STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH P. KRAEMER, Complainant, vs. OSCAR MAYER & COMPANY, INC. and LOCAL 538 OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Respondents.	Case III No. 16472 Ce-1471 Decision No. 11591-B

Appearances:

Axley, Brynelson, Herrick & Gehl, Attorneys at Law, by Mr. William Haus, appearing on behalf of the Complainant.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Respondent Union.

Mayer, Brown & Platt, Attorneys at Law by Mr. Stuart Bernstein and Mr. Michael F. Rosenblum, appearing on behalf of the Respondent Employer.

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 appointed George R. Fleischli, a member of the Commission's staff to act as Examiner and 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 hearing on said complaint having been held at Madison, Wisconsin on April 9, May 14, May 24, and June 20, 1973 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Joseph P. Kraemer, hereinafter referred to as the Complainant or Kraemer, is an individual currently residing at 2833 Moland Street, Madison, Wisconsin and was at all times relevant herein a production employe of Oscar Mayer & Company until his employment was terminated on or about November 9, 1972.

2. That the Respondent, Oscar Mayer & Company, hereinafter referred to as the Respondent Company or Company, is an employer engaged in the processing and distribution of meat products at its Madison, Wisconsin plant and is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended, and Section 301 of the Labor Management Relations Act.

3. That the Respondent, Local 538 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter referred to as the Respondent Union or Union, is a labor organization and the collective bargaining representative of all production and maintenance employes employed by the Respondent Company at its Madison, Wisconsin plant.

4. That at all times material herein, the Respondent Company and Respondent Union were parties to a collective bargaining agreement establishing wages, hours and working conditions for all production and maintenance employes (including the Complainant) employed by the Respondent Company at its Madison, Wisconsin plant which contained the following provisions relevant herein:

"AGREEMENT

. . .

128. An employee who is laid off is required to state in writing:

a. Preference for work in
   (1) Other than his seniority department
      (a) Any shift
      (b) Day shift only
      (c) Night shift only
   (2) Seniority Department only
   (3) Part Time or Casual Employment

b. The address and phone number where he can be contacted for recall.

c. Any change of address or phone number. An employee who cannot be contacted for recall because of his failure to keep his address and phone number correct shall be considered a quit.
An employee who refuses to accept a certified recall letter shall also be considered a quit.

. . .

182. Employees shall be considered quit and be separated from the payroll if they:

. . .

i. Fail to report for work when recalled from a layoff within forty-eight (48) hours (unless excused for a longer period by the Company's Employment Office) after the Company has deposited in the United States Mail, postage prepaid, a certified letter directed to such employee at his last known address as shown by the records of the Company. It shall be the responsibility of the employee to keep his address and phone number current by advising the Employment Office of any changes.

. . .

Grievance Procedure

213. Procedure for handling grievances involving members of the Union shall be as follows:

a. The aggrieved employee, accompanied by the Department Steward if the employee desires, shall consult with the employee's foreman. If a group of employees are involved in the grievance, the Steward shall represent the employees. The grievance shall be discussed in the foreman's office or away from the employee's workplace.

b. In case of failure to arrive at a decision in the first step within twenty-four (24) hours, the foreman together with the aggrieved employee and the Steward shall take the grievance up with the Department Supervisor. It is understood that the Division Superintendent, if any, the Union Chief Steward, and the Union Business Representative may be called in at this time.

c. In case of failure to arrive at a decision in the second step, the grievance shall be referred to the Production Superintendent or the Mechanical Superintendent and the Union Business Representative or his deputy for settlement.

d. In case of failure to arrive at a decision in the third step, the grievance shall be referred to the Operations Manager and the Union Business Representative for settlement.

e. In case the grievance is not settled at the level of the Operations Manager, it shall be referred to the Vice President of Operations or his deputy and the International Union Vice President or his deputy for settlement.

f. In case of failure to arrive at a mutual agreement of the grievance between the Union and the Company in the above step e., the grievance shall be referred to arbitration immediately as hereinafter provided. If the Company refuses to submit the grievance to arbitration, the Union shall not be bound under the no strike provision of this Agreement.

g. The procedure of arbitration and the arbitrator shall be agreed upon between the International Union President and the Company President or their deputies. Arbitration costs shall be borne equally by the Company and the Union. The findings of the arbitrator shall be final and binding on all parties concerned.

h. The arbitrator shall have no right to modify, amend, or add to the terms of this Agreement or to require of the Company, the Union, or any employee of the Company any act which he is not required by law or by this Agreement to perform. It is understood that disputes regarding wages rates shall not be subject to arbitration and that disputes regarding work standards are subject to arbitration only as specifically provided in Section 104.
It is understood that general wage changes shall not be subject to arbitration.

i. At any step in this grievance procedure the Executive Board of the Local Union shall have the final authority, in respect to any aggrieved employee covered by this Agreement, to decline to process a grievance, complaint, difficulty or dispute further, if in the judgment of the Executive Board such grievance or dispute lacks merit or lacks justification under the terms of this Agreement, or has been adjusted or justified under the terms of this Agreement to the satisfaction of the Executive Board."

