STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HAROLD MAHNKE, Complainant, vs. LOUIS ALLIS COMPANY, Respondent.	Case III No. 15639 Ce-1428 Decision No. 11017-B

ORDER AFFIRMING EXAMINER'S ORDER OF DISMISSAL AND REVISING MEMORANDUM ACCOMPANYING SAME

Howard S. Bellman, an Examiner on the staff of the Wisconsin Employment Relations Commission, having, on July 26, 1972, issued an Order dismissing the complaint filed in the above entitled matter, as well as a Memorandum accompanying same; and the above named Complainant, by its Counsel, having timely filed a Petition for Review of the Examiner's Order of Dismissal; and the Commission having reviewed the entire record, the Order of Dismissal, the Memorandum accompanying same, and the Petition for Review, and being satisfied that the Examiner's Order of Dismissal should be sustained; however, that his Memorandum accompanying same should be revised;

NOW, THEREFORE,

Pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Order of Dismissal; however, hereby revises the Memorandum accompanying same issued in the above entitled matter as its Order of Dismissal and Memorandum accompanying same.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S ORDER OF
DISMISSAL AND REVISING MEMORANDUM ACCOMPANYING SAME

Accompanying the Examiner's Order of Dismissal is a Memorandum setting forth the Examiner's rationale for his Order. In addition, the Examiner included certain dicta which in the opinion of the Commission is not necessary for the disposition of the issues involved herein. Said dicta concerns a discussion with respect to the financial ability of a union to proceed to arbitration. We do not adopt the Examiner's general rationale with respect thereto for we conclude when such an issue is raised, said issue will be determined on the individual merits of each particular case.

Therefore, we are revising the Examiner's Memorandum to read as follows:

The complaint alleges that the Respondent's discharge of the Complainant during August, 1971, on the basis of excessive absenteeism was in violation of a collective bargaining agreement and therefore in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act. At the hearing on the matter, Respondent moved for dismissal of the complaint. The following facts are admitted for the purposes of considering said motion.

The Complainant was a member of a collective bargaining unit represented by a labor organization and covered by a collective bargaining agreement which included a multi-step grievance procedure culminating in final and binding arbitration, which was in effect at all times material herein. Following his discharge, the Complainant's bargaining representative disputed the discharge throughout the grievance procedure up to the final and binding arbitration stage. It then determined not to pursue the grievance to that procedure based upon a decision by the labor organization that it was not financially feasible to do so.

According to the statements of Counsel for the Complainant at the hearing, these financial considerations by the labor organization were the major motivating factor in reaching the Union's determination not to seek arbitration, and the Union's motive should not be characterized as bad faith. Neither did the Complainant allege that the Union's financial self-analysis was to any extent tainted by improper motives.1/

1/ The duty of fair representation is breached when a Union is arbitrary, discriminatory or in bad faith. The Complainant, in his brief, for the first time argues that while it is admitted that his bargaining agent was not in bad faith, he still has the right to show discrimination and arbitrariness. This position is rejected as untimely. The asserted right does not exist unless preceded by appropriate contentions. A full opportunity to make such contentions was afforded by the complaint and at the hearing. (Additionally, as reflected in the transcript, Counsel for the Complainant did state that discrimination was not a basis of the Union's decision not to arbitrate.)

The Complainant apparently recognizes that in invoking Section 111.06(1)(f), Wisconsin Statutes, by alleging that the discharge in question violated the collective bargaining agreement by which the Complainant was covered, he must meet the tests of the substantive law fashioned under Section 301 of the Federal Labor Management Relations Act. More particularly, this allegation comes within the doctrine of the United States Supreme Court decision in Vaca vs. Sipes (386, U.S., 171, 64 LRRM 2369, 1967.)

According to that doctrine, when an employe believing that his rights under a collective bargaining agreement have been violated brings a breach of contract action against his employer, it is necessary that he allege and prove not only that he attempted to exhaust his remedies under the contract grievance procedure, but also that either the Employer repudiated said procedure, or the employe's attempt to use the procedure was frustrated by his union's breach of the duty for fair representation in the matter. Here, there is no question raised with regard to the employe's diligence under the contract grievance procedure or the Employer's repudiation of the procedure, but rather the question is: Has the Complainant adequately raised the question of the Union's attitude in the matter?

