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-D

Appearances:
Neubecker, Schrinsky & McKnight, Attorneys at Law, by Mr. Edward F. Neubecker and Mr. Barry F. Bruskin (on brief) appearing on behalf of the Complainant.
Mr. M. J. Diederich, Attorney for Litton Industries, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Harold Mahnke, having filed a complaint with the Wisconsin Employment Relations Commission alleging that Louis Allis Company has committed unfair labor practices within the meaning of Section 111.06(f) and Section 111.06(g) of the Wisconsin Employment Peace Act (WEPA); and the Commission having previously appointed Howard S. Bellman, then a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the WEPA; and Examiner Bellman, after hearing on said complaint, having issued an order dismissing said complaint 1/ and the Commission having affirmed the Examiner's Order of Dismissal 2/; and the Circuit Court for Dane County having reversed the Commission's order and remanded the matter to the Commission for further proceedings 3/; and the Wisconsin Supreme Court having affirmed the judgment of the Circuit Court for Dane County 4/ and remanded the case to the Commission for further proceedings; and the Commission having appointed George R. Fleischli a member of its staff to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the WEPA in accordance with the court's judgment; and further hearing having been held before the Examiner on May 6, June 24 and 25, and December 10, 1975 at Milwaukee, Wisconsin; and the parties having filed post-hearing briefs in the matter; and the Examiner having considered the evidence, arguments and briefs of the parties 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 Harold Mahnke, hereinafter referred to as Mahnke or the Complainant, is an individual who was employed by Louis Allis Company from April, 1951 until the effective date of his discharge on August 9, 1971.

1/ Decision No. 11017-A, 7/26/72.

2/ Decision No. 11017-B, 9/22/72.

3/ Case No. 137-398, 10/15/73.

4/ Mahnke vs. WERC, 66 Wis. 2d 524, 225 N.W. 2d, 617 (1975).

2. That Louis Allis Company, hereinafter referred to as the Respondent, is an employer which operates manufacturing facilities in Milwaukee County, Wisconsin.

3. That at all times relevant herein, Local No. 1131 International Union of Electrical, Radio and Machine Workers, AFL-CIO CLC, hereinafter referred to as the Union, has been the collective bargaining representative of certain employes of the Respondent including the Complainant at the time of his discharge; that the Union and the Respondent were parties to a collective bargaining agreement effective from June 1, 1970 until at least June 1, 1973 which contained the following provisions relevant herein:

"ARTICLE X

Grievance and Arbitration

69. Should differences arise between the Company and the Union or any of the employees as to the meaning and application of the provisions of this agreement, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle the differences. Time lost from work by the aggrieved employee and the departmental or divisional steward in settling such differences shall not be construed as suspension of work. Differences shall be settled by the following successive steps.

(a) First Step. The matter shall initially be taken up with his foreman by the employee or by his steward, or by both, as the employee elects within a reasonable period of time after the incident.

(b) Second Step. Failing adjustment the matter then becomes a grievance is placed in writing, signed by the aggrieved employee and delivered by his steward to the foreman's immediate supervisor within three (3) working days to be taken up between the departmental and/or divisional steward and the foreman's immediate supervisor and/or his designated representative within three (3) working days and answered within five (5) working days.

(c) Third Step. In the event no satisfactory settlement is reached in the second step the grievance may be processed by the Union within three (3) working days to be taken up between the Chief Steward and/or his representative, and the Labor Relations Manager and/or his designated representative within three (3) working days and answered within five (5) working days.

(d) Fourth Step. In the event no satisfactory settlement is reached in the third step the grievance may be processed by the Union within five (5) working days to be taken up between the Chief Steward or his representative together with two (2) additional representatives that he may designate and a higher level representative of Management of the Company and/or his designated representative, within five (5) working days and answered within ten (10) working days.

(e) Fifth Step. In the event the dispute has not been satisfactorily settled, the grievance may be (1) reviewed at Union request between the representative of Management of the Company who answered the grievance in the fourth step and the Union together with a professional advisor designated by the Union, and/or (2) appealed within ten (10) working days or mutually agreed extensions thereof from the date of disposition in the fourth step to an arbitrator mutually selected from a panel of at least five (5) arbitrators sub-

mitted by the Federal Mediation and Conciliation Service. Failure to mutually agree on the selection will require a specific appointment by the Federal Mediation and Conciliation Service. The decision of the arbitrator shall be final and binding on all parties. The Company and the Union shall each bear one-half the expense of arbitration. Any grievance that is not appealed within the ten (10) working days or mutually agreed extensions thereof may not be processed further."

