VACA CASE

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| HAROLD J. MC DANIELS,<br><br>Complainant,<br><br>vs.<br><br>GREY IRON FOUNDRY, INC., and LOCAL 125, INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO,<br><br>Respondents. | Case II<br>No. 16118 Ce-1450<br>Decision No. 11383-A |

Appearances:
Mr. Ralph Lessing, Attorney at Law, for the Complainant.
Brady, Tyrrell, Cotter & Cutler, Attorneys at Law, by Mr. David Jarvis, and Mr. Fred Groiss, for the Respondent-Employer.
Gratz, Shneidman & Myers, Attorneys at Law, by Mr. Robert Gratz, for the Respondent-Union.

FINDINGS OF FACT, CONCLUSIONS 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 Stanley H. Michelstetter II, 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 Milwaukee, Wisconsin, on December 6, 1972 before the Examiner, wherein at the close of the Complainant's case, the Respondents joined in a motion to dismiss the Complaint on the grounds that the Complainant failed to present sufficient evidence to warrant a conclusion that a violation of the Wisconsin Employment Peace Act was committed by either Respondent; and the Examiner having considered the evidence, arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. That Harold J. McDaniels, hereinafter referred to as "Complainant", is an individual presently residing at 2119 West Brown Street, Milwaukee, Wisconsin.

2. That Grey Iron Foundry, Inc., hereinafter referred to as "Respondent-Employer", is a corporation engaged in the manufacture of various metal products, with facilities located in West Allis, Wisconsin. That Respondent-Employer is an employer engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, as amended.

3. That Local 125, International Molders & Allied Workers Union, AFL-CIO, hereinafter called "Respondent-Union", is a labor organization having offices at 1909 West Forest Home Avenue, Milwaukee, Wisconsin.

4. That at all times material herein, the Respondent-Employer has recognized the Respondent-Union as the exclusive bargaining representative of certain of its employes.

5. That at all times material herein, the Respondent-Employer and Respondent-Union have been signators to a collective bargaining agreement covering wages, hours and working conditions of said employes and, among other provisions, provides a grievance procedure with a final step of final and binding arbitration as follows:

"ARTICLE X

GRIEVANCES & ARBITRATION

. . .

2. Any dispute, difference, disagreement or controversy of any nature or character, whether or not a grievance between the Union and Company which has not been satisfactorily adjusted within fifteen (15) working days after the initiation of conferences between representatives of the Union and the Company shall be promptly referred to arbitration by either party hereto as follows:

(a) The party requesting arbitration shall notify the other party in writing of its desire to arbitrate, setting forth the items in dispute and naming its selected arbitrator. Upon receipt of such notice the receiving party shall thereupon notify the serving party of its selection of an arbitrator, whereupon the two members of the arbitration

board thus selected shall meet within five (5) days of the request for arbitration. The two arbitrators thus selected shall select a third impartial member who shall act as Chairman of the Board of Arbitration. If within three (3) days the two named arbitrators fail to agree upon the third, then at the request of either party, he shall be selected under the Voluntary Labor Arbitration Rules, then obtaining, of the American Arbitration Association and the arbitration shall proceed thereunder.

(b) The majority decision of the Arbitration Board shall be final and binding upon the parties.

. . .

ARTICLE XII

DISCHARGE CASES

1. In the event of the discharge of an employee after the date hereof, and he believes he has been unjustly dealt with, such a discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event that it should be decided through such grievance procedure that an injustice has been dealt the employee with regard to discharge, the Company shall reinstate such employee with full compensation at the employee's regular rate for the time lost, such cases of discharge to be taken up within five (5) working days from the date of discharge."

6. That on July 31, 1963, Respondent-Employer employed Complainant as a squeezer-molder and, in that regard, assigned Complainant to the production of certain types of molds which assignment began in October, 1969 and continued until Complainant's discharge.

7. That Complainant filed two grievances with respect to the piece work rate for such assignment and the method of performance thereof, the last such grievance having been filed approximately in the first week of October, 1971. That Respondent-Union processed the first grievance to resolution and the second grievance through all steps of the grievance procedure except arbitration because arbitration was not requested by Complainant.

