the grievance form to Watson caused Watson not to file a second grievance over his discharge.

[3] These comments are based on the general principle set forth in *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show)*, 202 NLRB 620 (1973), which has been adopted by the courts. See *N.L.R.B.* v. *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO [The Evening Star Newspaper Co. and the Washington Daily News]*, 470 F.2d 1274 (C.A.D.C., 1972), denying enforcement of 193 NLRB 1089 (1971); *Dallas Mailers Union, Local No. 143 and International Mailers Union [Dow Jones Company, Inc.]* v. *N.L.R.B.*, 445 F.2d 730 (C.A.D.C., 1971), enfg. 181 NLRB 286 (1970); and *Truck Drivers, Oil Drivers, Filling Stations and Platform Workers Local 705, IBT [Johns Mansville Corporation]* v. *N.L.R.B.*, 509 F.2d 425 (C.A.D.C., 1974), enfg. 205 NLRB 387 (1973).

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard at Milwaukee, Wisconsin, on January 12, 1978, based on charges filed September 14, 1977, and a complaint issued October 28, 1977, alleging that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended. The General Counsel and Respondent Union have filed briefs.

Upon the entire record in the case, including my observation of the witnesses, and upon consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Bucyrus-Erie Company, herein called the Company, is a Delaware corporation engaged in the manufacture of heavy

equipment at various locations throughout the United States, including the South Milwaukee, Wisconsin, location involved in this proceeding. During the past calendar year, the Company sold and shipped products valued in excess of $50,000 directly to customers located outside the State of Wisconsin, and during the same period it purchased and received goods valued in excess of $50,000 directly from points located outside the State of Wisconsin. I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. United Steelworkers of America, AFL-CIO, the Respondent herein, is, as it admits, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The charging party, Donald Watson, began working for the Company November 5, 1973. He became a member of Respondent Union, remaining one until he was made a supervisor in August 1974. During that period, he had a number of meetings with Union Steward John Miller. In June 1977, a Company inspector, Milt Bergman, told Miller that Watson had, during an argument with Bergman, threatened to kick Bergman's "m— f— ass," and, when Bergman said he was going to get Steward Miller, Watson said "Bring him up here and I'll do the same to him." Miller went to see Watson, who told Miller, according to Miller's testimony, not to worry. Miller then spoke with Foreman Hank Bukowski. Finally, at a meeting with Superintendent John Savagian present, Miller told Savagian he was "kind of scared to work under this man if I had to." Savagian assured Miller that "nothing would happen. He'd take full responsibility."

According to Watson, he did tell Bergman "if you don't go away, I'll wring your neck," in order to get Bergman "to just go away and stop bothering me about something I didn't know anything about." Watson said he "came to the conclusion that although I probably didn't mean anything threatening by it, I should have said it in a different way." And, also according to Watson, Superintendent Savagian "put me in the position of having to promise him that I would not do—not do to him what I had never said I was going to do in the beginning. That meeting broke up with the resolution that Milt Bergman and I would have as little to do with each other as possible. Nothing was said further by John Miller. Watson testified that after the meeting broke up, he asked Miller "why he would just accept the word of someone coming up to him telling him something like that, and not even trying to find out if there were any basis in it. And like it was a type of thing whereas he casually looked over and said well, hey, I know how your kind are." Finally, Watson testified that he believed Miller was "pacified" by Savagian, and that there were no "encounters" between the two after the Bergman incident.

In August 1977, Miller heard "yelling and screaming," went to the door, and employees James Meyers "came and threw his helmet on the floor." Miller asked Meyers what had happened, and Meyers replied that Watson had attacked him. A meeting was held in relation to this incident with Meyers repeating his allegations that Watson put him in a cart, and beat him with a flashlight. This incident triggered the Company's returning Watson to the bargaining unit the next week as an employee. Watson requested, and was granted, a disciplinary suspension, in order to consider the matter. He finally agreed to return to the bargaining unit, and when he came into the plant on August 29 to pick up his check, he so informed Joe Graves of the Industrial Relations Department and signed authorization papers to go back to the unit. He had been on sick leave, having informed Superintendent Savagian of that fact on August 22.

Watson reported to the plant September 11, to go to work as a welder. He presented a "release letter" from a doctor, to the plant nurse. She refused to accept it because it was addressed to Superintendent Graves. Her supervisor, the head nurse, was called over, and she too said that Watson should see Graves about the matter. Watson then went to Foreman Bukowski, and Bukowski told him he had to see Graves, and could not work until "released through Industrial Relations."

Watson at this point asked to see a union steward to file a grievance about not being allowed to return to work.[1] According to Miller, he first told Watson that he (Miller) could not accept a grievance because Watson was a foreman. Watson explained that he was back in the bargaining unit. Miller then, according to his testimony, confirmed by that of Foreman Bukowski, offered to write out a grievance for Watson, but Watson wanted to take the form home and mail it to the Company. Miller explained that this was not the proper procedure. Miller also offered to have Watson write down on a piece of paper just what the grievance was all about, and Miller would then put in the grievance as Watson wrote it.[2] Watson refused this offer. Finally, Miller told Watson he would see a committee man the next morning and send Watson grievance forms. Miller did not send the forms to Watson the next day because, according to his testimony, he was told the next morning that Watson was no longer a company employee, that he had been fired.[3]

B. *Discussion*

The General Counsel contends that "the conduct of the Union, by refusing to allow Watson to file a grievance, by refusing to give Watson grievance forms, by providing Watson with hostile representation, and by perfunctorily dismissing the investigation of the Company's refusal to allow Watson to return to work, without even giving notice to

[1] Watson testified that he wanted to file two grievances, one concerning the procedures of that evening, with his not being permitted to return to work without seeing Graves, and the other concerning some remarks that had been made to him by another employee. None of the other witnesses to the incident mentioned anything about this second "grievance," and in any event it does not appear to be relevant to a resolution of this case that a second grievance may have been mentioned.

[2] Watson's own testimony tends to confirm Miller's in this respect. Watson testified that Miller "made the offer to sign a blank steward report and he would then fill in the grievance. I told him then that he didn't know the facts of the matter. And there was no way he could effectively write a grievance if he did not know what it was about."

[3] In fact, the Company had mailed a letter of discharge to Watson on September 9, which he did not receive until after September 12. On September 12, Watson called Graves, who told him about the letter of discharge. There is no evidence that Bukowski or Miller knew on September 11 that Watson had been discharged.

Watson, constitutes unfair, invidious and irrelevant conduct within the meaning of *Miranda Fuel, Inc.*" Boiled down to its essentials, the General Counsel rests his position on the arguments (1) that the Union's failure to process Watson's grievance was arbitrary, and no satisfactory explanation for the failure was given, and (2) that the Union's demonstrated hostility toward Watson, evidenced particularly by the June incident involving Watson, Miller, and Bergman, in effect requires the inference that "Miller's representation of Watson would never be in complete good faith."

The facts of this case, however, do not support either prong of the General Counsel's argument. Both Watson's testimony and Miller's conduct on the evening of September 11 establish, in my view, that Miller was seeking ways to help Watson, rather than to frustrate his attempts to grieve concerning the developing situation. Whether or not Miller had reason to dislike Watson,[4] I cannot accept the General Counsel's view that from "that fact alone" (Miller's hostility toward Watson in June), I should conclude that Miller could never represent Watson "in complete good faith."

Even accepting at face value all of Watson's testimony,[5] and disregarding not only any conflicting testimony, but also certain internal inconsistencies in Watson's testimony, I must conclude that the General Counsel has not established a violation by the Union here. The absolute minimum required for a violation by a union—some sort of arbitrary and unexplained failure to process a grievance—has not been met in the light of Watson's testimony that Miller did "offer to sign a blank steward report sheet and he would fill in the grievance." The testimony, which I credit, of both Bukowski and Miller, which is actually not too different from that of Watson in this respect, also demonstrates that Miller, far from refusing to represent Watson, was seeking out ways to accommodate the procedure as he believed them to be with what Watson wanted.

Based on all the testimony, it is apparent that Watson was not satisfied with the manner in which Miller was proceeding, that he wanted to write out his own grievance. The difference of opinion regarding the proper procedure, and Watson's refusal to go along with Miller's suggestions as to how the grievance should be filed, do not amount to a "failure to process the grievance." If anything, it would appear that Watson was more hostile to Miller than Miller to Watson, for Watson evidently did not trust Miller to fill out the form correctly, even with Watson writing out the information. Thus, Watson testified that he told Miller "I felt I was capable of writing my own grievance. And I did not need him to copy it because I didn't know if he would copy it exactly like I had written it. I had been made aware of situations out there where guys have written grievances and these grievances have been changed." In the light of Bergman's earlier accusation that Watson had threatened Miller, it is understandable that Watson (whether or not the accusation were true) might fear that Miller harbored some resentment toward him, and might not give him wholehearted representation. His subjective feelings in this respect do not, however, serve to show that any such fears were well founded; only the evidence of what Miller actually did can be the basis for determining whether or not the Union failed in its duty of fair representation toward Watson. *Local No. 1268, United Automobile, Aerospace and Agricultural Implement Workers of America (Chrysler Corporation)*, 193 NLRB 898, 909 (1971).

It is true that Miller did not follow through on his statement to Watson that he would get grievance forms to him the next day. But the nature of the difficulty on the evening of September 11—the insistence of the nurse, the head nurse, and Foreman Bukowski that Watson had to be cleared by Graves, of the Industrial Relations Department, to come to work, had, in effect, been mooted by the next day, when Miller discovered that Watson was no longer an employee.

The General Counsel argues that the Union owed Watson the affirmative duty, the next day, "to get back to Watson," when Miller learned he had been discharged. Perhaps some further communication from the Union to Watson might have been a more desirable way for the Union to have handled the matter. But absent any attempt by Watson to file a grievance about his discharge—and he, too, knew nothing about the discharge until September 12—I cannot legally fault the Union for not doing anything else.[6]

[4] The General Counsel emphasizes in his brief that Miller, with respect to the June incident involving Bergman, admitted to having acted on the basis of "pure hearsay." The General Counsel goes on to contrast Miller's reaction in June to the "denied hearsay" with Miller's actions in September, when he "conveniently disbelieves hearsay which he has every reason to believe," the "rumor" he had heard that Watson was back in the bargaining unit. But the report by Bergman to Miller in June was *not* hearsay to Miller (Miller's testimony about that report would be hearsay as to what Watson had in fact done). And the "conveniently disbelieved" hearsay was, as Miller testified, "rumors to the effect" that Watson was back in the unit, clearly hearsay about the fact of the matter by any standard. Although this case does not turn on the legal niceties concerning what is or is not hearsay, it does not strike me as illogical for someone to react to what is told him directly, and not to react to a "rumor." Finally, although Miller did at first say that Watson was a foreman, and he could not therefore process a grievance, he obviously proceeded otherwise after Watson told him he was no longer a foreman.

[5] Watson testified at one point that Miller told him, on September 11 when he was attempting to file the grievance, that Kenneth Roth had told Miller not to take part in any grievances filed by Watson, that Watson was "on his own," and Miller was to "turn his back" on any problems or grievances Watson might have. Miller denied saying anything like this to Watson, and Roth denied ever having had any such conversation with Miller. The General Counsel does not advert to this testimony in his brief. Even if I were to conclude that Miller did say this at the outset of his discussion with Watson that evening, Miller's later conduct would demonstrate that he did not follow Roth's presumed instructions. For a variety of reasons, however, I cannot credit Watson's testimony in this respect over the denials of Miller and Roth. In the first place, what Miller actually did (even based solely on *Watson's* testimony) was not in keeping with such a statement. Secondly, as Respondent points out in its brief, this testimony was an embellishment of the version of the events that Watson had earlier given, and was adduced by a somewhat leading question. Finally, there being no way in which Miller or Roth could have known that Watson would appear that evening and attempt to go to work, or that the two nurses and Bukowski would take the position he had to go through Graves if he did show up, it is difficult to imagine why they would have discussed Watson, or assumed he would have problems, and made any kind of determination pro or con as to whether the Union would handle the problems or represent Watson.

[6] After all, Watson had been a supervisor when last on the job, and had not worked as a rank and file employee since 1974, although he may technically have been one from August 22 on. (It was not until August 29 that he indicated he would accept the demotion from supervisor to employee.) It would therefore not have been entirely unreasonable for the Union to take the position it could not represent him at all. It did not, as the facts show, take that position other than the initial statement by Miller to Watson on September 11.

For all the foregoing reasons, I conclude that Respondent has not violated the Act,[7] and issue the following recommended:

ORDER[8]

The complaint herein is dismissed in its entirety.

[7] In view of this disposition of the case, I need not pass on the Respondent's motion to dismiss the case, renewed in its brief, on the ground that it did not state a cause of action.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.