4. That during the period beginning in June, 1969 and continuing through July, 1971 the Complainant was frequently absent from work or late for work and frequently left work early; that a portion of this absenteeism 5/ is unexplained in the record and was unexcused at the time but that a large portion of such absenteeism was accompanied by doctor's appointments, medical treatment as an outpatient and medical treatment as an admitted patient.

5. That during his tenure of employment by the Respondent, the Complainant received approximately 11 warning notices; that the first five such notices dated March 24, 1959, August 22, 1961, August 31, 1961, January 18, 1962 and March 25, 1966 dealt with alleged deficiencies in the performance of his work as an assembler and a failure to punch out properly; that the next two warning notices dated August 19, 1969 and September 29, 1969 dealt with alleged excessive absenteeism; that the next warning notice dated August 7, 1970 was issued in lieu of discharge and dealt with the grievant's alleged failure to correct his excessive absenteeism despite repeated warnings and was accompanied by a five-day disciplinary layoff; that the next two warning notices dated September 1, 1970 and October 20, 1970 dealt with alleged negligence in the operation of a hoist and failure to abide by a safety rule regarding the wearing of safety glasses; that the last warning notice, dated April 6, 1971, read in relevant part as follows:

"Nature of Violation: POOR ATTENDANCE HABITS
This notice is being written to advise this employee that the validity of his recent extended absence, although covered by a medical doctor, is questionable in the eyes of the Company due to the conflict of various telephone reports of absence regarding this time period.

Disciplinary Action:
The Warning Notice issued 8/7/70, with reference to discharge for failure to correct poor attendance habits, is still in effect. Since the five (5) day suspension in August 1970, this employee has been absent 76 days, for a variety of reported reasons (sometimes two different reasons for the same day) which indicates a total disregard on the employee's part to correct his problem and save his job. The Company's posture is unchanged and immediate correction must come."

6. That thereafter the Complainant was not absent from work, except for two weeks of vacation taken in the last part of April, 1971 and a holiday taken on May 12, 1971, until June 14, 1971; that on June 14, 1971 the Complainant left work three hours early; that on June 30, 1971, the Complainant was absent from work; that on July 8, 1971 the Complainant was approximately 30 minutes late for work; that on July 13, 1971 the Complainant was absent from work; that on July 16, 1971 the Complainant began work one hour after his scheduled starting time and finished work one hour after his scheduled quitting time; that on July 27, 1971 the Complainant was absent from work; and that on July 30, 1971 the Complainant was absent from work;

5/ The term "absenteeism" is used herein to denote lost time due to absences, tardiness and early departure regardless of the reason for the absenteeism or whether the absenteeism was excused or unexcused.

7. That during the late afternoon or evening of August 4, 1971, the Complainant was called into a meeting attended by his immediate supervisor, Lloyd Hartford, Manufacturing Manager, and Robert Foulston, Assistant Manager of Labor Relations, on behalf of the Respondent, and Pat Salome, President, Everett C. Pearson, Chief Steward, and Ernest Shellhammer, Union Steward, on behalf of the Union; that the purpose of said meeting was to review the Complainant's absenteeism rate which his supervisor, Hartford and Foulston maintained was unacceptable and cause for discharge; that during said meeting Hartford said words to the effect that he did not want to review the Complainant's absenteeism prior to his (Hartford's) recent employment by the Respondent and that he wished only to discuss the Complainant's recent absenteeism; that consequently most of the discussion at said meeting focused on the Complainant's absenteeism in June and July, 1971; that during said discussion it was established that the Respondent's records erroneously indicated that the Complainant was absent for eight hours on July 2, 1971 when in fact he had worked a full shift on that day; that the Complainant stated that he left work early on June 14, 1971 because it was excessively hot; that the Complainant stated that he did not report for work on June 30, 1971 because it was excessively hot; that the record does not establish what reason, if any, the Complainant gave for being 30 minutes late for work on July 8, 1971; that the grievant stated that he had gone to the dentist to take care of a dental problem on July 13, 1971; that the record does not disclose whether there was any discussion of the Complainant's reason for beginning work one hour after his scheduled starting time and finishing work one hour after his scheduled quitting time on July 16, 1971; that the grievant stated that he was absent on July 27 and 30 because he was ill and that even though he had not been to see a doctor, a fellow employe had witnessed his having severe stomach pain on the afternoon of July 29, 1971; that Salome, Pearson and Shellhammer urged the Company to consider the grievant's long years of service with the Respondent and not to discharge him; that at the conclusion of said meeting the Complainant was advised that he was suspended from work pending possible discharge and that the Company would "reconsider" its position after he provided the Company with evidence that he had been to see the dentist on July 13 and that he had suffered severe stomach pain on the afternoon of July 29, 1971.

8. That sometime thereafter, probably on August 5, 1971, Salome approached Hartford and asked him about Mahnke's suspension; that Salome mentioned the fact that Mahnke was prepared to provide the Company with the evidence discussed in the meeting on the prior day and Hartford responded to the effect that Mahnke had a record of absenteeism that was "atrocious" and that he "should have been fired a long time ago"; that Salome pointed out that Hartford had indicated on August 4, 1971 that he was not interested in Mahnke's prior record of absenteeism and Hartford indicated that he did not wish to discuss the matter further; that as a result of this conversation, Salome concluded that Mahnke would be discharged because of his overall record of absenteeism regardless of whether Mahnke produced the evidence discussed on August 4, 1971.

9. That on Friday, August 6, 1971, the Complainant provided the Company with evidence which purported to establish his claim that he had been to the dentist on July 13, 1971 and that he had suffered severe stomach pain on July 29, 1971; that on Monday, August 9, 1971 the Respondent's agents determined to discharge the grievant; that thereafter, probably on August 11, 1971, the Complainant was advised that he was discharged effective Monday, August 9, 1971 for excessive absenteeism; that on August 11, 1971, Shellhammer wrote out a grievance in longhand protesting said termination and obtained Mahnke's signature; that said grievance was later typewritten and reads in relevant part as follows:

> "The Co. called me to a meeting on Aug. 4, 1971 accused me of excessive absenteeism without having good reason. The total days discussed was 5 days since April 6, 1971. One of these days was June 30, which Mr. Hartford said was excussable [sic] because of the heat factor. Another day was on July 2nd which was incorrect

on the record. I did work on the 2nd. On July 13th, I was absent because of dental work and on July 27, I was absent because of illness. I did work on July 28th and 29th and missed on July 30. Although I was ill on the 28th and 29th, I did come into work. When I requested not to work overtime I was told by my foreman that it was scheduled overtime and that I must work it. All of the above was brought out at the meeting with the Co. to verify the absenteeism for July 13 and July 27 and 30. I said I did not see a doctor on the 27th or 30th of July. The Co. then said I should get the slip from the dentist and a note from an employee who could varify [sic] the fact that I was sick, and that if I did this the Co. would reconsider the case. I brought in the data they requested and was then notified on August 9th that I was terminated. Yet, the same foreman who condemned me is allowed by the Co. to come in late for work several times a week and cause a hardship on the employees without the Co. taking any action against this foreman. The Union has written many grievances against this foreman for his attitude and all have been ignored by the Co. It has always been my belief that the foreman sets the example for the employees to follow. I ask the Co. to answer what kind of attitude the employees should have when they have a foreman such as this. I also request that the Co. reinstate me on my job with severe restrictions that I must adhere to, so I can prove to the Co. that I am trying to be a good employee and that I do not just take time off work with complete disregard for the Co."

10. That on August 30, 1971, James Kaja then Manager of Industrial Relations and Pearson entered into a written stipulation advancing said grievance to the "third written step" (fourth step) with the following statement:

"In view of the fact that the second step parties were involved in the original determination to discharge the aggrieved, it is hereby stated that this grievance should be passed on to the third written step of the procedure."

11. That on September 14, 1971 a meeting was held at the "third written step" (fourth step) of the grievance procedure; that said meeting was attended by Kaja and Foulston on behalf of the Company and Stan Bugnacki Vice President, Pearson and Shellhammer on behalf of the Union; that the Complainant was in attendance at said meeting; that during said meeting the Company and Union representatives reviewed the Complainant's absenteeism record and the Union representatives took the position that the Complainant should be reinstated; that said representatives argued among other things that the grievant's absenteeism was due to health problems and that he should be given another chance and that his termination was contrary to an alleged agreement reached with Hartford on August 4, 1971 that the Complainant would not be terminated if he could document the reasons for his absence on July 13 and 30, 1971; that the Company representatives took the position that the Complainant's absenteeism record warranted discharge even if it was due to legitimate health problems and that he had been given sufficient warnings in the past; that the Company representatives denied that there was an agreement not to discharge the grievant if he provided the documentation in question; that on September 24, 1971, Kaja provided the Union with an answer at the "third written step" (fourth step) which read as follows:

"A reevaluation of all the facts relating to this case was made by all concerned parties. The aggrieved employee had been given sufficient warnings in the past regarding his poor attendance. While some of the absences were allegedly beyond the employee's control there still are strong evidences against the employee's true concern for his job. The company judges it has already granted all the 'chances' to the aggrieved that any efficient profit-making organization dare allow. The grievance is hereby denied."

12. That thereafter Salome and Pearson met with Howard Davis, the Union's attorney for the purpose of discussing a number of grievances including the Mahnke grievance; that after discussing the merits of the Mahnke grievance Davis advised Salome and Pearson that in his opinion the grievance was not "winnable" in arbitration and that he advised against arbitrating said grievance; that thereafter on October 14, 1971, the Union's Executive Board met for the purpose of discussing matters of concern to the Union including the status of various grievances; that although the Complainant was generally aware that the Union's Executive Board had the responsibility for acting on grievances, including the making of decisions of whether or not to arbitrate grievances, he was not specifically advised that said meeting was going to take place or that his grievance was going to be discussed and he did not attend said meeting; that at said meeting Pearson discussed the Mahnke grievance and after discussing Mahnke's length of service, his prior suspension, and his record of absenteeism the members of the Executive Board agreed that Mahnke's grievance was without merit and should not be appealed to arbitratio that the minutes of said Board meeting contain the following reference to the Mahnke grievance:

> "He [Pearson] reported the discharge of Harold Mahnke because of his atrocious attendance work record. How can a union defend a member for his absenteeism? The board felt that we should not pursue this case any further."

13. That on October 24 there was a regular membership meeting of the Union held for the purpose of discussing union business including the status of grievances and the review of actions taken by the Executive Board with regard to particular grievances; that said meeting was the first such meeting to be held subsequent to the third step meeting on September 14, 1971; that although the Complainant was not advised that his grievance was going to be discussed at said meeting he was generally aware that pending grievances were normally reported on by a representative from the Executive Board at membership meetings; that the Complainant knew or should have known that a membership meeting was going to take place on October 24, 1971 because such meetings are normally held on the fourth Sunday of each month and because the times and places of such meetings are published and made readily available to all Union members; that the grievant did not attend the membership meeting which was held on October 24, 1971; that at said meeting Pearson discussed the current status of a number of grievances including the Mahnke grievance; that Pearson reported that the Executive Board did not believe that the grievance should be taken to arbitration and that the Union's attorney had advised against arbitration; that the minutes of said membership meeting contained the following reference to the Mahnke grievance:

> "He [Pearson] reported the discharge of Harold Mahnke because of his poor attendance work record and adding what defense can the union give on absenteeism. The board felt that we should not pursue this any further and no action was taken from the floor."

14. That thereafter the Union's representatives took no steps to appeal Mahnke's grievance to arbitration; that the reason the Union's representatives failed to appeal Mahnke's grievance to arbitration was the judgment of said representatives that his grievance was without merit and not because of the cost involved or any claim on the Respondent's part that an appeal to arbitration would be untimely; that the conclusion of the Union's representatives that Mahnke's grievance was without merit was based on their evaluation of the merits of said grievance and the likelihood of success in arbitration and was not arbitrary or based on discriminatory motivation or other bad faith considerations.

15. That the grievance procedure set out above was intended by the parties to be the exclusive means for enforcing the provisions of the

1970-1973 collective bargaining agreement between the Respondent and the Union, that pursuant to the terms of that procedure, and in its role as the exclusive bargaining representative, the Union had the sole right to make the determination of whether to appeal grievances to arbitration consistent with its duty to fairly represent the employes covered by said agreement, including the complaintant.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

That, by the actions of its agents of refusing to invoke the Union's exclusive right to appeal the Complainant's grievance to arbitration, the Union did not fail in its duty to fairly represent the Complainant.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

That the amended complaint herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 13th day October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli

George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In his original complaint which was filed on May 16, 1972, the Complainant alleged that the Respondent discharged him in violation of Sections 111.06(f) and 111.06(g) of the WEPA 6/. With regard to his claim that the Respondent violated Section 111.06(f), the Complainant alleged that:

1. For two and one-half years prior to his discharge on August 9, 1971 he missed approximately 100 days from work for health reasons and that health reasons forced him to be tardy and leave early on certain occasions but that the reasons for his absences were verified by licensed physicians and that the Complainant informed the Respondent of these problems;

2. His absenteeism was therefore justified as a matter of law and the terms of the collective bargaining agreement; and

3. By discharging him for "failure to correct poor attendance habits" the Respondent violated the terms of the collective bargaining agreement which provides that the Respondent will grant sick leave for illness supported by proper medical authority, since the Complainant was not granted sick leave even though proper medical authority was presented to the Respondents.

In addition as part of his original complaint, the Complainant alleged as follows:

"6. That the complainant referred the matter of his discharge to his union for adjustment through the grievance procedure provided for in the collective bargaining agreement but the parties failed to agree on a disposition. That his labor representive [sic] referred to in paragraph five (5) refused to submit the issue of complainant's termination to arbitration as provided in the collective bargaining agreement, and therefore, the complainant has no other remedies within the collective bargaining agreement."

In its answer which was filed on May 30, 1972 the Respondent alleged, inter alia, that:

1. The Complainant was not ill at the time of his discharge; there was no occasion for granting sick leave at that time and the sick leave provisions are not a guarantee of continued employeyment;

2. The Complainant was discharged for good and just cause due to his poor attendance record; and

6/ The claim that the Respondent violated Section 111.06(g) was based on the fact that the Wisconsin Department of Industry, Labor and Human Relations made a default determination that the Complainant was entitled to unemployment compensation benefits which was not appealed by the Respondent. Examiner Bellman and the Commission rejected that claim as being based on a misconstruction of Section 111.06(g). The Commission's determination in that regard was upheld by the Circuit Court and was not appealed by the Complainant.

3. The Complainant filed a grievance which was not appealed to arbitration within the time limits set out in the agreement. 7/

In addition, the Respondent set out, as part of its answer, the following allegation:

"6. The respondent and the labor organization representing the claimant have had a collective bargaining relationship for many years, and collective bargaining agreements have been in effect between these parties during all these years and these agreements including the current one have contained provisions for the resolution of disputes concerning whether or not provisions of the Labor Agreement have been violated. These disputes settlement provisions have served the parties well over the years and many disputes similar to the one now brought by the claimant have been resolved in similar fashion under the collective bargaining agreement. The respondent, therefore, respectfully urges that the Wisconsin Employment Relations Commission should in its consideration of the instant complaint give weight to this long and successful collective bargaining relationship and allow to stand a dispute determination arrived at thereunder."

During the course of the hearing before Examiner Bellman, he attempted to determine with greater particularity what allegation the Complainant was making with regard to the Union's conduct in the handling of his grievance. By his counsel, the Complainant maintained that the reason the Union refused to proceed to arbitration was not due to "discrimination" or "an invidious motive" but was due to "reasons of Union finances". He indicated that the Complainant would present testimony that the cost of arbitrating the Complainant's grievance would have been from $800 - $1,200 and "that was the major consideration for not having this reviewed by an arbitrator." Also during the hearing before Examiner Bellman, the Respondent moved to dismiss the complaint on the basis that there was no "allegation of discrimination" and "no allegation of an overall improper proceeding within the framework of the collective bargaining agreement with the Company - Union . . ." Examiner Bellman directed the parties to brief the issue raised by the Respondent's motion.

In his brief to Examiner Bellman, the Complainant admitted that the Union was not guilty of "bad faith" but asserted the claim that the Complainant could still attempt to show that the Union was "arbitrary and discriminatory". The Examiner and the Commission both rejected this claim as untimely and noted further that the Complainant had admitted at the hearing that the Union's decision not to arbitrate was not based on "discrimination". Examiner Bellman and the Commission concluded that based on the Complainant's failure to allege any facts which would support the conclusion that the Union had refused to process the Complainant's grievance to arbitration for reasons which were in violation of its duty to fairly represent him, the complaint should be dismissed. 8/ The Circuit Court for Dane County reversed and remanded 9/ and the Commission appealed that judgment. In affirming the judgment of the Circuit Court the Wisconsin Supreme Court concluded that the Complainant "equivocated" on the

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7/ This was the first occasion that the time limits set out in the grievance procedure were raised as a defense by the Respondent.