5. That at the end of his shift on Thursday, November 2, 1972, the Complainant was advised by Leonard W. Benson, the supervisor in the department that he was temporarily working in, that he was probably going to be laid off effective at the end of his shift on Friday, November 3, 1972 and he therefore completed and signed a layoff and recall preference form which contained the following information relevant herein:

"WORK PREFERENCE FOR LAYOFF AND RECALL FROM LAYOFF

Name Kramer (sic) Joseph P. Clock No. 36387

Address 706 Dexter St (Street) Madison (City)

Telephone (Area Code) 249-6573 (Number)

. . .

READ CAREFULLY

I understand that it shall be my responsibility to notify the Employment Office at Oscar Mayer & Co. of any change in my address and that failure to do so will result in loss of all rights if I cannot be reached when work is available.

. . .

Joe Kraemer /s/ (EMPLOYEE'S SIGNATURE) 11-2-72 (DATE) Leonard W. Benson /s/" (FOREMAN'S SIGNATURE)

6. That, pursuant to a request that he check with the Company's Employment Office on Friday, November 3, 1972 to make certain that there was no work for him on Monday November 6, 1972, the Complainant went to the Respondent Company's Employment Office on November 3, 1972 and was advised that there was still no work for him on November 6, 1972; that either on that same day or on Monday, November 6, 1972, the Complainant went to the Union's Business Office to get a Union withdrawal card and spoke to the Union's Financial Secretary-Treasurer and Business Manager, Gary N. Paske, who, in response to a question from the Complainant, told him that the layoff would probably last for "about two weeks or until deer season [which was a little more than two weeks away] when a number of employes would be taking vacation" or words to that effect; that, although Paske's estimate of the length of the layoff was based in part on a conversation with Brien Bloss, an Employment Interviewer in the Respondent Company's Employment Office, Paske did not tell Kraemer what basis, if any, he had for estimating the possible length of the layoff; that thereafter Kraemer had no other relevant conversation with anyone acting on behalf of the Respondent Company or Respondent Union before leaving Madison at 8:00 a.m. on Wednesday, November 8, 1972 for the purpose of helping his brother pick corn on his farm near Plain, Wisconsin, a city located approximately 50 miles from Madison, Wisconsin; that, although said farm had a telephone and an established mailing address, Kraemer took no steps to advise the Respondent Company's Employment Office of how he could be reached during his absence.

7. That on Monday, November 6, 1972 Jane Stuntebeck, a clerical employe working in the Respondent Company's Employment Office, attempted to contact Kraemer by phone at the number indicated by him on the layoff and recall preference form set out above (which was actually a friend's phone number) for the purpose of recalling him from layoff but received no answer; that on Tuesday, November 7, 1972 at approximately 7:45 a.m. Bloss sent Kraemer a recall notice by certified mail (return receipt requested) which read in relevant part as follows:

> "You are being recalled from layoff to Department #01 (Hog Kill) at 6:45 a.m. as of November 8, 1972. Please report to the department 15 minutes before the actual shift begins.
>
> If you have any further questions, feel free to contact me in the Employment Office."

8. That on November 8, 1973 at approximately 9:30 or 10:00 a.m. the United States Post Office attempted to deliver Bloss' letter set out above at Kraemer's home address as indicated by him on the layoff and recall preference form set out above and left a notice to that effect because there was "no response" to the attempted delivery; that the Complainant returned to Madison on Friday morning, November 10, 1972 and went immediately to the Company's Employment Office for the purpose of picking up his paycheck for his earnings for the previous week; that when the Complainant entered the Company's Employment Office Bloss advised him that the Company had tried to recall him from layoff and that his failure to respond within 48 hours after the recall notice was placed in the mail was a constructive quit under the terms of Section 182 (i) of the collective bargaining agreement set out above; that although Kraemer claims that he told Bloss that he went out of town because Paske told him the layoff would last "two weeks", Bloss and another employe in the Employment Office who claimed he was present, did not remember hearing Kraemer make such a statement; that shortly thereafter Kraemer and Bernard Gorman, another employe who had been similarly terminated, went to the Union's Business Office and talked to Paske about their individual situations and Paske called the Respondent's Personnel Manager, Harold Polzer and asked for an appointment for the purpose of discussing Kraemer's and Gorman's respective terminations. 1/

9. That Paske, Kraemer, and Gorman met with Polzer at about 1:00 p.m. on Friday, November 10, 1972; that at no time during the conversation did Paske contend that the Company was improperly applying the terms of the collective bargaining agreement but instead asked Polzer to reconsider the decision to terminate Kraemer and Gorman because of the hardship it would impose on the two men; that, although Kraemer and Gorman both explained at some length the individual circumstances surrounding their respective failures to respond to the recall notice within the prescribed time, the fact that Kraemer may have relied on Paske's statement that he thought the layoff would last "about two weeks" was probably not mentioned by Paske during the conversation but even if it was, neither Paske or Polzer remember that it was; that Polzer obtained information from Bloss which established that both Kraemer and Gorman had failed to comply with the 48-hour requirement and reminded Paske that the same rule had recently been applied to two other employes, Siegfried Maurer and Billie Mosley, in the spring of 1973 even though Paske had asked that exceptions be made in their cases for hardship reasons; that thereafter and shortly before the meeting ended, in response to a question by Polzer, Pasked admitted that he might be expected to assert a claim for back wages on behalf of Maurer and Mosely if an exception was made for Kraemer and Gorman since Maurer and Mosely were not reinstated and had been required to apply for re-employment; that throughout the discussion Paske took the position that an exception ought to be made on behalf of Kraemer and Gorman even though there was no contention that the Company had violated the collective bargaining agreement, and at the end of the discussion Polzer agreed to "think it over" for a few days and advise Paske of the Company's decision.

1/ Gorman filed a similar complaint with the Wisconsin Employment Relations Commission on February 12, 1973 which was consolidated for hearing with the instant complaint. During the second day of hearing on Kraemer's complaint, Gorman advised the Examiner that he desired to withdraw his complaint which was thereafter dismissed on May 16, 1973 (Decision No. 11613-B). All references to the Gorman grievance herein are for the sole purpose of establishing the manner in which the Kraemer grievance was handled by the Union and Company officials with particular regard to Kraemer's claim that he had been discriminatorily treated by both the Union and the Company.

10. That thereafter on November 17, 1972 Polzer called Paske and advised him that the Company had decided that no exception would be made and Kraemer and Gorman were going to be treated as constructive quits pursuant to Section 182 (i) of the collective bargaining agreement; that probably on the same day Kraemer and Gorman went to the Employment Office for a second time and possibly spoke with Polzer at which time they filled out applications for reemployment; that at the time that Kraemer filled out his application for reemployment he was of the opinion that such application would not preclude his further pursuing his grievance wherein he asked for reinstatement and at all times thereafter he has asked that his grievance be processed through the various steps of the contractual grievance procedure.

11. That on November 21, 1972, the Respondent Union's Executive Board met and, at Kraemer's request, considered the Kraemer and Gorman grievances; that Kraemer and Gorman were present throughout the discussion; that Paske, who is a member of the Executive Board, advised the Executive Board that in his opinion, the grievances were without merit but he would process them further if directed to do so; that at the end of the discussion, the Executive Board directed Paske to take the two grievances to the "next step" of the grievance procedure; that pursuant to the Executive Board's directive, Paske arranged for a meeting with John Paul, the Company's Operations Manager which occurred on December 1, 1972; that Roger Kinson, Production Supervisor and Polzer were also in attendance at the meeting on December 1, 1972, but that Kraemer and Gorman were not; that during the course of the meeting the Company representatives advised Paske that in the Company's opinion, the grievances were without merit and that they did not intend to make an exception to the 48-hour requirement in the case of Kraemer and Gorman; that, thereafter, Paske advised Gorman of the Company's decision by telephone but was unable to contact Kraemer by telephone.

12. That on December 12, 1972 the Respondent Union's Executive Board again met with Kraemer and Gorman and after a discussion of the merits of the two grievances, went into closed session to discuss what action to take with regard to Kraemer's request that they process the grievances to the arbitration step of the grievance procedure; pursuant to the Executive Board's usual practice in cases where it is considering arbitration, the employment history of the two grievants was discussed and it was pointed out that Kraemer had a disciplinary suspension in his record of employment with the Respondent Company; that in addition, references may have been made to the effect that Kraemer was not liked by the foreman in his department because of his willingness on one occasion to complain about working conditions to higher levels of supervision; that the Executive Board did not consider either of these differences between the two individual grievants to be of any significance since, in their opinion, both grievances were without merit under the terms of the collective bargaining agreement and the Executive Board resolved, by a vote of 11 to 0 with one abstention, not to pursue the grievances to the arbitration step of the grievance procedure; that Board Member Robert Schultz was of the opinion that the two grievances should be considered separately because of his belief that the differences referred to above should have some bearing on the decision as to whether to proceed to arbitration and he therefore abstained from the voting; that shortly thereafter, at a meeting of the regular membership of the Union, at which Kraemer was present and spoke, the Kraemer and Gorman grievances were discussed pursuant to the Union's established procedure of asking the membership to "approve" the minutes of Executive Board meetings; that during the discussion, Kraemer told the membership that Paske had stated that the layoff would last two weeks and Paske responded that his prediction was a routine one and a generality on which no one should rely; that during the discussion Francis Urschlitz, President of the Union and a member of the Executive Board reminded the membership that the Executive Board had the final authority under Section 213 (i) to decide whether to process a grievance to arbitration; that because

Kraemer, who had discussed his grievance with Robert M. McCormick, a Mediator on the staff of the Wisconsin Employment Relations Commission, had made certain representations to the Executive Board and membership with regard to the Union's legal obligations to process his grievance, a motion was made at the suggestion of Urschlitz that the Executive Board meet with McCormick for the purpose of discussing those obligations with McCormick directly and to attempt, if possible, to help settle the two grievances; that said motion passed and thereafter on December 15, 1972 Paske and Urschlitz, with the concurrence of the rest of the members of the Executive Board, sent Kraemer and Gorman a letter indicating that tentative arrangements had been made for McCormick to meet with Kraemer, Gorman, and the Executive Board on December 21, 1972 at the Union's office provided Kraemer and Gorman could be there; that thereafter because Kraemer failed to respond to said letter, Paske and Urschlitz wrote a second letter on December 26, 1972 advising Kraemer and Gorman that tentative arrangements had again been made for McCormick to meet with Kraemer, Gorman and the Executive Board on January 11, 1973 at the Union's office.

13. That a meeting was held by McCormick and another mediator on January 11, 1973 at the Union's office which was attended by Kraemer, Gorman, Paske, Urschlitz and the other members of the Executive Board for the purpose of discussing the Kraemer and Gorman grievances and the Board's refusal on December 12, 1972 to process said grievances to arbitration; that during the course of this meeting Kraemer reminded the Executive Board that Paske had expressed the opinion at the time of the layoff that the layoff would last "about two weeks" and he asked Paske to explain where he got his information in that regard; that Paske advised the Executive Board that his opinion was based in part on conversations with Brien Bloss and during the course of the discussion Gorman also pointed out that Ted Wagner, his supervisor, had also predicted that the layoff would last "about two weeks" and indicated that he was aware that a number of employes were of the same opinion because of the proximity of deer season; that at the conclusion of the discussion, McCormick offered to attempt to mediate the dispute with appropriate Company officials, if possible, and the Executive Board directed Paske to attempt to obtain the Company's concurrence to participate in mediation; that thereafter Paske contacted the appropriate Company official with a request that the Company agree to participate in mediation and the Company official declined indicating that the Company intended to rely on the established grievance procedure which did not provide for mediation; that on January 18, 1973, at a special meeting called for that purpose, Paske and Urschlitz advised the other members of the Executive Board that the Company had refused to participate in mediation and the Executive Board reaffirmed its decision of December 12, 1972 not to process the Kraemer and Gorman grievances any further; that on January 19, 1972 Paske and Urschlitz sent Kraemer and Gorman identical letters advising them of the Executive Board's decision which read in relevant part as follows:

> "The December 12, 1972, Executive Board Meeting of Local 538 took action on your case regarding the voluntary quit under the labor agreement, Section 182-I. The action was to not process this grievance any further, which means there wouldn't be any arbitration.
>
> On the December 12, 1972, regular membership meeting a motion was made, seconded and passed on the floor to have the Wisconsin Employment Relations Commission in and discuss your case further. On January 11, 1973, the executive board met with you and the Wisconsin Employment Relations Commission. After discussion, the board made a recommendation to the full time officers to process your grievance through the channels of mediation with the Wisconsin Employment Relations Commission and Oscar Mayer and Company.

The full time officers checked with top management of Oscar Mayer and Company to see if they would be receptive to this. The answer the company gave is; the labor agreement which is a legal document signed by the company and the union has a grievance procedure and the company is saying that mediation is not part of the grievance procedure under Section 213.

A special executive board meeting was held January 18, 1973, in which the full time officers reported back to the executive board on the company's answer to mediation. The executive board then took action to reaffirm their action taken on 12/12/72 not to arbitrate this grievance. The end result of your grievance is now completed and will not be processed any furhter. (sic)

The local is sorry that they couldn't come up with a better end result. Trusting you understand, we would recommend that you reapply for employment with Oscar Mayer and Company. Under the rehire clauses of the contract if you are rehired and have one year of seniority at the time of last employment and are rehired within 5 years you are allowed to bridge your vacation rights. Under the pension program, if you are rehired within one year you may also bridge your pension."

14. That during the period after the Kraemer and Gorman grievances were first presented to the Union's Executive Board on November 21, 1972 and prior to the final action of the Executive Board on January 18, 1973, the two grievances were the subject of discussion among some of the employes working in Department 20 (Ham Boning), the Department where the grievant normally worked on the night shift; that during this period Kenneth Kramer, a production employe and day shift steward in Department 20, heard comments from other employes in Department 20, including Rex Lawyer, night shift steward, to the effect that the Complainant was considered a "troublemaker" and that Gorman was not; that said comments were probably based in part on Kraemer's record of discipline and the fact that on one occasion Kraemer complained to higher levels of supervision that the hams were "too hard [cold] to bone" without going through the regular grievance channels; that during the same period of time some employes in the department, including Schultz who worked next to Kraemer on the day shift, expressed the opinion that the Complainant's alleged reputation as a "troublemaker" may have had something to do with the "decision to apply the 48-hour rule" to the Complainant and consequently to Gorman; that there is no evidence in the record which would support a finding that the Company applied the 48-hour rule to Kraemer or Gorman because of Kraemer's disciplinary record or his alleged reputation as a "troublemaker" and that the evidence will not support a finding that the Union's Executive Board refused to proceed to arbitration on Kraemer's grievance because of his disciplinary record or his alleged reputation as a "troublemaker".

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

CONCLUSIONS OF LAW

1. That the Complainant exhausted the established grievance procedure before he filed the complaint herein.

2. That the Respondent Union, through the actions of its agents Paske and the Executive Board, did not act arbitrarily, discriminatorily, or in bad faith in its processing the Complainant's grievance or in its decision not to process said grievance to the arbitration step of the established grievance procedure and therefore the Complainant was not denied fair representation by the Respondent Union.

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

ORDER

IT IS ORDERED that the complaint in the above entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 9th day of August, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his complaint, the Complainant, alleges that he left town on November 8, 1972 "in reliance on information from the Company and Union" that his layoff would last "at least two weeks" and that the Company acted in a "discriminatory, arbitrary, and bad-faith" manner by invoking the 48-hour requirement of the collective bargaining agreement to terminate his employment even though said provision had been "waived in several instances in the past" and that the Respondent Union "had processed similar grievances in the past on behalf of other Union Members" but refused to process his grievance to arbitration and that such "conduct and decision was arbitrary, discriminatory and in bad faith." During his opening statement, the Complainant's counsel alleged that the Union and Company have "acted in concert in this matter to the damage of the [Complainant] in order to terminate [his] employment", but declined the opportunity to amend the complaint in that regard and agreed to proceed on the complaint as originally drafted. After the first day of hearing, on April 9, 1973, and before the second day of hearing on May 14, 1973, the Complainant filed an amended complaint wherein he made the additional allegation that, based on information and belief, the Union had "embarked on a course of action intended to intimidate and influence the testimony of witnesses in this action."

In its answer, the Respondent Company denied a number of the factual allegations set out in the complaint, including the allegation that the 48-hour requirement had been waived in several instances in the past, as well as the conclusionary allegation that the Company had acted discriminatorily, arbitrarily, and in bad faith in terminating the Complainant's employment. The Respondent Union also denied a number of the factual allegations set out in the complaint, including the allegation that the Union had processed similar grievances in the past on behalf of other Union members, as well as the conclusionary allegation that the Union's "conduct and decision was arbitrary, discriminatory, and in bad faith" and "violated its duty to fairly represent the Complainant." At the outset of the second day of hearing, the Union and Company verbally amended their answers to meet the new allegation regarding intimidation of witnesses. The Company denied knowledge and the Union denied the substance of the new allegation.

During the course of the hearing, the parties stipulated that the Respondent Company was engaged in interstate commerce and therefore subject to the provisions of the National Labor Relations Act and Section 301 of the Labor Management Relations Act. Because the Wisconsin Employment Relations Commission has jurisdiction in Wisconsin for the purpose of enforcing collective bargaining agreements, it has jurisdiction in this case to enforce the provisions of the collective bargaining agreement in its capacity as a "Section 301" tribunal. 2/

2/ Seaman-Andwall Corporation (5910) 1/62; Tecumseh Products Co. v. WERC 23 Wis 2d 118 (1964); American Motors Corp. v. WERC 32 Wis 2d 237 (1966).

In doing so, the Commission is bound to apply rules of law and policies which are not in conflict with the federal laws and policies established under the National Labor Relations Act and Labor Management Relations Act. 3/

Even prior to the development of federal law on the question, the Commission had adopted a policy of refusing to assert its jurisdiction to entertain complaints wherein it was alleged that a collective bargaining agreement had been violated, if the collective bargaining agreement in question provided for binding arbitration of such disputes. 4/ This policy is consistent with the subsequently established federal labor policy under Section 301. 5/ Likewise, where there is a grievance procedure the Commission will not entertain a complaint that alleges a violation of a collective bargaining agreement unless the Complainant is able to show that he has either exhausted the contractually provided grievance procedure or was frustrated in his efforts to do so. 6/ This is the same rule that applies under federal labor policy as established in Republic Steel Corp. v. Maddox 7/ The Commission, like the federal courts, will not assert its jurisdiction to entertain a complaint that an employer has violated the terms of a collective bargaining agreement where the union has refused to proceed to arbitration unless it can be said that the union's refusal to proceed to arbitration is arbitrary, discriminatory, or in bad faith or otherwise in violation of its duty to fairly represent the employes covered by the agreement. 8/

There are three legal issues presented in this case, namely: (1) whether the grievant has exhausted the contractual grievance procedure; (2) whether the Union's handling of the grievance and decision not to process the grievance further was arbitrary, discriminatory, or in bad faith and therefore in violation of its duty to fairly represent the Complainant; and (3) whether the Complainant's grievance has merit under the terms and provisions of the collective bargaining agreement. Unless it can be said that the answer to both of the first two issues presented is yes, it is unnecessary to make a determination whether or not the Complainant's grievance has merit under the provisions of the collective bargaining agreement. A Union clearly has the right to refuse to proceed to arbitration on a grievance when, in its opinion, the grievance is lacking in merit (even if it is wrong in that regard) provided its reason for doing so is not arbitrary, discriminatory, or in bad faith. 9/

Union's Motion to Dismiss

At the conclusion of the Complainant's testimony on direct examination, the Respondent Union made a motion to dismiss based on

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3/ Textile Workers Union v. Lincoln Mills 353 U.S. 448, 40 LRRM 2113 (1957).

4/ River Falls Coop. Creamery (2311) 1/50.

5/ Republic Steel Corp. v. Maddox 379 U.S. 650, 58 LRRM 2193 (1965).

6/ American Motors Corp. (7488) 2/66; American Motors Corp. (7798) 11/66; Northwest General Hospital (10599-B & 10600-B) 1/73.

7/ Supra, see note 4.

8/ Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967); Northwest General Hospital (10599-B & 10600-B) 1/73.

9/ Ibid.

its contention that the evidence presented at that point would not sustain a finding that the Union had acted in a manner that was arbitrary, discriminatory, or in bad faith. The Examiner denied that motion as being premature and reaffirms his decision in that regard. After the Complainant had presented his case in chief 10/ the Respondent Union renewed its motion to dismiss the complaint and made an additional motion that the new allegation that the Union had intimidated witnesses be dismissed as well. The Employer also moved to dismiss on the claim that the Complainant's proof failed to establish a prima facie case that the Company had violated the collective bargaining agreement.

The Examiner indicated at the hearing that he would reserve ruling on both motions until he had the benefit of a transcript and briefs and would deal with them in the decision herein. In its brief, the Respondent Union contends that the only possible conclusions which can be drawn from the proof adduced at the hearing, must be drawn in favor of the Union both with regard to the allegation of lack of fair representation and with regard to the allegation of intimidation of witnesses.

At the time that the Examiner allowed the Complainant to amend his complaint, he made it clear that since the Commission does not have jurisdiction for the purpose of entertaining independent allegations of acts of interference with the rights of employes who are employed by employers engaged in commerce, the sole basis for allowing the Complainant to amend his complaint was in support of the allegation of lack of fair representation. For that reason the Examiner views the additional allegation contained in the amended complaint as a mere factual allegation which should not be dismissed independently of the complaint unless the complaint itself is dismissed.

The Respondent Union cites no legal authority setting forth the standard which ought to be applied by the Commission in dismissing a complaint on what might be characterized as a motion to "involuntarily nonsuit" the Complainant. On the assumption that the standard that ought to be applied is that which is applied by courts in civil actions, the Examiner is satisfied that the Respondent Union's motion ought to be denied. It is not possible to say that the Complainant's evidence provided no basis on which to reach a decision in his favor on the issue of fair representation. Substantial issues of fact were raised, which, if viewed in a light most favorable to the Complainant's contentions in this case without regard to the Respondents' evidence, might conceivably support a fact finder's determination that the Complainant was denied fair representation by the Respondent Union. For reasons described more fully below, the Examiner is satisfied however, that in light of all the evidence of record it is clear that the Complainant was not denied fair representation by the Respondent Union in the handling of his grievance.

Alleged Failure to Exhaust Grievance Procedure

While it is true that failure to exhaust the grievance procedure is an appropriate defense to an allegation that the Employer has

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10/ It was agreed by all parties to this proceeding that the Complainant would recall witness Schultz at a later time out of order and that his testimony would be considered as part of the Complainant's case in chief.

violated the terms of a collective bargaining agreement, 11/ the Respondent Union's claim that the Complainant herein did not exhaust the grievance procedure is contrary to the facts. Although it is true the grievant never presented his grievance to his foreman as contemplated by the first step of the procedure, the Union processed his grievance in substantial compliance with the later steps of that procedure and the Company never raised any objection based on the Complainant's failure to discuss his grievance with his foreman. The Respondent Union's Executive Board at all times treated the Complainant's grievance as one arising under the terms of the collective bargaining agreement and refused to process his grievance to arbitration for reasons having nothing to do with the failure of the Complainant to follow the first step of the established procedure. It is undisputed that the sole reason the grievance was not processed further was the Executive Board's refusal to proceed to arbitration.

Alleged Denial of Fair Representation

The Respondent Union has a wide area of discretion in deciding whether to process a grievance to arbitration. As the Supreme Court stated in the case of Vaca vs. Sipes:

". . .

> 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).
>
> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule

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11/ Supra notes 5 and 6.

a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." 12/

The Complainant would have the Examiner find that Paske acted arbitrarily, discriminatorily and in bad faith because of: (1) Paske's conduct in meetings with management including his failure to support Kraemer's claim that he relied on Paske's statement about the length of the layoff; and (2) because the Executive Board allegedly decided not to process the Complainant's grievance to the arbitration step because of his prior record of discipline and his alleged reputation as a "trouble-maker". The claim that Paske failed to support Kraemer's claim that he relied on Paske's prediction of the length of the layoff (which was utlimately based on a similar prediction made by a Company official) is supported by the evidence. Although Kraemer testified that he mentioned the claim in his initial contact with Bloss and later in Paske and Polzer's presence, Paske did not remember hearing anything about this claim on November 10, 1972 and Bloss and Polzer did not remember hearing the claim until the complaint herein was filed.

However, the record is clear that on November 10, 1972 the Complainant was given the opportunity to explain to Polzer why he failed to respond to the recall and he did so. It is difficult for the Examiner to believe that the Complainant would fail to mention this argument in his meeting with Polzer since it constituted the sole basis for his claim that he was being unfairly treated at that time. According to Kraemer, the initial conversation with Polzer on November 10, 1972, was a "long" one and Polzer appeared to be "sympathetic". 13/ It is undisputed that the Complainant did subsequently advise the Union's Executive Board and membership of his contention that he had relied on Paske's statement and Gorman advised the Executive Board that he heard similar predictions from his foreman and other employes in the department. Neither of these facts persuaded the Executive Board that the grievances had any merit.

However, assuming that Paske was aware of Kraemer's reliance argument on November 10, 1972 and failed to pursue it in his initial meeting with Polzer or his subsequent meeting with Paul and Kinson, it does not follow that Paske was acting arbitrarily or in bad faith in failing to do so. Kraemer and Gorman's reasons for failing to respond to the recall notice were irrelevant to the merits of the grievance unless the reason was that the notice was sent to the wrong address. Kraemer's claim was a relevant mitigating factor in Polzer's opinion but only on the question of whether the Company should make an exception and not on the question of whether Kraemer's grievance had merit under the terms of the agreement. When Polzer pointed out that making an exception, for whatever reason, in the case of Kraemer and Gorman could give rise to a claim of discrimination by other employes who had previously failed to respond to a recall notice, Paske understandably agreed with Polzer. As recently as the Spring of 1972 Paske had approached Polzer with a similar request on behalf of two other employes (Maurer and Mosley). In spite of the fact that the hearing in this case lasted several days and the Complainant presented evidence going back as far as 1953 in his effort to prove that "said provision

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12/ Supra, note 7, 64 LRRM at 2377.

13/ Transcript at pp. 9-11.

had been waived in several instances in the past by the Company and the Union" the only credible evidence that an "exception" has ever been made since 1952 was the isolated case of David Davenport which occurred 17 years ago. 14/

In 1957, Davenport was allowed to return to work without loss of seniority because the notice from the Post Office "went to the bottom of the mailbox" and he did not find it until after the 48 hours had already elapsed. The Union was not aware of Davenport's case since he was reinstated by the Company when he explained the circumstances of his case to the appropriate Company official.

In spite of the fact that no employe in the Company's Employment Office could remember any exceptions in the "last 12 years", and the fact that 34 employes have been terminated under Section 182 (i) since 1967, the Complainant would have the Examiner find that there are probably other cases similar to Davenport's which are difficult to find because records of reinstatements (as opposed to involuntary quits) would not normally be maintained. Even if the Examiner were willing to make such an unwarranted inference, such a conclusion would not

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14/ Although Steven Dennis Malchahy, Jr., was also allowed to return to work without loss of seniority after failing to respond to a recall notice in March of 1972, his case was not an "exception" since he had advised the Company of his new address and the Company had erroneously mailed the notice to his old address anyhow.

Ray Dahlberg claimed that in April, 1953 he was recalled by a letter received on a "Tuesday" indicating he was expected to return to work on the prior "Monday" and he was verbally granted a week's extention since he had obtained interim employment. If Dahlberg's recollection was accurate, it is quite possible that he complied with the 48-hour rule since the letter could have been sent on Friday afternoon or Monday morning and he asked for and was granted an extention before the 48 hours ran out. (Saturdays and Sundays do not count towards the 48 hours and the Company practice is to recall employes effective immediately when there is an immediate need). However, Dahlberg's recollection is drawn into serious question by the Company records which reflect that he was recalled by a letter signed for by him on Saturday, May 9, 1953 and he started work on Monday, May 11, 1953.

Robert Schultz claimed that in April of 1953 he returned on a "Tuesday" from a trip out of town and found a notice in his mailbox. When he called the Company on Tuesday afternoon, they told him to report on Wednesday morning. Although Schultz's testimony on this point was of dubious accuracy based on internal contradictions, the Company records do reflect that he was laid off effective Monday, April 21, 1953 and that he was back to work on Wednesday, April 23, 1953. Based on Company practice, it is clear that Schultz complied with the 48-hour requirement if he called in on the afternoon of April 22, 1953.

Finally, Kenneth Kramer testified that prior to September 2, 1958 he received a letter recalling him effective the day before, to a department other than his home department even though he had expressed a preference for recall to his home department. He called in and was told to disregard the erroneous recall and he was later recalled to his home department on September 2, 1958. His case was clearly not an "exception" to the 48-hour rule.

support a finding that the Union acted arbitrarily in Kraemer's case. Paske had no reason to believe that any exceptions had ever been made by the Company to the application of the 48-hour rule. In fact, his recent experience was exactly to the contrary. In spite of this, Paske still attempted to get the Company to make an exception in the case of Kraemer and Gorman.

Based on his conversation with Polzer, Paske reasonably concluded that the Kraemer and Gorman grievances lacked merit under the terms of the collective bargaining agreement and he simply argued that they should be treated as "hardship cases". Both he and Polzer understood that the parenthetical exception found in 182 (i) referred to extentions granted by the Company before the 48 hours has elapsed and therefore had no applicability to Gorman or Kraemer's case. His frank admission that he might have to ask that Maurer and Mosley be given backpay if exceptions were made in the cases of Kraemer and Gorman is more of an indication of his fidelity to his duty to fairly represent all employes than it is an indication of a desire to undermine Kraemer's grievance as contended by the Complainant in his brief.

It is difficult to determine from the record presented exactly who made what comments regarding the Complainant's disciplinary record and alleged reputation as a "troublemaker" in the Executive Board's closed deliberations on November 12, 1972; but it does appear that some such comments were made. The Board had information about the grievants' employment history and the fact that Kraemer had received a disciplinary layoff for an unrelated reason was undoubtedly mentioned. In addition, a comment may have been made to the effect that Kraemer was not liked by his foreman presumably because he had complained to higher levels of supervision about the difficulty of boning some hard hams.

The main reason for the difficulty in establishing what was said in the Executive Board meeting on December 12, 1972, was due to the fact that the Complainant relied largely on the testimony of Board member Schultz to establish what was said and Schultz proved to be both a reticent and difficult witness. Schultz admitted that he was reluctant to testify as to what was said because he was near retirement and did not like the idea of giving testimony on behalf of the Complainant in a case where both the Company and Union were Respondents. Despite repeated assurances by the Examiner that any retaliation by the Company or Union would be illegal and assurances by counsel for the Company and Counsel for the Union that they had no intention of taking any action against him, regardless of the legality of such action, Schultz remained reticent throughout most of his testimony. Finally during his second appearance Schultz admitted on redirect examination 15/ that he remembered hearing Paske say that he understood that Kraemer's foreman "did not like him". Paske denied making the comment and two other Board members supported him in that denial.

There is no evidence that the Company attempted to influence the testimony of Schultz in any way and, on the contrary, the Company attempted during the course of the hearing to assure Schultz that he had nothing to fear in testifying to the truth in the instant proceeding. The only evidence introduced tending to support the Complainant's claim that the Union had attempted to improperly influence the testimony of witnesses was the action of the Union's Executive Board of taking up and then deferring action on the question of whether Schultz would be

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15/ Transcript at p. 284.

reimbursed by the Union for time lost in testifying in this proceeding on behalf of the Complainant. The question of whether the Union should, in accordance with its own internal rules, pay for the time lost by witnesses called by another party to this proceeding was raised by the witness himself and the deferral of that question (which occurred after the complaint had been amended) would not support a finding that the Union was intending to improperly influence his testimony. 16/

A fair evaluation of Schultz' testimony, in light of the other testimony given, leads the Examiner to the conclusion that the only Board member who thought that Kraemer's disciplinary record and alleged reputation as a "troublemaker" had some relationship to Kraemer's grievance was Schultz himself. The evidence taken as a whole, supports the finding that 11 of the 12 members of the Executive Board reached the conclusion, contrary to Schultz, that the Kraemer and Gorman grievances should be treated alike and that they both were without merit under the terms of the collective bargaining agreement. It may be that some other employes in Department 20, other than Schultz and Kramer also felt that the Company might be more willing to make an exception in the case of an employe like Gorman who had a "good record" than it would in the case of Kraemer. However, such an opinion finds no support in the conduct of the Company officials who apparently recognized the hazards of making any exceptions. The Examiner is satisfied that the Respondent Union's Executive Board concluded that Kraemer's grievance, like Gorman's grievance, was without merit and ought not be processed to the arbitration step of the grievance procedure because, as one Board member put it, the "amount of cost" was not justified by the "chance of winning based on the facts that we had before us." 17/ Even so, the Executive Board, at the request of the general membership, reconsidered the Kraemer and Gorman grievances and offered to mediate the grievances if the Company was willing. When the Company indicated it was unwilling to participate in mediation the Respondent Union's Executive Board again refused to invoke the arbitration procedure for a grievance which, in its opinion, had no merit, an action which was entirely consistent with its responsibilities as described by the Supreme Court in the quotation set out above.

Because the evidence does not support a finding that the Respondent Union acted in violation of its duty to fairly represent the Complainant, it is unnecessary to reach the issue of whether the Complainant's

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16/ It should also be noted that Kenneth Kramer, a steward on the day shift in the Complainant's home department, was very evasive when asked about the Complainant's alleged reputation as a "troublemaker" and was also given assurances by the Examiner and counsel for the Company and Union that he had no reason to be concerned about giving testimony. Likewise there was no evidence that would support a finding that anyone acting on behalf of the Company or the Union attempted to improperly influence Kramer in giving testimony.

17/ Transcript at p. 387. Another Board member asked Kraemer for names of people who he claimed were given "waivers" and Kraemer refused saying he "would not be giving any names out because he was going to use it in his trial". (Transcript at p. 393). It is interesting to note that the only credible example of an exception presented at the hearing involved David Davenport who came forward and told Kenneth Kramer about his case after the first day of hearing herein.

grievance has merit under the provisions of the collective bargaining agreement and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 9th day of August, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner