STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 322, Complainant, vs. RACINE MOTOR HOTEL, INC., Respondent.	Case I No. 15281 Ce-1399 Decision No. 10751-A

Appearances:
Schwartz, Schwartz & Roberts, Attorneys at Law, by Mr. Jay Schwartz, for the Complainant.
Mr. Robert W. Weber, Attorney at Law, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having authorized Howard S. Bellman, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on such complaint having been held at Racine, Wisconsin, on February 24, 1972 before the Examiner, and the Examiner having considered the evidence, arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Hotel and Restaurant Employees' and Bartenders' International Union, AFL-CIO, Local No. 322, hereinafter referred to as the Complainant, is a labor organization having offices at 1840 Sycamore Avenue, Racine, Wisconsin.

2. That Racine Motor Hotel, Inc., hereinafter referred to as the Respondent, is a corporation engaged in the operation of a hotel and restaurant at 535 Main Street, Racine, Wisconsin.

3. That at all times material herein, the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent and the Complainant have been parties to a collective bargaining agreement covering the wages, hours and working conditions of such employes, which agreement is dated June 16, 1970 and was in effect at all times material herein; that said agreement, in Article V, provides final and binding resolution of grievances arising between Complainant and Respondent by arbitration.

4. That on approximately October 19, 1971 employe Gary Niesen was suspended by the Respondent for the following seven working days

of his regular schedule as a disciplinary measure; that said suspension was not in accordance with any agreement to do so with the Complainant; and that said employe was in the collective bargaining unit represented by the Complainant and covered by the aforementioned collective bargaining agreement.

5. That on approximately November 17, 1971, and subsequent to the transmittal to the Respondent of a document dated November 11, 1971, which document the Complainant contends constituted a grievance under the aforesaid collective bargaining agreement, the Complainant requested of the Respondent that said suspension be submitted to the aforesaid arbitration procedure provided at Article V of said collective bargaining agreement; and that the Respondent refused said request and refused to submit the matter to such arbitration.

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

CONCLUSION OF LAW

That the Respondent, by refusing to proceed to arbitration upon the request of the Complainant with respect to the "grievance" over the suspension of Gary Niesen, has violated the arbitration provisions of the aforesaid collective bargaining agreement existing between it and the Complainant, and therefore, in that regard, Respondent committed, and is committing, an unfair labor practice within the meaning of 111.06(1)(f) of the Wisconsin Employment Peace Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Racine Motor Hotel, Inc., its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the "grievance" over the suspension of Gary Niesen, and the issues concerning same, to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and the Complainant with respect to the "grievance" over the suspension of Gary Niesen, and all issues concerning same.

   b. Notify the Complainant that it will proceed to arbitration on said "grievance", and all issues concerning same.

   c. Participate with the Complainant in the selection of an arbitrator to determine the dispute over said "grievance", and all issues concerning same.

d. Participate in the arbitration proceeding, before the arbitrator so selected, on the said "grievance", and all issues concerning same.

e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what action it has taken to comply herewith.

Dated at Madison, Wisconsin, this 11th day of May, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

RACINE MOTOR HOTEL, INC.
Case I Decision No. 10751-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant alleges that the Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act, which makes it an unfair labor practice for an employer to violate a collective bargaining agreement, by refusing to submit a grievance over the disciplinary suspension of an employe to arbitration provided in their collective bargaining agreement. The Respondent apparently contends that there was no collective bargaining agreement violation in its refusal to arbitrate because (1) a settlement agreement was reached in the matter by the Complainant and the Respondent (Ozite Corp., Decision No. 10298-C, 1972) and (2) the "grievance" filed by the employe was not adequate under the contractual grievance procedure (Fred Rueping Leather Co., Decision No. 10986, 1972).

With regard to the Respondent's first contention, the Examiner finds that the record discloses no such settlement agreement. It appears that the Complainant may have accepted the concept that the employe should be suspended, rather than discharged as the Respondent initially proposed, but the terms of the suspension were unilaterally determined by the Respondent and imposed without the Complainant's concurrence. 1/

As to Respondent's contention (2), above, subsequent to his suspension the grievant transmitted to the Respondent a document dated November 11, 1971 which the Complainant, contrary to the Respondent, alleges was an adequate grievance for the purpose of reaching the arbitration step of the grievance procedure.

In American Motors Corp. vs. WERB (63 LRRM 2226, 1966) the Wisconsin Supreme Court ruled that in cases where, as here, violations of Section 111.06(1)(f) are alleged to have been committed by employers covered by Section 301 of the Federal Labor Management Relations Act, this agency must apply Federal substantive law. Federal substantive law as stated by the United States Supreme Court in John Wiley & Sons, Inc. vs. Livingston (55 LRRM 2769, 1964) is that questions of procedural arbitrability, i.e., whether an employe or union has complied with the procedural requirements of a contractual grievance procedure, are always questions to be determined by the arbitrator and may never constitute a defense for refusing to

---

1/ No conclusion is reached herein with regard to the contention by the Respondent, contrary to the Complainant, that the collective bargaining agreement has been orally amended to allow for employer-initiated grievances against employes. The meeting at which the alleged settlement was reached is further alleged to have occurred pursuant to such amended procedure. However, inasmuch as no settlement is found herein, it is not necessary to rule on the existence of the amended procedure.

submit to arbitration. 2/ The Wisconsin Supreme Court and this agency have acknowledged this principle in several decisions. (e.g. Dunphy Boat Corporation, (Wis. Sup. Ct., 34 LRRM 2321, 1954); Seaman-Andwall Corporation, Decision No. 5910 (1962); Allen Bradley Co., Decision No. 6284 (1963); Neat and Trim Cleaners, Decision No. 6341 (1963); Schlueter Company, Decision No. 6557 (1963); Elm Tree Baking, Decision No. 6383 (1963); Pierce Auto Body Works, Inc., Decision No. 6635 (1964); Harnischfeger Corporation, Decision No. 7556 (1966); Snap-On Tools Corporation, Decision No. 8198 (1967); Milwaukee Gear Co., Decision No. 8191 (1968); St. Mary's Hospital, Decision No. 8675 (1969); Plymouth Plastics, Division of Ametek, Inc., Decision No. 9720-A (1971)).

In the instant case the Respondent urges that the complaint should fail because the "grievance" that the Respondent has refused to submit to arbitration was not adequate under the grievance procedure of the labor contract in question. Pursuant to the above-cited precedents, the Examiner must not rule on the adequacy of the grievance, but must order the matter to arbitration where the Respondent's argument may be made appropriately.

Dated at Madison, Wisconsin, this 11th day of May, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

2/ Such procedural requirements include those that go to the form and content of the grievance. UAW v. Folding Carrier Corp., 73 LRRM 2632 (CA 10, 1970); IBEW v. Ohio Power Co., 53 LRRM 2026 (DC, S.D. Ohio, 1963).