8. That on or before October 21, 1971, while Complainant was preparing to produce molds pursuant to the aforementioned assignment, the sand hauler delivered to Complainant's work area a load of sand to be used in such molding. That Complainant informed the sand hauler that it was his opinion that said sand was unfit for such molding. That, in accordance with accepted plant procedure, the sand

hauler reported the conclusions of the Complainant to Complainant's foreman who instructed the sand hauler to instruct Complainant to use said sand in such molding. That the sand hauler relayed such instructions to Complainant, who thereupon used said sand without further objection or discussion with anyone else. That of 56 molds produced with said sand, 26 molds were scrap.

9. That on October 21, 1971 the Respondent-Employer, having concluded that the incident described in paragraph 8 constituted the intentional production of scrap by Complainant, discharged Complainant. That immediately thereafter on the same day, members of the Respondent-Union's shop committee attempted to have Complainant reinstated and, upon the Respondent-Employer's refusal to reinstate Complainant, filed a written grievance seeking Complainant's reinstatement.

10. That on or about October 23, 1971, the Complainant met with Respondent-Employer's representatives, Respondent-Union's shop committee and Respondent-Union's business representative, at which meeting the Respondent-Employer refused to reinstate Complainant on the basis of its position that Complainant had intentionally produced scrap.

11. That, after the meeting described in paragraph 10, the Respondent-Union's business representative and other representatives and Respondent-Employer's representatives met with respect to Complainant's grievance without Complainant present, at which meeting the Respondent-Employer displayed to all present the scrap produced by Complainant as described in paragraph 8 and at which meeting the Respondent-Employer refused to reinstate Complainant because he had intentionally produced such scrap.

12. That at all times relevant hereto, Complainant reiterated to his shop steward who was a member of Respondent-Union's shop committee that he desired to have his grievance processed to the fullest extent possible. That the members of the Respondent-Union's shop committee, Respondent-Union's business representative and the Respondent-Union's Executive Board all knew of and understood Complainant's stated desire as a request that the Respondent-Union process Complainant's grievance to arbitration.

13. That Respondent-Union's business representative conducted an investigation whereby he gained knowledge of all the foregoing

facts. That on the basis of those facts he concluded that Complainant intentionally produced scrap, in that, during the incident described in paragraph 8, he failed to stop producing scrap and again consult his foreman.

14. That after the meeting described in paragraph 11, Respondent-Union's business representative appeared before Respondent-Union's Executive Board and urged that Complainant's grievance not be taken to arbitration. That the Executive Board, in good faith, refused to take the grievance to arbitration.

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

## CONCLUSIONS OF LAW

1. That Complainant Harold J. McDaniels by having requested that Respondent-Union Local 125, International Molders and Allied Workers Union, AFL-CIO process his grievance concerning his discharge and Respondent-Union having processed said grievance through all steps of the grievance procedure except the last, and Complainant having requested that the Respondent-Union pursue his grievance to the furthest extent, sufficiently attempted to exhaust the grievance procedure provided in the applicable collective bargaining agreement.

2. That the Respondent-Union, having in good faith, after an investigation which developed all relevant facts, determined that the aforementioned grievance lacked merit and, on that basis, having decided not to process such grievance to final and binding arbitration as provided in the applicable collective bargaining agreement, did not violate its duty to fairly represent Complainant.

3. That on the basis of the foregoing Conclusions of Law, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent-Employer breached its collective bargaining agreement with Respondent-Union thereby violating Section 111.06 (1) (f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and

Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Complaint of unfair labor practices filed in the instant matter be, and the same is, dismissed.

Dated at Milwaukee, Wisconsin, this 28th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant, Harold J. McDaniels, was hired by Respondent-Employer, Grey Iron Foundry, Inc., on July 31, 1963. Pursuant to a continuing assignment of producing a certain type of mold, on or before October 21, 1971, Complainant refused to use a certain load of sand in such production. Complainant's foreman through a third party directed Complainant to use such sand. Complainant used such sand without any further objection, producing a substantial amount of scrap. On October 21, 1971 the Respondent-Employer discharged Complainant for having intentionally produced such scrap. After processing Complainant's grievance through all the steps of the grievance procedure, except final and binding arbitration, the Respondent-Union knowing Complainant wanted such grievance taken to arbitration refused to do so on the basis of its conclusion that Complainant had indeed intentionally produced such scrap by having not stopped production thereof and reported the situation to his foreman again.

DISCUSSION

Before the Examiner will reach the merits of Complainant's claim that the Respondent-Employer violated the applicable collective bargaining agreement between the Respondents in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act, the Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that such attempt was frustrated by the Union's breach of its duty of fair representation. [1/]

EXHAUSTION OF GRIEVANCE PROCEDURE:

The Examiner does not understand either Respondent to seriously contend that Complainant did not sufficiently attempt to exhaust the applicable grievance procedure. The evidence clearly establishes that Complainant requested and received Respondent-Union's assistance through all steps of the applicable grievance procedure except arbitration, and that such arbitration was available to Complainant only with union representation. It is uncontroverted that Complainant repeatedly told the then shop steward that he wanted his grievance "pushed". Both Respondent-Union's business representative and

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1/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); American Motors Corp. (7988-B) 10/68.

the Respondent-Union's Executive Board understood the foregoing as a request for arbitration; but, nevertheless, the business representative urged the Executive Board to refuse to process Complainant's grievance to arbitration, and the Executive Board did so refuse. Complainant's attempt to exhaust the applicable grievance procedure was clearly sufficient under applicable case law. [2/]

VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

The parties all agree that the Union processed Complainant's grievance in good faith. Complainant urges that such processing was perfunctory and arbitrary, citing Respondent-Union's processing of Complainant's previous grievances and what the Complainant claims was the Respondent-Union's baseless and absolutely inaccurate decision that Complainant intentionally produced scrap.

1. Previous Grievances:

The Complainant's argument that the settlement of previous grievances with the Employer is evidence of the Respondent-Union's tendency to give Complainant's grievances "perfunctory handling", cannot be sustained. Grievance procedures exist for the settlement of grievances, arbitration, where it exists, being reserved for those grievances which, after all honest efforts have been made by both parties, cannot be resolved. Absent a showing of arbitrary or bad-faith resolution of previous grievances, evidence of previous settlements, not themselves germane to the issue at hand, is irrelevant. [3/] Since no such showing has been made, the Examiner expressly disregards the evidence of settlements of previous grievances.

2. Processing:

Complainant asserts that Respondent-Union's processing of his grievance was "perfunctory". The evidence clearly establishes that Respondent-Union made an investigation which at least developed all of the evidence presented by Complainant in his own behalf at hearing in this matter. Complainant cannot assert that such would be sufficient for the Examiner to decide this matter but insufficient

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[2/] American Motors (7488) 2/66; Kroger Company (10004) 11/70; and Woodland Foundry (11294-A 2/73.

[3/] Cf., American Motors Corporation (7283) 9/65. (Union may in good faith and without arbitrary conduct settle grievance against will of grievant, prejudicing his rights to proceed further.)

for the Respondent-Union to base its decision on. Such investigation cannot be concluded to be "arbitrary" or "perfunctory". [4/]

The uncontroverted evidence further establishes that Respondent-Union, in a good faith, earnest effort to remedy the grievance, processed Complainant's grievance through all but the last step of the applicable grievance procedure and, on the basis of the aforementioned investigation, in good faith refused to take the grievance to the last step, arbitration. No challenge is or could be made to such procedure. [5/]

3. Decision Not to Arbitrate:

Thus, Complainant's fundamental argument is that the decision of Respondent-Union not to arbitrate his grievance was clearly wrong and, thus, arbitrary. Complainant's position is based on the evidence that Complainant refused a load of sand, that, through a third party, Complainant's foreman directed him to use such sand, and that Complainant without further objection used such sand, thereby producing a substantial amount of scrap. This, Complainant argues, squarely contradicts the Respondent-Union's grounds for refusing to arbitrate Complainant's grievance, that Complainant did not report the situation to his foreman. The evidence, however, establishes that Respondent-Union concluded that Complainant had the duty to stop such production of scrap and again report the situation, including the fact that the molds were turning out to be scrap, to his foreman, and that Complainant's failure to do so was sufficient grounds for discharge under the applicable collective bargaining agreement. Thus, Respondent-Union's decision was not arbitrary but merely a disagreement as to the validity of Complainant's grievance. As such, it is for the Respondent-Union, not the Examiner, to, in good faith, upon investigation, determine the credibility of the grievant and supporting witnesses, and to, in good faith, interpret the meaning of the collective bargaining agreement to which it is a party. [6/] The Examiner will not substitute his judgment for that of Respondent-Union and, therefore,

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[4/] Kroger Company (10004) 11/70.

[5/] Vaca v. Sipes, supra; Kroger, supra.

[6/] American Motors Corporation (7988-B) 11/68; American Motors Corporation (8385) 2/68.

refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission over Complainant's Complaint of unfair labor practice.

Dated at Milwaukee, Wisconsin, this 28th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II, Examiner

STATE OF WISCONSIN

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## FINDINGS OF FACT, CONCLUSIONS 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 Stanley H. Michelstetter II, 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 Milwaukee, Wisconsin, on December 6, 1972 before the Examiner, wherein at the close of the Complainant's case, the Respondents joined in a motion to dismiss the Complaint on the grounds that the Complainant failed to present sufficient evidence to warrant a conclusion that a violation of the Wisconsin Employment Peace Act was committed by either Respondent; and the Examiner having considered the evidence, arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. That Harold J. McDaniels, hereinafter referred to as "Complainant", is an individual presently residing at 2119 West Brown Street, Milwaukee, Wisconsin.

2. That Grey Iron Foundry, Inc., hereinafter referred to as "Respondent-Employer", is a corporation engaged in the manufacture of various metal products, with facilities located in West Allis, Wisconsin. That Respondent-Employer is an employer engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, as amended.

3. That Local 125, International Molders & Allied Workers Union, AFL-CIO, hereinafter called "Respondent-Union", is a labor organization having offices at 1909 West Forest Home Avenue, Milwaukee, Wisconsin.

4. That at all times material herein, the Respondent-Employer has recognized the Respondent-Union as the exclusive bargaining representative of certain of its employes.

5. That at all times material herein, the Respondent-Employer and Respondent-Union have been signators to a collective bargaining agreement covering wages, hours and working conditions of said employes and, among other provisions, provides a grievance procedure with a final step of final and binding arbitration as follows:

"ARTICLE X

GRIEVANCES & ARBITRATION

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2. Any dispute, difference, disagreement or controversy of any nature or character, whether or not a grievance between the Union and Company which has not been satisfactorily adjusted within fifteen (15) working days after the initiation of conferences between representatives of the Union and the Company shall be promptly referred to arbitration by either party hereto as follows:

(a) The party requesting arbitration shall notify the other party in writing of its desire to arbitrate, setting forth the items in dispute and naming its selected arbitrator. Upon receipt of such notice the receiving party shall thereupon notify the serving party of its selection of an arbitrator, whereupon the two members of the arbitration

board thus selected shall meet within five (5) days of the request for arbitration. The two arbitrators thus selected shall select a third impartial member who shall act as Chairman of the Board of Arbitration. If within three (3) days the two named arbitrators fail to agree upon the third, then at the request of either party, he shall be selected under the Voluntary Labor Arbitration Rules, then obtaining, of the American Arbitration Association and the arbitration shall proceed thereunder.

(b) The majority decision of the Arbitration Board shall be final and binding upon the parties.

. . .

ARTICLE XII

DISCHARGE CASES

1. In the event of the discharge of an employee after the date hereof, and he believes he has been unjustly dealt with, such a discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event that it should be decided through such grievance procedure that an injustice has been dealt the employee with regard to discharge, the Company shall reinstate such employee with full compensation at the employee's regular rate for the time lost, such cases of discharge to be taken up within five (5) working days from the date of discharge."

6. That on July 31, 1963, Respondent-Employer employed Complainant as a squeezer-molder and, in that regard, assigned Complainant to the production of certain types of molds which assignment began in October, 1969 and continued until Complainant's discharge.

7. That Complainant filed two grievances with respect to the piece work rate for such assignment and the method of performance thereof, the last such grievance having been filed approximately in the first week of October, 1971. That Respondent-Union processed the first grievance to resolution and the second grievance through all steps of the grievance procedure except arbitration because arbitration was not requested by Complainant.

8. That on or before October 21, 1971, while Complainant was preparing to produce molds pursuant to the aforementioned assignment, the sand hauler delivered to Complainant's work area a load of sand to be used in such molding. That Complainant informed the sand hauler that it was his opinion that said sand was unfit for such molding. That, in accordance with accepted plant procedure, the sand

hauler reported the conclusions of the Complainant to Complainant's foreman who instructed the sand hauler to instruct Complainant to use said sand in such molding. That the sand hauler relayed such instructions to Complainant, who thereupon used said sand without further objection or discussion with anyone else. That of 56 molds produced with said sand, 26 molds were scrap.

9. That on October 21, 1971 the Respondent-Employer, having concluded that the incident described in paragraph 8 constituted the intentional production of scrap by Complainant, discharged Complainant. That immediately thereafter on the same day, members of the Respondent-Union's shop committee attempted to have Complainant reinstated and, upon the Respondent-Employer's refusal to reinstate Complainant, filed a written grievance seeking Complainant's reinstatement.

10. That on or about October 23, 1971, the Complainant met with Respondent-Employer's representatives, Respondent-Union's shop committee and Respondent-Union's business representative, at which meeting the Respondent-Employer refused to reinstate Complainant on the basis of its position that Complainant had intentionally produced scrap.

11. That, after the meeting described in paragraph 10, the Respondent-Union's business representative and other representatives and Respondent-Employer's representatives met with respect to Complainant's grievance without Complainant present, at which meeting the Respondent-Employer displayed to all present the scrap produced by Complainant as described in paragraph 8 and at which meeting the Respondent-Employer refused to reinstate Complainant because he had intentionally produced such scrap.

12. That at all times relevant hereto, Complainant reiterated to his shop steward who was a member of Respondent-Union's shop committee that he desired to have his grievance processed to the fullest extent possible. That the members of the Respondent-Union's shop committee, Respondent-Union's business representative and the Respondent-Union's Executive Board all knew of and understood Complainant's stated desire as a request that the Respondent-Union process Complainant's grievance to arbitration.

13. That Respondent-Union's business representative conducted an investigation whereby he gained knowledge of all the foregoing

facts. That on the basis of those facts he concluded that Complainant intentionally produced scrap, in that, during the incident described in paragraph 8, he failed to stop producing scrap and again consult his foreman.

14. That after the meeting described in paragraph 11, Respondent-Union's business representative appeared before Respondent-Union's Executive Board and urged that Complainant's grievance not be taken to arbitration. That the Executive Board, in good faith, refused to take the grievance to arbitration.

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

## CONCLUSIONS OF LAW

1. That Complainant Harold J. McDaniels by having requested that Respondent-Union Local 125, International Molders and Allied Workers Union, AFL-CIO process his grievance concerning his discharge and Respondent-Union having processed said grievance through all steps of the grievance procedure except the last, and Complainant having requested that the Respondent-Union pursue his grievance to the furthest extent, sufficiently attempted to exhaust the grievance procedure provided in the applicable collective bargaining agreement.

2. That the Respondent-Union, having in good faith, after an investigation which developed all relevant facts, determined that the aforementioned grievance lacked merit and, on that basis, having decided not to process such grievance to final and binding arbitration as provided in the applicable collective bargaining agreement, did not violate its duty to fairly represent Complainant.

3. That on the basis of the foregoing Conclusions of Law, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent-Employer breached its collective bargaining agreement with Respondent-Union thereby violating Section 111.06 (1) (f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and

Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Complaint of unfair labor practices filed in the instant matter be, and the same is, dismissed.

Dated at Milwaukee, Wisconsin, this 28th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant, Harold J. McDaniels, was hired by Respondent-Employer, Grey Iron Foundry, Inc., on July 31, 1963. Pursuant to a continuing assignment of producing a certain type of mold, on or before October 21, 1971, Complainant refused to use a certain load of sand in such production. Complainant's foreman through a third party directed Complainant to use such sand. Complainant used such sand without any further objection, producing a substantial amount of scrap. On October 21, 1971 the Respondent-Employer discharged Complainant for having intentionally produced such scrap. After processing Complainant's grievance through all the steps of the grievance procedure, except final and binding arbitration, the Respondent-Union knowing Complainant wanted such grievance taken to arbitration refused to do so on the basis of its conclusion that Complainant had indeed intentionally produced such scrap by having not stopped production thereof and reported the situation to his foreman again.

## DISCUSSION

Before the Examiner will reach the merits of Complainant's claim that the Respondent-Employer violated the applicable collective bargaining agreement between the Respondents in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act, the Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that such attempt was frustrated by the Union's breach of its duty of fair representation. [1/]

EXHAUSTION OF GRIEVANCE PROCEDURE:

The Examiner does not understand either Respondent to seriously contend that Complainant did not sufficiently attempt to exhaust the applicable grievance procedure. The evidence clearly establishes that Complainant requested and received Respondent-Union's assistance through all steps of the applicable grievance procedure except arbitration, and that such arbitration was available to Complainant only with union representation. It is uncontroverted that Complainant repeatedly told the then shop steward that he wanted his grievance "pushed". Both Respondent-Union's business representative and

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1/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); American Motors Corp. (7988-B) 10/68.

the Respondent-Union's Executive Board understood the foregoing as a request for arbitration; but, nevertheless, the business representative urged the Executive Board to refuse to process Complainant's grievance to arbitration, and the Executive Board did so refuse. Complainant's attempt to exhaust the applicable grievance procedure was clearly sufficient under applicable case law. [2/]

VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

The parties all agree that the Union processed Complainant's grievance in good faith. Complainant urges that such processing was perfunctory and arbitrary, citing Respondent-Union's processing of Complainant's previous grievances and what the Complainant claims was the Respondent-Union's baseless and absolutely inaccurate decision that Complainant intentionally produced scrap.

1. Previous Grievances:

The Complainant's argument that the settlement of previous grievances with the Employer is evidence of the Respondent-Union's tendency to give Complainant's grievances "perfunctory handling", cannot be sustained. Grievance procedures exist for the settlement of grievances, arbitration, where it exists, being reserved for those grievances which, after all honest efforts have been made by both parties, cannot be resolved. Absent a showing of arbitrary or bad-faith resolution of previous grievances, evidence of previous settlements, not themselves germane to the issue at hand, is irrelevant. [3/] Since no such showing has been made, the Examiner expressly disregards the evidence of settlements of previous grievances.

2. Processing:

Complainant asserts that Respondent-Union's processing of his grievance was "perfunctory". The evidence clearly establishes that Respondent-Union made an investigation which at least developed all of the evidence presented by Complainant in his own behalf at hearing in this matter. Complainant cannot assert that such would be sufficient for the Examiner to decide this matter but insufficient

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for the Respondent-Union to base its decision on. Such investigation cannot be concluded to be "arbitrary" or "perfunctory". [4/]

The uncontroverted evidence further establishes that Respondent-Union, in a good faith, earnest effort to remedy the grievance, processed Complainant's grievance through all but the last step of the applicable grievance procedure and, on the basis of the aforementioned investigation, in good faith refused to take the grievance to the last step, arbitration. No challenge is or could be made to such procedure. [5/]

3. Decision Not to Arbitrate:

Thus, Complainant's fundamental argument is that the decision of Respondent-Union not to arbitrate his grievance was clearly wrong and, thus, arbitrary. Complainant's position is based on the evidence that Complainant refused a load of sand, that, through a third party, Complainant's foreman directed him to use such sand, and that Complainant without further objection used such sand, thereby producing a substantial amount of scrap. This, Complainant argues, squarely contradicts the Respondent-Union's grounds for refusing to arbitrate Complainant's grievance, that Complainant did not report the situation to his foreman. The evidence, however, establishes that Respondent-Union concluded that Complainant had the duty to stop such production of scrap and again report the situation, including the fact that the molds were turning out to be scrap, to his foreman, and that Complainant's failure to do so was sufficient grounds for discharge under the applicable collective bargaining agreement. Thus, Respondent-Union's decision was not arbitrary but merely a disagreement as to the validity of Complainant's grievance. As such, it is for the Respondent-Union, not the Examiner, to, in good faith, upon investigation, determine the credibility of the grievant and supporting witnesses, and to, in good faith, interpret the meaning of the collective bargaining agreement to which it is a party. [6/] The Examiner will not substitute his judgment for that of Respondent-Union and, therefore,

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Dated at Milwaukee, Wisconsin, this 28th day of March, 1973.

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