

United Steelworkers of America, Local 1870, AFL–CIO–CLC (Newport Steel Corp.) and Jerry Davidson. Case 9–CB–9743

October 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On September 23, 1998, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.

The Respondent has excepted, inter alia, to the judge's order that the Respondent make the Charging Party whole for the amount of wages lost as a result of a suspension imposed on him by the Employer, Newport Steel Corp., and the Respondent's failure to process the Charging Party's grievance concerning the grievance. We find merit in this exception.

The judge found that the Respondent had violated Section 8(b)(1)(A) of the Act by failing to process the grievance of the Charging Party, Jerry Davidson, or processing it in a perfunctory manner. The judge, in the remedy part of his decision, found that the Respondent was responsible for the uncertainty of whether Davidson would have received a milder form of discipline or no discipline at all if the Respondent had properly processed his grievance. He therefore ordered that the Respondent pay Davidson the 8 hours of pay he lost as a result of his suspension, plus interest.

On August 26, 1998, prior to the decision of the judge in this case, the Board, in *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375 (1998), set forth criteria for the imposition of a make-whole remedy on a union in cases involving the unlawful failure to process a grievance. The judge did not consider the *Iron Workers* case in this case. We will therefore modify the judge's recommended Order and Notice to remedy the unfair labor practice found in a manner consistent with the Board's holding in *Iron Workers*.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Steelworkers of America, Local 1879, AFL–CIO–CLC, Newport,

Kentucky, its officers, agents, and representatives, shall take the action set forth in the Order as modified.¹

1. Substitute the following for paragraphs 2(a) and (b) and reletter subsequent paragraphs.

“(a) Request Newport Steel Corp. to consider the grievance of employee Jerry Davidson concerning his 3-day suspension and, if it agrees to do so, process the grievance with due diligence.

“(b) Permit Jerry Davidson to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings, and pay the reasonable legal fees of such counsel.

“(c) In the event that it is not possible for the Respondent to pursue the grievance, and if the General Counsel shows in compliance that a timely pursued grievance would have been successful, make whole Jerry Davidson for any increase in damages suffered as a consequence of the Respondent's failure to process the grievance, together with interest.”

2. Delete the last sentence in the former paragraph 2(b)

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to process the grievance of any employee to whom we owe a duty of fair representation, or process such grievance in a perfunctory manner without reason or for arbitrary or invidious reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL request Newport Steel Corp. to consider the grievance of employee Jerry Davidson concerning his suspension and, if it agrees to do so, WE WILL process the grievance with due diligence.

WE WILL permit Jerry Davidson to be represented by his own counsel at any grievance proceedings, including arbitration or other resolution proceedings, and WE WILL pay the reasonable legal fees of such counsel.

¹ As set forth in his partial dissent in *Iron Workers Local 377 (Alamillo Steel Corp.)*, supra, Member Hurtgen would order a full make-whole remedy in the event that the General Counsel can meet his evidentiary burden at compliance regarding the merits of the grievance.

WE WILL, in the event that it is not possible to pursue the grievance, and if the General Counsel of the National Labor Relations Board shows in compliance proceedings that a timely pursued grievance would have been successful, make whole Jerry Davidson for any increases in damages suffered as a consequence of our refusal to process that grievance, together with interest.

UNITED STEELWORKERS OF AMERICA
LOCAL 1870, AFL-CIO-CLC

Patricia Rossner Fry, Esq., of Cincinnati, Ohio, for the General Counsel.

Herbert L. Segal, Esq. (Segal, Sales, Stewart, Cutler & Tillman), of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed by Jerry Davidson on December 29, 1997,¹ against United Steelworkers of America, Local 1870, AFL-CIO-CLC (Respondent) as the representative of the employees of Newport Steel Corp. (Newport), a complaint was issued on March 18, 1998, alleging that Respondent, by Thomas Wells, violated Section 8(b)(1)(A) of the National Labor Relations Act (Act), by failing to file a grievance on behalf of Davidson over a 3-day suspension issued to Davidson on August 24, and thereby failed to represent employee Davidson for reasons that are unfair, arbitrary, and invidious and that Respondent has breached the fiduciary duty it owes to the employees it represents. Respondent admits that Wells did not file a grievance objecting to Newport's August 24 imposition of a 3-day suspension upon employee Davidson but Respondent denies violating the Act as alleged in the above-described complaint.²

A hearing was held on August 3, 1998, in Cincinnati, Ohio. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Newport, which is a corporation, has been engaged in the manufacture of steel products at its Newport facility. The complaint alleges, the Respondent admits, and I find that during the past 12 months Newport, in conducting its operations, sold and shipped goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky; and that at all times material, Newport has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

¹ Unless indicated otherwise, all dates are in 1997.

² In its response to the complaint Respondent admits that at all material times (1) Wells has held the position of president and departmental committeeman for Respondent and has been an agent of Respondent within the meaning of Sec. 2(13) of the Act; (2) the United Steelworkers of America, AFL-CIO-CLC (USWA) has been the exclusive collective-bargaining representative of the following employees:

All hourly rated production and maintenance employees, employed by the Employer at its Newport and Wilder, Kentucky facilities, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act;

and (3) Newport and the USWA are parties to a collective-bargaining agreement effective through April 15, 1999, which contains a grievance and arbitration procedure, and USWA has delegated to Local 1870 certain authority to enforce the agreement. Only the Employer's facility at Newport is involved herein.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Facts

General Counsel's Exhibit 2 is the collective-bargaining agreement between Newport and the Respondent, dated April 16, 1994.

Davidson began working at Newport in November 1994.³ He is a member of Respondent. Davidson estimated that there were between 700 and 800 employees at Newport.

In April 1997 Davidson was nominated for union committeeman, General Counsel's Exhibit 8, but he was disqualified because he did not attend the requisite number of union meetings.⁴ Wells was the committeeman for the involved department. On cross-examination Davidson testified that he did not file an appeal from the ruling declaring him ineligible. When called by counsel for General Counsel, Wells testified that "tellers" are given the responsibility to conduct local union elections and part of their responsibility was to check the eligibility of all the nominees for office.⁵ When called by Respondent, Wells testified that he did not ask anyone to check Davidson's eligibility. Brockman testified that he has worked at Newport for about 9 years; that, as a teller for the elections, he checked the records to make sure each candidate is eligible to run; that Wells has nothing to do with his employment or the question of eligibility of a candidate; that the tellers committee determined that Davidson did not attend enough union meetings to run for the committeeman position; and that he reported this determination to the secretary/treasurer of the Local.

On July 25, Davidson received his second written warning for absenteeism.⁶ Davidson testified that he was under a doctor's care for an on-the-job injury for just about all of the time the attendance warnings concerned; that he went to the infirmary and spoke to the nurse who told him she was not authorized to give him any information without going through Steve Schultz, the manager of human resources; that the nurse telephoned human resources to get permission to release the documents to him and she was denied permission; that he went to Wells who obtained the necessary information for him; and that he told Wells that he wanted to grieve the warnings and Wells set up a meeting with Schultz. When called by Respondent, Wells testified that Davidson was really concerned about this because he said that he was looking for another job and he did not want anything on his record about his absenteeism.

On August 22, Davidson received a notice of suspension, General Counsel's Exhibit 5, which indicated that he had been given a 3-day suspension ("3pm 8/24/97 to 3pm 8/27/97") for "Misconduct—Abuse of Company official." The form indicates "copies to" employee, personnel, foreman, and union. Regarding this warning, Davidson testified that it was given to him by his immediate supervisor, Wayne Young; that he asked Young what it was about; that Young said that he did not know and Young suggested that he speak to Steve Heuser, who is Young's supervisor; that Heuser said that he did not know what it was about but it came from Schultz' office and Heuser had been instructed to give it to Davidson; that he went to Wells the day he received the notice and showed Wells the notice; that Wells said that the guards would have a report, he goes by the guard shack at the south gate—which is manned by a security guard, and he would stop in and try to get a copy of the report for Davidson; that he did not try to get the report himself because he previously had tried to get records from the company nurse regarding his absence warnings and he was denied access; that Wells was the only way he knew how to

³ Between 1974 and 1994 he was employed as an ironworker and he served in the Iron Workers Union as a department steward, financial secretary, treasurer, executive board member, and business agent. The position of business agent was a full-time paid position and he held this position for 3 years. He left the Ironworkers and went to Newport when he lost a business agent election.

⁴ Art. III, sec. 5 of the bylaws for the Local Unions, Respondent's Exh. 4, specifies as follows:

No member shall be eligible for election as a Local Union Officer or Grievance Committee Member unless

....

(c) . . . a member shall have attended at least one-third (1/3) of the regular meetings held by the member's Local Union during the twenty-four (24) month period immediately preceding the month in which the election is to be held.

⁵ The tellers listed on GC Exh. 8 are Ron Brossfield, Tom Yeager Jr., Tom Brockman, and Greg Coleman.

⁶ According to GC Exhs. 3 and 4 he had received a written warning on January 7.

get company records; that when he received the suspension he had an idea of what it might be related to, namely when he attempted to obtain his paycheck the payroll clerk refused to give it to him, explaining that he was supposed to get it the next day, and as he left the area he used profanity which was "not directed at . . . [the payroll clerk] but just in general, over being upset about my check" (Tr. pp. 29, 30); that he has heard cursing by employees and supervisors everywhere at Newport and no supervisor has ever told him that he should not use profanity in the workplace; that he parks by the north gate which has a guard shack but it is seldom manned; and that in the past he has tried to have committeemen other than Wells file grievances and he was told that he should see Wells because Wells was his department committeeman. On cross-examination Davidson testified that he was aware that there was a grievance procedure in the involved collective-bargaining agreement but that he was not completely familiar with it; that he has filed employee complaints regarding overtime, Respondent's Exhibits 1 and 2, through Wells;⁷ that he did not recall what profanity he used when he was leaving the payroll office; that he did not say "[y]ou cocksuckers and your checks"; that he did not know what words he used but it was not directed at anybody employed by the Company and "you" definitely was not used; that he used the profanity as he exited the room through a door which was 10 feet from the payroll window; that he did not know if anybody heard what he said; and that he did not believe that he yelled the profanity and it was more to himself than to anyone else. Newport employee Ken Hicks testified that cursing is normal shop talk; that sometimes supervisors "get cussed" (Tr. p. 88); and that he has never known of anyone being written up for using bad language in the shop. On cross-examination Hicks testified that the pay office where the payroll clerks work is at the north end of the plant and it is enclosed with walls, a ceiling, windows, and a door; that there is a timeclock in the hallway near the pay window; and that he overheard an employee asking a payroll clerk "w]hy in hell can't I get my check" (Tr. p. 99) and nothing happened. On redirect Hicks testified that the timeclock is about 10 feet from the pay window so that if someone were complaining loudly someone at the pay window could hear them. When called by counsel for General Counsel, Wells testified that under paragraph 63 of the grievance procedure in the involved collective-bargaining agreement (step 1-Oral) the grievance committeemen or the assistant grievance committeeman had the authority to withdraw or settle a complaint even without the employee going along with it; that he did not receive a copy of Davidson's notice of suspension, General Counsel's Exhibit 5, notwithstanding the fact that by contract the Union is supposed to get a copy; and that in order to get a grievance beyond step 1, if the foreman has no knowledge of it or says "I can't resolve that for you," the employee would have to go to the union committeeman to take it further. When called by Respondent, Wells testified that after he received the charge from the National Labor Relations Board (the Board) alleging a failure to file a grievance regarding the 3-day suspension he asked Schultz for all the pertinent information and he was given a copy of the 3-day suspension and the report regarding the complaint about Davidson's conduct at the pay office on August 14;⁸

⁷ R. Exh. 1 was processed in November 1996 and R. Exh. 2 was processed in July 1997. Wells testified regarding the November 1996 complaint that when he explained to Davidson that he did not think that Davidson's position had merit Davidson slammed and broke a part of a door, and kicked a chair across the room, asked for the name of Wells' staff man to report Wells, and, at the suggestion of Wells, wrote the grievance up himself. Wells turned the complaint into the Company. With respect to the July 1997 complaint, Wells testified that he wrote the complaint up for Davidson and turned it into the Company; that, as indicated on the backside of the document, this complaint was denied; and that Davidson did not ask him to further process this complaint. On cross-examination by counsel for General Counsel Wells testified that he did not appreciate what occurred with Davidson about the November 1996 complaint.

⁸ The "8/14/97" report, R. Exh. 10, reads, as here pertinent, as follows:

WHEN ... [LINDA LAWSON] INFORMED ... [DAVIDSON] THAT HE COULD NOT PICK UP HIS CHECK UNTIL TOMORROW MORNING HE BECAME VERY IRATE. SHE STATED THAT HE STATED "YOU COCKSUCKERS AND YOUR CHECKS." SHE STATED THAT HE WENT ON A BARRAGE OF FOUR LETTER WORDS EVEN AS HE WAS LEAVING THE BUILDING. CORTLYN AND LINDA BOTH FEEL THEY SHOULD NOT HAVE TO PUT UP WITH THIS KIND OF LANGUAGE.

and that he handled a grievance involving employee Dewey Little who was given a 5-day suspension for abuse of a company official over the telephone, the Union arbitrated it and the Union lost the case. On rebuttal Davidson testified that he gave his suspension notice to Wells on August 22 when he first discussed this matter with him, and Wells kept the notice.

On August 24 through 27, Davidson served the suspension. Two of the days were his days off but he was scheduled to work on one of the days so he lost 8 hours' pay.

According to the testimony of Davidson, on or about September 5, or about 2 weeks after he first spoke to Wells about his suspension, he went to Wells and asked him if he had picked up a copy of the report. Davidson testified that Wells said that he had forgotten to get a copy of the report for Davidson but he would check into it.

On September 16 Davidson, Wells, and Schultz met regarding the two 1997 attendance warnings Davidson received. Wells testified that Davidson did not bring up the 3-day suspension at this meeting with Schultz; and that he did not even know about Davidson's 3-day suspension at the time he attended this meeting.

By letter dated September 17, General Counsel's Exhibit 4, Schultz advised Davidson as follows: "After reviewing your absentee record in my office on September 16, 1997 I have agreed to remove the two (2) written warnings from your record dated 1/7/97 and 7/25/97."

According to his testimony, on some unspecified date in September⁹ Davidson again went to Wells. Davidson testified that he went with Hicks; that he and Hicks were coming on shift and Wells was getting ready to go off; that he spoke to Wells at Wells' workstation; that he asked Wells if he "got the report from the guards as to why I had received this warning" (Tr. p. 25); that Wells said that he did not have it, he forgot it; that he told Wells that he needed to have it and that he would not be timely to get to the grievance; that Wells said that Davidson had already gone to the supervisor and timeliness was not going to be an issue; that Wells said that he would get the report for him; that he told Wells that he was trying to find out the reason behind his suspension because he was going to have to enter a grievance to get it off his work record; and that Wells said that he was going to get the necessary information, the report, which Davidson had been waiting for. On cross-examination Davidson testified that he told Wells that he, Davidson, was worried about the time limits the second time that Wells failed to get him the report and he, Davidson, believed that this conversation occurred about 2 weeks after he first spoke to Wells about the suspension. Hicks testified that he has been a member of the Respondent for 29 years; that he was a committeeman when he was an employee of Newport's predecessor; that Wells is his department committeeman and had been, at the time of the hearing herein, for 5 years, and Wells was also the president of the Local; that toward the end of September and the first of October during the shift change at 7 a.m. he was present at a conversation between Davidson and Wells; that he and Davidson were coming in and Wells was leaving; that the conversation occurred at Wells' workstation; that Davidson asked Wells, "Tom, have you filed my grievance," that Wells said, "[W]hat grievance"; that Davidson then said "Tom, its gonna be to late to file the grievance"; that Wells then said, "I'll check into it"; that he then excused himself and went down to his workstation; that he did not know if anything else was said between Davidson and Wells; that he has gone to Wells and asked him to check into something and that he knows that this is a part of the committeeman's job because it was one of his, Hicks's, responsibilities when he was a committeeman; and that the employee can have a committeeman go to the foreman for the first step. On cross-examination Hicks testified that he was not sure if the conversation between Davidson and Wells that he witnessed occurred around the end of September or in October; that he heard Davidson say "[h]ave you filed my grievance" (Tr. p. 90); that Wells said, "[W]hat grievance," Davidson then said "the time would . . . run out to file a grievance," and Wells said, "I'll check on it" (Tr. p.91); and that this was all that he heard. When called by Respondent Wells testified as follows regarding this conversation:

I believe the incident Mr. Hicks was talking about was when Jerry was asking me about his absentee record. There was no mention, at that time, of a three-day suspension. It was on the absenteeism, because that's where the timeliness come in.

⁹ Davidson testified that "it was probably in September."

Because he kept questioning about the timeliness. I said "I've initiated Step 1, when I called Steve Schultz and questioned your record. So the timeliness won't be an issue until he gives me an oral response," and that's where—that's what Ken Hicks overheard. [Tr. p. 180.]

According to the testimony of Davidson, 2 weeks after he spoke with Wells in Hicks' presence he, Davidson, went back and spoke with Wells again. Davidson testified that no one was with him when he spoke with Wells on this occasion; that Wells told him that he still had not gotten the report; and that Wells said that he would definitely get it.

According to the testimony of Davidson, he went to see Wells again in December. Davidson testified, as set forth at pages 28 and 29 of the transcript, that he and fellow employee Ron Workman, on their way to the canteen to get a cup of coffee before their shift, stopped at Wells' workstation; that, in the presence of Workman, he told Wells that he, Davidson, wanted to file a grievance; Wells asked what for, he told Wells "[o]ver my suspension," Wells asked "[w]hat suspension," he told Wells "[t]he one for abusing a company officer" and he had already "been to him two or three times prior to that," Wells called him a liar and he pointed to Wells and called him a liar; that Wells picked up the microphone and started calling the department foreman; and that he and Workman continued on their way to the canteen. On cross-examination Davidson testified that he called Wells a "God damn liar" because Wells called him a liar; and that he did not shake his fist in Wells' face and call him a "lying motherfucker." Workman testified that he has been at Newport for 27 years and is a member of the Respondent; that he witnessed a conversation between Davidson and Wells in November or December 1997; that the conversation occurred during the shift change in the morning; that he and Davidson stopped at Wells' workstation; that Davidson asked Wells "if he filed the grievance, pertaining to . . . a three-day suspension [a]nd Tommy said something about [w]hat grievance . . ." (Tr. p. 106); that Davidson and Wells had an argument with Davidson indicating he wanted the grievance filed and Wells saying "[y]ou didn't say anything about it" (Tr. p. 106) that when Wells asked what the grievance was about Davidson said "[y]ou know what it's about" (Tr. p. 106); that Wells then said "[n]o, I didn't know anything at all" (Tr. p. 106); that Davidson told Wells that this was the third time he, Davidson, had talked to Wells and Wells said "[n]o you didn't" (Tr. p. 107); that at the end of their argument Davidson called Wells a liar and left; and that Davidson pointed his finger at Wells but Davidson did not touch Wells. On cross-examination Workman testified that he did not hear Davidson say "[y]ou are a motherfucking liar" to Wells and Davidson did not say this; that he heard Wells call Foreman Gobel Fryman; that he and Davidson left Wells' workstation; that when Davidson pointed at Wells there was an operational desk or table between them and they were about 2- or 3-foot apart; and that he did not hear anything about getting a report. When called by Respondent, Wells testified that Davidson never asked him for a grievance for the 3-day suspension or Davidson never asked him to grieve the 3-day suspension; and that on December 12 Davidson and Workman came to his workstation and Davidson, as set forth on transcript pages 171 and 172,

[He] questioned me about the status of his grievance.

And I—asked him what grievance or—or he asked me about the information that he had requested—oh, he asked me about the status of his grievance over the three-day incident.

And I—referred—I told him, he didn't never, ever, ever ask me to file a grievance on that. And he says, "I told you to get the information." And I remember, I saying—I said "No, no. You never, ever asked me to get you anything."

And I'm telling you, he just—he went—well, his

Q. Tell us what he did and what—

A. —his face turned about—

Q.—he said.

A.—two shades of red. And he comes toward me, shaking his finger at me, pointing in my chest or my face

area. And he got right up next to me, and he couldn't have been no more than a foot away. And he looked right down at me and he said "You are a motherfucking liar." And I just reached right behind me and I called for the turn foreman. And in the meantime he—he walked off the job.

I told the turn foreman I needed security down here, because of I—I had a problem. And within five—I'd say five, six minutes, the guard was right there, on the job.

Q. What did you say to Mr. Davidson?

A. I told him, One, he had never ever asked me to file a grievance on that three day incident; Two, he never asked me to get no guard report. I don't get guard reports at the guard station.

I get guard reports—anything I get, from that company, I have to go to Human Resources, to get. I would never tell him "I'll stop at the guard station and pick it up," because I don't get nothing from the guards.

Every—everything the union gets from the company, they get from Human Resources. I request everything through them.

Wells also testified that he did not call Davidson a liar. Wells' "12-12-97" report which the guard asked for regarding this incident was received as Respondent's Exhibit 11. It reads as follows:

At approx. 22:20 hrs. Jerry Davidson came up to me at the F.C.O. [flying cut off]. He said he wanted to file a grievance on his 3 DAY SUS. I asked him what 3 DAY SUS. He replied the 3 days he got off for the incident at the time office a month ago. I told him it was untimely [and] he said he was waiting for me to get the report he asked for. I replied no no you didn't ask me any thing like that. At that time he became enraged, shook his finger in my face and called me a lying motherfucker.

Wells further testified that the only thing that Davidson ever asked him to get was the absentee report; that to get reports from the guards all he has to do is telephone human resources and the report is sent to him because it is part of the grievance procedure and he is entitled to that information; that Davidson never requested him to get any report on what happened on August 14 in the pay office; and that he never refused to investigate any of Davidson's grievances or dissatisfactions. On cross-examination by counsel for General Counsel Wells testified that in his affidavit to the Board, dated February 9, 1998, he indicated that he heard rumors in the shop that Davidson had been suspended for 3 days, he believed that he may have mentioned it to Davidson during one of their conversations, and he believed that Davidson said that he was going to wait until he reviewed the guard's report; that the only way to get a guard's report is to go through Schultz; that in his above-described affidavit he indicated that he did not recall whether Davidson asked him to get the report and he did not recall whether he offered to Davidson to get the report; that while the involved collective-bargaining agreement specifies that the company will provide respective departmental committeemen with copies of all disciplinary warnings issued and suspensions would be included in this language, he never received a copy of Davidson's 3-day suspension; and that if Davidson had complained to him about the suspension, the first thing he would have done would have been to request a copy but he was not even aware that Davidson got the suspension. On redirect by Respondent Wells testified that in his affidavit he indicated "[a]t the same time the attendance dispute was being resolved I heard rumors in the shop that Davidson had been suspended for three days" (Tr. p.204); and that when he was sitting with Davidson talking about the absenteeism he said to Davidson "I heard you got a three day suspension" and Davidson said, "Yeah I'm gonna look at the reports, and I'll decide what I'm gonna do." (Tr. p. 206.) Subsequently Wells testified that Davidson sat at the September 16 meeting with him and Schultz, and Davidson never even mentioned the suspension, Davidson never even made him, Wells, aware of it. With respect to whether an

employee would have been able to obtain a guard's report on his own, Wells testified that if Davidson would have called human resources they "probably" would have given it to him or they would have told him to have committeeman Wells request it; that Davidson asked him to get his absentee records because he, Davidson said that the Company would not give them to him; and that he obtained the absentee records for Davidson. Wayne Dean, the grievance chairman and the committeeman for the labor department since 1994, testified that when an employee had been suspended he did not know whether that employee could, on his own, obtain the guard report from human resources without going to the committeeman; and that he could not remember any employee who was suspended in his department obtaining a guard report.

According to the testimony of Wells, on December 15, he attended a meeting with Schultz and Dean regarding an unrelated matter. Wells testified that Schultz asked him what happened with Davidson on December 12; that after he told Schultz, Schultz said that he wanted to fire Davidson because this was the third incident with Davidson;¹⁰ and that he asked Schultz not to fire Davidson because it would not look good to the membership if Davidson was fired over an incident with the president of the Local. Davidson was not fired. Dean testified that after the meeting Schultz asked Wells what happened with Davidson and after Wells explained, Schultz said that he was going to fire Davidson; that Wells asked Schultz not to fire Davidson; and that he noticed that there was bad blood between Wells and Davidson but he did not know when he first noticed it.

On December 29, Davidson filed the above-described charge against Respondent. His signature is dated December 17.

On March 18, 1998, according to the minutes of the Local Union meeting—Respondent's Exhibit 14—Davidson asked Wells if it would be possible to get another union committeeman in his work area, and Davidson referred to the fact that he had filed a charge against Wells with the National Labor Relations Board. Davidson testified that at a union meeting he asked Wells if it was possible to get another union committeeman in his area. Wells and Dean also testified about this statement.

Analysis

In my opinion, Wells is not a credible witness. One example of his being less than candid is the fact that on the one hand he claims that on September 16, when he met with Davidson and Schultz, he, Wells, did not even know about Davidson's 3-day suspension. On the other hand, Wells testified that when he was sitting with Davidson discussing absenteeism they discussed the 3-day suspension. Obviously, the discussion of Davidson's absenteeism occurred before the September 16 meeting with Schultz. Wells was asked by Davidson on August 22 to obtain the guard's report.

As pointed out by the Board in *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB 995, 996 (1986):

A labor union owes a duty of fair representation to all the employees it represents. See *Vaca v. Sipes*, 386 U.S. 171 (1967). A union breaches this duty when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. *Id.* at 190. Although a union may not ignore a meritorious grievance or process it in a perfunctory fashion, a union is afforded broad discretion in deciding which grievances to pursue and the manner in which to handle them. Mere negligence is insufficient to establish a breach of the duty of fair representation. [Footnotes omitted.]

¹⁰ The other two were the August 14 pay office incident and the fact that a situation arose between Davidson and Pat Pike, a crane operator. Pike testified that he spoke to Schultz about Davidson because he did not believe that Davidson was conducting himself in a safe manner when near the crane. On rebuttal Davidson testified that he filed a safety report against Pike regarding his operation of the crane allegedly in an unsafe manner.

Since Wells denied ever being asked before December 12 to obtain the report, we would not be dealing with negligence if he was taken at his word.

On brief, counsel for General Counsel contends that Wells deliberately avoided dealing with Davidson, who had challenged his competence, threatened to go over his head to a staff representative, and attempted to run against him for union office; that Wells neither sent Davidson to another union representative nor flatly informed him that he would not do anything and Davidson would have to deal with it himself; that instead, Wells strung Davidson along until it was too late for Davidson to take other action and then, in December, when Davidson accused him of lying, Wells reported him, potentially subjecting him to discipline because Davidson had become incensed at Wells' inaction; that Wells' inaction was more than a mere error of judgment; that it is the kind of unfair, arbitrary, and invidious treatment that violates the Act; that Wells' failure to do anything on this matter after repeated requests for over 4 months after the initial suspension surely amounts to more than mere negligence; that Davidson's request for information about his suspension was not frivolous in that the record fails to show that he engaged in any conduct that was so egregious that the Union did not have to represent him; that according to some witnesses he was only accused of actions that are normal plant conduct; that the Union was not privileged to refuse to give him any assistance because he had opposed Wells in the past; and that Wells' actions may have violated the Act even in the absence of animus, *Union of Security Personnel of Hospitals*, 267 NLRB 974, 979 (1983).

Respondent, at pages 7 and 8 of its brief, argues as follows:

In this case, the issue under the Collective Bargaining Agreement is whether there is or would have been just cause for suspension. Davidson verbally attacked two female payroll employees, using obscenities they found objectionable enough to file a security report. Obviously this went far beyond typical shop talk, as if shop talk should be used toward defenseless payroll employees in an office. Furthermore, it was repeat behavior—Schultz wanted to fire Davidson for this third offense of the same nature. Obviously Wells was able to save Davidson's job. For this, he was only suspended for three (3) days, and lost one (1) day's pay. Had the Union been presented with Davidson's request to file a grievance (it was not), it would not have been irrational for the Union to conclude that there was just cause for the suspension. Wells testified that, in another case, an employee had been suspended for five (5) days for cursing a supervisor. The Local Union arbitrated that grievance and lost. (Tr. 179.) Consistency with past experience is not irrational. Furthermore, the relative leniency of the penalty could have led the Local Union to decide that the grievance lacked merit. [Emphasis in original.]

The record does not support the Respondent with respect to certain assertions made in this paragraph of its brief. More specifically, the sentence reading "[f]urthermore, it was repeat behavior—Schultz wanted to fire Davidson for this third offense of the same nature." (Emphasis added.) Schultz did not want to fire Davidson in August 1997 when he was suspended. In August 1997 this was not the third offense of this nature. According to the record made herein, the situation with Pike related to safety matters and obviously Davidson's December 12 verbal exchange with Wells had not yet occurred. Wells did not testify that the other employee who was suspended for 5 days cursed a supervisor. Wells testified that the employee was suspended for 5 days "for abuse of a company official over the telephone." (Tr. p. 179.) Wells did not specify what form the verbal abuse took. It would appear that it was approximately 70 percent more egregious than what Davidson did on August 14 for the sanction was for 5 days and not the 3 days that was given to Davidson. Or perhaps the status of the company official or some other unspecified variable was factored in in determining the length of the suspension. For our purposes it does not matter. This example was supplied by Respondent for one purpose. But it also can be used for another purpose, namely to demonstrate that even though the sanction was

about 70 percent greater for Little, Wells filed a grievance for Little.¹¹ Wells refused to take that action which would have put Davidson in a position to determine whether he wanted to file a grievance. Without knowing the specifics of the Little situation, it cannot be used herein as a justification for not acting on behalf of Davidson. Moreover, Wells did not tell Davidson that the Union would not pursue his matter because of the outcome of the Little grievance. Wells treated Davidson differently than Little and Wells did not explain why. Wells denied Davidson the opportunity to determine if he should proceed to see if he could get the sanction reduced or reversed. Wells treated Davidson in an arbitrary manner. Wells' continued nonaction amounted to a willful failure to pursue the grievance Davidson eventually asked to file when, after repeated requests, he was unable to get Wells to obtain the guard's report. Wells, by his continued nonaction, handled Davidson's grievance in a perfunctory fashion. Respondent violated Section 8(b)(1)(A) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(b)(1)(A) of the Act by failing to fairly represent Jerry Davidson regarding his grievance against the Employer by willfully failing to obtain the report of the incident in issue thereby precluding Davidson from processing a grievance.
4. The foregoing unfair labor practice affects commerce within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

It is uncertain whether the processing of Davidson's grievance would have resulted in a milder form of discipline or any discipline at all. This uncertainty results from Respondent's unlawful action. Where, as here, such an uncertainty requires resolution, at least for the purposes of determining monetary responsibility, it is deemed only proper to resolve the question in favor of the discriminatee and against the wrongdoer. Since Respondent did not prove that had it processed Davidson's grievance Davidson would still have been suspended for 3 days, I shall resolve the uncertainty in favor of Davidson and find that Davidson is entitled to 8 hours of backpay at his August 1997 rate, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

¹¹ As Chief Judge Hand concluded in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), it is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some but not all.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, United Steelworkers of America, Local 1870, AFL-CIO-CLC, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Failing or refusing to process the grievance of Jerry Davidson, or any other employee, or processing such grievance in a perfunctory manner without reason or for arbitrary or invidious reasons.
 - (b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act.
 - (a) Make Jerry Davidson whole at the wage rate in effect in August 1997 for the 8 hours of pay he lost, together with interest, to be computed in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent goes out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since August 22, 1997.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Newport Steel Corp., if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."