8/ Supra, footnotes 1 and 2.

9/ Supra, foothote 3.

question of whether the Union had acted in good faith 10/ and stated in relevant part:

> "Even though counsel, in his preliminary statement, quite clearly stated he was relying only upon the cost of arbitration or [sic] justification for the union's failure to exhaust the contract grievance procedures, we do not think in this case the employee should be foreclosed from establishing a want of fair representation, if he can.
>
> We do not believe the United States Supreme Court intended a person in the position of Mahnke to be remediless. After twenty years of employment it is difficult to understand why, federal labor policy notwithstanding, he could be discharged, arguably in violation of his contract, and then denied a remedy merely because his union does not wish to spend the money necessary to vindicate his rights. Vaca, supra provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination."

The WERC cites Encina v. Tony Lama Co. (W.D. Texas 1970), 316 Fed. Supp. 239, affirmed (5th Cir. 1971), 448 Fed. 2d 1264, for the proposition that cost of arbitration is a legitimate consideration as to whether to arbitrate. The case clearly stands for the proposition that a union is entitled "to take into account the expense of arbitration, the requirements of the collective agreement, and the highly speculative chance of prevailing." Encina at page 245. Thus the case is not inconsistent with the view just expressed because factors other than costs alone entered into the decision.

This case should be remanded to the WERC to make a determination from all of the relevant evidence before it as to whether the union failed in its duty of fair representation to Harold Mahnke, its employee member. If it finds the union failed in its duty of fair representation then the employee should be permitted to pursue his claim. If the finding is that the union did not fail in its duty of fair representation, the employee will be foreclosed from further prosecution of his claim. The burden to establish the breach of a duty of fair representation is upon the employee Harold Mahnke." 11/

On February 28, 1975, the Commission appointed the undersigned Examiner pursuant to Section 111.07(5) of the WEPA for the purpose of conducting further hearing and issuing Findings of Fact, Conclusions of Law and Orders consistent with the judgment of the Court. Further hearing was held on the matter on May 6, June 24 and 25 and December 10, 1975. On September 22, 1975, and before resting his case in chief on December 10

10/ The Court based this conclusion on a statement made by counsel for the Complainant to Examiner Bellman that "the Union has not acted in this matter, I don't think, in good faith. . ." Supra, footnote 4 at p. 533.

11/ Supra, footnote 4 at 534-535.

1975 the Complainant filed an amended complaint which was substantially the same as the original complaint but amended paragraph six to read as follows:

> "[6] That Complainant referred the matter of his discharge to his union for adjustment through the grievance procedure provided for in the collective bargaining agreement, but the parties failed to agree on a disposition; that his labor representative referred to in paragraph 5 breached its duty owed to the Complainant, of fair and adequate representation, by refusing to make a good faith determination based on all relevant factors as to the merits of pursuing arbitration of the Complainant's cause; and that said labor representative arbitrarily refused to submit the issue of Complainant's termination to arbitration as provided in the collective bargaining agreement; and therefore, the Complainant has no other remedies within the collective bargaining agreement."

The Respondent filed an amended answer to the amended complaint which generally denied most of the matters asserted and alleged by way of affirmative defense:

1. That the Complainant was discharged for good cause;

2. That the Complainant's sole recourse under the terms of the collective bargaining agreement was to pursue the grievance and arbitration provisions set out therein and his grievance, which did not allege a violation of the sick leave provisions of the agreement, was not pursued to arbitration within the time limits contemplated;

3. That in filing the grievance, the Union sought reinstatement but did not seek backpay; and

4. It would violate Article I, Section 10 and the Fifth Amendment of the United States Constitution if the WERC or any other federal court or agency were to set aside or ignore the agreement between the Respondent and the Union that the terms of their collective bargaining agreement are to be enforced through the grievance and arbitration provisions set out therein.

ISSUES:

At the outset of the hearing, the Examiner indicated his intent to provide the Complainant an opportunity to present all of his evidence and arguments with regard to:

1. The question of whether the Union failed in its duty of fair representation to the Complainant; and

2. Whether the Complainant was discharged in violation of the collective bargaining agreement as alleged.

However, if it is found that the Union did not fail in its duty of fair representation, it will be unnecessary to reach the second issue presented.

POSITION OF THE COMPLAINANT ON THE ISSUE OF FAIR REPRESENTATION:

It is the Complainant's basic position, as set out in the amended complaint, that the Union refused to make a good faith determination based on all of the relevant factors as to the merits of pursuing arbitration and that it arbitrarily refused to submit the matter to arbitration. More specifically, the Complainant argues that:

1. The decision of the Union's membership not to arbitrate the Complainant's grievance was based on the recommendation of its Executive Board;

2. The decision of the Executive Board not to recommend arbitration was arbitrary because:

   a. It could not have been based on the cost of arbitration since the cost of arbitration was $800 - $1,200 and the Union had approximately $25,000 in savings;

   b. That it could not have been based on the ten-day time limit for appealing grievances since such limits were normally waived by the parties;

   c. It could not have been based on the merits of the grievance since the grievant was not subject to discharge under the terms of the agreement for medically justified absenteeism; and

   d. Their reliance on the advice of their attorney did not make the decision any the less arbitrary since he had never talked to the Complainant, did not see the Complainant's medical record and was not a labor relations specialist.

3. The Union's failure to advise the grievant of the decision not to arbitrate and that he could pursue arbitration at his own expense constituted a failure to fairly represent him.

RESPONDENT'S POSITION ON ISSUE OF FAIR REPRESENTATION:

The Respondent contends that the Complainant has failed to establish by a clear and satisfactory preponderance of the evidence that the Union failed in its duty to fairly represent him. The Respondent contends that:

1. The Union and Respondent have agreed in a succession of labor agreements that the sole and exclusive means of enforcing the agreement shall be the grievance and arbitration provisions contained therein;

2. The law is clear that before seeking redress for an alleged breach of a collective bargaining agreement an employe must first attempt to exhaust an exclusive grievance procedure including any provisions for arbitration;

3. The grievance procedure here gives the Union ultimate authority to determine whether a grievance should be processed to arbitration and it may, consistent with its duty of fair representation, settle or drop grievances short of arbitration; and

4. The Union's decision not to arbitrate Mahnke's grievance in this case was consistent with that duty because:

   a. The Complainant admits the Union was not discriminatorily motivated and bore no hostility toward him;

   b. The Complainant admitted at the hearing before Examiner Bellman and in his brief to Examiner Bellman that the Union did not act in bad faith; and

   c. The only claim made is that the Union acted arbitrarily, which claim is contradicted by the evidence.

The Respondent would appear to be correct in its contention that the thrust of the Complainant's argument at this juncture is that the Union acted arbitrarily in refusing to process his grievance to the arbitration step of the procedure. There is no evidence or argument presented that the Union acted discriminatorily or otherwise in bad faith. Furthermore, the record will not support a finding that the cost of arbitration was considered to be of controlling importance in the Union's decision not to arbitrate the Mahnke grievance. As noted above, the Complainant contended before Examiner Bellman that it was his understanding that the decision not to arbitrate his grievance was based primarily on financial considerations. This claim was apparently based on a casual comment allegedly made by Pearson to Mahnke in the hallway immediately prior to the hearing before Examiner Bellman. 12/

In his brief, the Complainant now contends that the decision of the Executive Board "finds no support in any economic factor which might have been considered". The Examiner agrees. The Union readily arbitrated a number of grievances during the period immediately before the filing of the Mahnke grievance and had sufficient financial resources to arbitrate his grievance at that time. Furthermore the evidence discloses that even if the grievant's version of his June 19, 1972 conversation with Salome and Pearson is accepted as true, the expense of arbitrating his grievance was not given any explicit consideration at the October 14, 1971 Executive Board meeting or the October 24, 1971 membership meeting.

On the contrary, it is clear from the evidence developed that the Union concluded that his grievance had no merit under the terms of the agreement. Its determination in that regard was consistent with its decision in approximately 12 prior cases involving the same or similar problems of alleged excessive absenteeism none of which had ever been processed to the fourth step. While it is possible that the Union did not have the benefit of the advice of the Union's attorney before the Executive Board meeting in question, it is clear that his advice was also considered by Pearson, Salome and ultimately the Union's membership.

The Complainant now contends that the Union's decision not to arbitrate was an "irrational" choice of conduct. However, in analyzing the arguments offered in support of that contention, it is clear that the Complainant is really contending that the Union's judgment that the grievance was without merit was wrong.

The Complainant's arguments are all premised on the theory, first raised in his 1972 complaint, that the Respondent violated the sick leave provision of the agreement by failing to place him on sick leave or that the sick leave provision of the agreement precluded his discharge if the reason for his prior absenteeism was medically related. The short answer to this contention is that the Respondent and the Union are in apparent agreement that under the terms of their agreement the Respondent may discharge an employe for excessive absenteeism even if it is medically related. 13/ However, the record also discloses that the grievant alleged

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12/ Mahnke testified that Pearson stated that "it would have been too expensive" to arbitrate his grievance in response to an inquiry by himself or his attorney as to why the Union hadn't taken his case to arbitration. Pearson denied ever making such a comment.

13/ There is no evidence disclosing what outside considerations were taken into account by the Union's attorney in rendering his advice that the grievance was not "winnable" in arbitration. However, a number of published arbitration awards recognize the right of an employer to terminate employes for excessive absences even where they are due to illness. See generally Elkouri and Elkouri How Arbitration Works (BNA 1973) at p. 545-546.

at the time that he was physically able to work and the grievance which he filed specifically asked that he be returned to work. Furthermore the grievant thereafter sought and obtained unemployment compensation benefits which are premised on the applicant's continuing availability for work. With the regard to that aspect of the claim that the Respondent could not discharge the Complainant because his past absenteeism was medically related, the Respondent maintained at the time and continues to maintain that much of his absenteeism was unexcused and unexplained and that some of the medical explanations offered were questionable. Finally, the record discloses that the Union has for a number of years and in a number of cases, recognized the Respondent's right under the agreement to discharge an employe for excessive absenteeism even if it is medically related.

From all of this it would appear that there was no violation of the duty to fairly represent the Complainant when the Union made the judgment on the merits not to take his grievance to arbitration. In the words of the United States Supreme Court:

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in prefunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L.M.R.A. sec 203(d), 29-U.S.C. sec. 173 (d), Congress declared that 'Final adjustment by a method agreed upon by the parties themselves is . . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.' In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956)." 14/

At the hearing the Complainant testified that he was advised by Pearson to await the outcome of his unemployment compensation appeal and if he prevailed in his appeal of the initial determination the Union would then decide whether to proceed to arbitration and that the Union never advised him that they had decided to drop his grievance even though he ultimately prevailed in his appeal. According to the grievant when he did prevail, he was then told that it was "too late".

Pearson denied ever telling the grievant that the Union would await the outcome of the unemployment compensation appeal before deciding whether to go to arbitration or advising him thereafter that it was "too late". At the hearing, the Complainant indicated a tendency on his part to forget facts which were damaging to his case, such as his presence at the September 14, 1971 meeting which was clearly established by the other evidence and his own handwritten appeal in the

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14/ Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369, at p. 2377 (1967).

unemployment compensation proceeding, and a tendency to reconstruct events and conversations in a way which casts a favorable light on his case, such as his description of the decision not to discharge him in 1970 and the discussion which took place on August 4, 1971. For this reason, the Examiner does not credit the Complainant's version of what he was told about his unemployment compensation appeal.

Finally, with regard to Mahnke's claim that he was never advised about the decision of the Executive Board and Union membership not to appeal his grievance to arbitration, the testimony indicates that Mr. Pearson was unable to contact him by phone and that Shellhammer had been directed to advise the grievant of the outcome. Shellhammer did not testify. Based on the credible evidence of record, the undersigned is inclined to believe that the Complainant did not learn of the Union's action until sometime after the decision had been made. However, that fact alone does not establish that the Union's decision not to arbitrate his grievance was arbitrary. While it is undisputed that no one on behalf of the Union ever advised Mahnke that he could arbitrate his grievance at his own expense, such fact is irrelevant in view of the fact that the grievance procedure is exclusive 15/ and under that procedure only the Union may process a grievance beyond the second step. Nowhere in the agreement has the Respondent agreed to arbitrate grievances with individuals.

Based on the above and foregoing, and the record as a whole, the undersigned concludes that the Union did not fail in its duty to fairly represent the Complainant and that therefore the complaint should be dismissed.

Dated at Madison, Wisconsin this 13th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

15/ Supra, footnote 4 at p. 530.