It is the conclusion of the Examiner that the Complainant has not fitted his case within the doctrine Vaca vs. Sipes, supra, or of the decision of the Wisconsin Supreme Court in Tully v. Fred Olson Motor Service Co. (66 LRRM 2730, 1967), by alleging only that the Union failed to prosecute the grievance to arbitration because the Union believed, in good faith, that to do so was not financially feasible.

As stated by the United States Court of Appeals for the 5th Circuit in Lomax vs. Armstrong Cork Co. (75 LRRM 2585, 2587, 1970) "although a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner, an employee does not have an absolute right to have any grievance taken to arbitration, and the refusal of the Union to take all grievances to arbitration does not per se amount to a breach of the duty of fair representation."

The same Court focused more particularly on the situation wherein the Union is motivated by financial considerations in Encina vs. Lama Boot Co. (78 LRRM 2382, 1971). In that case, "the Union refused to use its funds to finance arbitration, on the ground that the chances of success were slight, but nonetheless offered to request arbitration if plaintiff would pay the expenses," and the Court dismissed the complaint on the ground that the plaintiff's case had received, in the grievance procedure, all the attention to which it was entitled.

In the instant case it is not established that the Union had evaluated the Complainant's "chances of success" in arbitration, or had offered to go ahead at the Complainant's expense. However, the burden of contending that the Union had engaged in improper considerations regarding his grievance or had refused to proceed at the Complainant's expense fell upon the Complainant, and he failed to sustain that burden. Likewise the record herein does not disclose whether the Union concluded that it had no money to spend upon the arbitration of the Complainant's grievance, or rather that its money was more advantageously spent otherwise. However, if that distinction is material, appropriate contentions and proof must be produced by the Complainant. The relevant law does not include a presumption against the Union in this regard that the Company must overcome.

To hold in favor of the Complainant on the instant motion would be to declare that, even without any further evidence or allegation of an impropriety in its motives, the Union that is not a party to the proceeding, and therefore must in effect be defended by the employer, is guilty of breaching the duty to provide fair representation simply by virtue of its decision regarding its finances. In other words, such a Union decision will be a per se violation of the Union's duty of fair representation. There is no precedent in the law for such a holding. It would be contrary to Ford Motor Co. vs. Huffman (U.S. Sup. Ct., 31 LRRM 2548, 1953) in which it was held that a labor organization must, in its exercises of discretion as to which of its members it will favor in utilizing its resources, be given "a wide range of reasonableness . . . subject always to complete good faith. . ." Likewise it would not be in line with this agency's decision, affirmed by the Dane County Circuit Court in Cooper vs. WERB (68 LRRM 2189, 1967) in which it was held that a grievance over a discharge could be settled by dropping it in exchange for employer concessions in bargaining for a new collective bargaining agreement without violating the duty of fair representation. In that decision (No. 7283, 1965), which involved a grievance procedure that did not end in arbitration, the Commission did not consider whether or not the grievance in question had, or even arguably had, merit. It was determined, at least in effect, that the Union, because its motives were untainted, had the discretion to accept what it judged to provide the most advantage for the employes it represented. Thus, the union in Cooper elected to not resist one employe's discharge in order to gain a certain collective agreement for the remaining employes.

The Complainant's reference to Section 111.06(1)(g) is based upon a ruling by the Department of Industry, Labor and Human Relations that the Complainant, contrary to the position taken in that proceeding by the Respondent, was not guilty of such misconduct as should affect his eligibility to receive unemployment compensation. Subsection (g) declares it an unfair labor practice for an employer "to refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted", and it is apparently the Complainant's position that the Respondent violated (g) by not reinstating him in view of the finding of no misconduct. The Respondent contends, on the other hand, that the finding in the unemployment compensation proceeding is "irrelevant".

The Commission rejects the Complainant's position because interpretations of the unemployment compensation statutes are neither reviewable or enforceable by this agency, nor do they constitute rulings on controversies in labor relations such as are within the scope of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin, this 22nd day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner