STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL NO. 695, Complainant, vs. ZAPATA KITCHENS, INC., Respondent.	Case III No. 18595 Ce-1575 Decision No. 13229-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas P. Krukowski, appearing on behalf of the Complainant.
Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Joseph A. Melli, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, having on December 13, 1974, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Zapata Kitchens, Inc. had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order 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 January 28, 1975; and the parties having filed briefs on the matter; and the Examiner having considered the evidence and arguments 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 Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1314 North Stoughton Road, Madison, Wisconsin.

2. That Zapata Kitchens, Inc., hereinafter referred to as the Respondent, is engaged in the food products business with facilities located at Industrial Park, Stoughton, Wisconsin; and that, at all times pertinent hereto Ronald Heinzeroth, and Sheldon Hanson were supervisory personnel of the Respondent authorized to act on behalf of the Respondent in its dealings with its employes.

3. That the Complainant and Respondent are signators to a collective bargaining agreement effective at all times material herein, covering wages, hours and other conditions of employment of all production and maintenance employes of the Respondent, but excluding office clerical employes, guards and supervisors; and that said agreement contains the following provisions pertinent hereto:

"GRIEVANCE AND ARBITRATION PROCEDURE

A grievance is defined as a complaint by an employee as to the meaning or application of a specific provision of this Agreement. A grievance must be filed in writing with the Company within ten (10) working days from the date of the event giving rise thereto or from the date the employee should have known of the existence of said grievance, or such grievance shall be barred, unless said time is extended in writing by mutual consent of the parties.

If the Company and the Union are unable to adjust the grievance within twenty (20) working days after submission of the written grievance, and unless said time is extended in writing by mutual agreement, then within the next twenty (20) working days either party may make a written request (a copy of which shall be delivered to the other party) to the Wisconsin Employment Relations Commission for appointment of an arbitrator pursuant to its rules. Grievances not timely submitted for arbitration as provided above shall be barred.

The parties shall equally share the expenses of the arbitrator.

It is agreed that the decision or award of any arbitrator shall be final and binding upon the parties. The authority of the arbitrator shall be limited to determining questions arising under this Agreement. The arbitrator shall have no authority to modify or change any of the terms of this Agreement or to change existing wage rates or to establish a new wage rate. Each party shall bear the expense of preparing and presenting his own case.

At any time before the commencement of the hearing, either party may demand that the proceedings be transcribed by a court reporter, in which case the arbitrator shall make the arrangements to secure the attendance of a court reporter to record all the testimony and all of the proceedings. The reporter shall transcribe the notes of the hearing within twenty (20) calendar days from the completion of the hearing, and a copy of the transcript shall be furnished to the arbitrator. All witnesses shall be duly sworn. The arbitrator shall have the power to compel the attendance of witnesses and to require either party to produce records or documents which are pertinent to the dispute. The expense of the transcript for the arbitrator shall be borne equally by the parties.

In consideration of the foregoing arrangement for the adjustment of grievances or settlement of disputes, both parties to the contract accept this procedure as a sole and exclusive method of seeking adjustment of a grievance.

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DISCHARGE AND DISCIPLINE

Employees covered by this agreement may be suspended or discharged after they receive one warning notice in writing, with a copy to the Union, except employees may be discharged without any notice where the reason for discharge is drunkenness, unlawful use of drugs, dishonesty, recklessness or intentional conduct resulting in injuries to a person or persons, damage to property including Company products, disparagement of Company products, or violations of a posted safety rule calculated to protect the employees in the plant. It is

understood that the reason for discharge or suspension need not be the same as the matter giving rise to the warning notice. Discharge or suspension shall be by written notice to the employee involved and the Union. Warning notices, suspension and discharge shall be without recourse and are not subject to the grievance and arbitration procedure.

Nothing herein shall preclude the Union from filing unfair labor practice charges with the National Labor Relations Board regarding any discipline including discharge.

SENIORITY

The principle of seniority shall be taken into account only on layoff and recall from layoff; and then will be considered on a classification basis where the factors of skill, demonstrated ability and other pertinent factors regarding performance of available work are relatively equal.

Seniority shall accrue from the most recent beginning date of employment by the Employer. Any employee's seniority shall be terminated for any of the following reasons:

1. If the employee quits."

4. That Teresa Annette Coon is a member of the bargaining unit represented by the Complainant; that Coon had not received any warning notice pursuant to the Discharge and Discipline provision of the aforesaid collective bargaining agreement; that on November 1, 1974, Coon reported for work and, when her shift began, went directly to the taping machine and started to operate same; that, shortly thereafter, Heinzeroth ordered Coon to leave the taping machine and to perform frying and stacking work; that Coon refused, and continued working on the taping machine until her 5:00 p.m. break; that, when Coon returned from her break, Heinzeroth again ordered that Coon work in the frying room; that Coon refused to do so, whereupon Heinzeroth informed Coon that, if she refused to perform the assigned job, such a refusal was considered a quit; and that this exchange between Coon and Heinzeroth was repeated several times during the course of the shift.

5. That, a short time later, Hanson came out of his office and told Coon that her refusal to perform frying work as directed was considered a quit; that Coon responded that she didn't quit because she couldn't afford to; that Hanson then asked Coon to punch out on her time card; that Coon refused to punch out; that Hanson punched out Coon's time card; that Coon went over to her mother's work station; that Hanson followed and asked the mother to persuade Coon to perform the work (and grieve the matter later); and that Hanson then asked Coon to leave the premises, which she did.

6. That, in making its decision to deem Coon as having quit her employment, Respondent made an interpretation of the aforesaid collective bargaining agreement in light of an alleged understanding reached orally by the representatives of the Complainant and the Respondent during negotiations for said collective bargaining agreement, to the effect that a refusal to perform assigned work would constitute a quit.

7. That, on November 4, 1974, the Grievant reported to work and handed Hanson a written statement wherein she stated that she did not quit and was reporting for work; that Hanson stated that she had quit when she refused to perform her assigned job on November 1, and that she should immediately leave the premises; and that the Grievant then left the Respondent's premises and has not returned to work.

8. That, on November 1, 1974, Coon filed a grievance under the collective bargaining agreement, wherein she protested the termination of her employment; that said grievance was served upon the Respondent by placing a copy thereof on Hanson's desk; that Hanson received said grievance on or about November 2, 1974, but made no response thereto; that, subsequently, the Complainant made a demand on Hanson for the reinstatement of the grievant, taking the position that Coon had been discharged without benefit of a written warning notice prior to her discharge, and that Coon had not quit her employment; that Hanson took the position that Coon had quit her employment and that the matter was not subject to the grievance and arbitration procedures of the collective bargaining agreement; and that, at all times subsequent thereto, the Respondent has failed or refused to process the grievance of Teresa Annette Coon, as a grievance under the aforesaid collective bargaining agreement or to proceed to arbitration on the grievance of Teresa Annette Coon.

9. That the grievance of Teresa Annette Coon concerns a difference or dispute arising out of the interpretation and application of the collective bargaining agreement between the Complainant and the Respondent.

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

CONCLUSION OF LAW

That the Respondent, Zapata Kitchens, Inc., by refusing to proceed through the grievance and arbitration procedure on the grievance of Teresa Annette Coon has violated, and continues to violate, the terms of the collective bargaining agreement between it and the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and, by such violation of a collective bargaining agreement, the Respondent, Zapata Kitchens, Inc., has committed and is committing, an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Zapata Kitchens, Inc., its officers and agents, shall immediately:

1. Cease and desist from refusing to agree to the appointment of a member of the staff of the Wisconsin Employment Relations Commission as Arbitrator to determine the grievance filed by Teresa Annette Coon, or otherwise refusing to submit the grievance filed by Teresa Annette Coon to arbitration.

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

   a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and Complainant with respect to the selection of a member of the staff of the Wisconsin Employment Relations Commission to act as arbitrator with respect to the grievance of Teresa Annette Coon and the arbitration of same.

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

c. Notify the Wisconsin Employment Relations Commission that it will agree to the appointment of a member of the staff of the Wisconsin Employment Relations Commission as an arbitrator to determine the aforementioned grievance.

d. Participate in the arbitration proceeding, before the arbitrator so selected, on the aforementioned grievance.

e. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the instant Order, as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 7th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

The Teresa Annette Coon grievance arose during the effective term of the collective bargaining agreement which existed between the parties.

The Complainant maintains that the Respondent constructively discharged Coon by refusing to allow her to continue working. As a result, the Complainant contends, the Respondent violated the discharge and discipline provision of the agreement by failing to give Coon a written warning notice prior to the alleged discharge. The Complainant alleges that the Respondent refused to process the grievance of Teresa Annette Coon through the grievance procedure and, in its prayer for relief, the Complainant requests that the Examiner decide the merits of the Coon grievance. Therefore, the Complainant asks for a determination in this proceeding that the Respondent's discharge of Coon was in violation of the agreement and thereby in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

In its answer the Respondent denies the allegations of the Complainant and alleges, as affirmative defenses, that the Respondent

(a) Relied on mutually agreed interpretation of the Discipline and Discharge clause with Complainant, through Roy Lane, its authorized representative, which did not require that refusal to perform assigned work be considered a discharge, but a quit, and

(b) that if for any reason the termination was a discharge, there was by contract "no recourse".

For the reasons discussed below, it will not be necessary to discuss the merits of the Complainant's allegation that the Respondent violated the terms of the collective bargaining agreement by failing to give the grievant a written warning notice prior to her alleged discharge. It will also not be necessary to deal with the Respondent's defenses on the merits, except insofar as they relate to the Employer's position that the grievance of Teresa Annette Coon is not arbitrable under the provisions of the collective bargaining agreement.

Assertion of WERC Jurisdiction - Where Contract Provides for Final Disposition of Grievances

It is clear by a long line of decisions that the Commission has consistently refused to assert its jurisdiction to decide complaints that one party has violated the terms of a collective bargaining agreement where the Agreement provides for a final disposition of such questions. 1/ This policy is consistent with the body of law which has been applied in the federal courts under Section 301 of the Labor-Management Relations Act. 2/ Complainant urges that even though it may be the established policy of the Commission to refuse to assert its jurisdiction to determine the alleged contract violations where the agreement provides, as does this one, for the final disposition of such questions, the Commission ought to assert its jurisdiction in this case. The Complainant bases its argument on the Respondent's refusal to discuss

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1/ River Falls Coop Creamery (2311) 1/50; Hurlburt Co. (4121) 12/55; Pierce Auto Body Works (6635) 2/64; American Motors Corp. (7488) 2/66; Allen Bradley Co. (7659) 7/66; Rodman Industries (9650-A) 9/70.

2/ Cf. Drake Bakeries Inc. vs. Local 50 American Bakery & Confectionery Workers, 50 LRRM 2440 (U.S. Sup. Ct. 1962).

Coon's employment status, to process the grievance of Teresa Annette Coon through the grievance procedure, or to go to arbitration on same.

The Commission has ruled that a refusal by the Employer to proceed to arbitration because of his belief that the employe involved had no rights under the collective bargaining agreement did not, in itself, warrant the exercise of the Commission's jurisdiction to determine the grievance on the merits. 3/ Where one party to a collective bargaining agreement completely ignores and rejects the voluntary method for the settlement of disputes thereunder, without any defense or reason whatsoever, the Commission may, in order to effectuate the policies of the Act, unless the complaining party requests an order compelling arbitration, determine whether or not the agreement has been violated without requiring the complaining party to be frustrated in seeking an adjudication of the dispute through arbitration. 4/ However, this is not a Mews situation where the behavior of the Employer is such that is has wholly rejected and refused to follow the contractual procedures. Rather, the Respondent here refuses to proceed to arbitration on the mistaken belief that the agreement imposes on the Respondent no duty to do so. The Examiner finds the facts presented here would not justify a departure from the well-established and sound policy of refusing to consider the merits of a contract violation where there is a provision for final and binding arbitration in the agreement.

The Examiner concludes that his function in the present unfair labor practice proceeding ought to be limited to deciding the question of whether or not the Respondent is in violation of the agreement by refusing to proceed to arbitration on the grievance of Teresa Annette Coon. The basic federal law in this regard was established by the cases which have come to be known as the Steelworkers trilogy. 5/ The law of those cases has been established as the policy of this Commission in numerous cases 6/ In its simplest from that policy is as follows:

> "In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage." 7/

Applying that policy and the test contained within it to the contract at hand, it app ars that two issues pertaining to the Teresa Annette Coon grievance are clearly arbitrable.

3/ Rodman Industries, Inc. (9650 A,B) 11/70 (Aff. Brown Co. Cir. Ct. 2/72)

4/ Levi Mews d/b/a News Ready Mix Corp. (6683) 3/64 (Aff. 29 Wis. 2d 44, 11/65; Bob Harrison Trucking (9051-A,B) 4/70; Wonderland Foods (19256-A,B) 7/71.

5/ Steelworkers v. American Mfg. Co., 363 U.S. 564, (1960); Steelworkers v. Warrior & Gulf Navigaiton Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

6/ The leading case is Seaman-Andwall Corp., (5910) 1/62.

7/ Seaman-Andwall Corp., at p. 14, 1/62.

QUIT

The Respondent argues, in its brief, that the refusal by Coon to perform assigned work constituted a quit; therefore, there was no discharge. The Respondent points out that arbitration decisions support the proposition that a refusal to perform work is a quit. Respondent also maintains that past practice under the clause in question supports such an interpretation. Finally, the Respondent claims that the uncontroverted testimony of the parties' bargaining history clearly shows that the Complainant considered refusal to perform assigned work to be a quit. The Respondent concludes that to allow the Complainant not to contend that the termination here involved is a discharge would be grossly inequitable and contrary to the mutual intent of the parties to the Agreement.

The aforementioned seniority article in the parties' collective bargaining agreement states that an employe's seniority shall be terminated if the employe quits. The Respondent has raised the affirmative defense that it relied on mutually agreed upon interpretation of the Discipline and Discharge clause with the Complainant. The Complainant has not conceded such interpretation, and the Examiner finds that a question has arisen concerning whether Coon quit her employment. Interpretation of contract language and parole evidence is more properly made by an arbitrator than by the undersigned in this unfair labor practice forum, and deferral to the arbitration process made fully implements the policies of the Wisconsin Employment Peace Act discussed above.

NOTICE PRIOR TO DISCHARGE

The Complainant alleges that the Respondent should have given Coon a written warning notice prior to her discharge. The Respondent, in its brief, maintains that the agreement denies review of discharge by the Wisconsin Employment Relations Commission. Essentially, the Respondent relies on the aforementioned Discharge and Discipline provision to claim that no restrictions are placed on the Respondent as to grounds for discharge. The Respondent argues that the only restriction is as to procedure, in that, except for certain offenses, a prior written warning notice is required. The Respondent states that, assuming the provision is subject to full and unlimited recourse, the sole issue for an arbitrator, a court or the Wisconsin Employment Relations Commission, would be whether the prior notice if required, were given.

The Union doesn't concede that point either, and the Examiner concludes that an issue concerning notice prior to discharge of Coon arises under the terms of the contract. While it is true that an Arbitrator may agree with the Respondent's arguments, it is also conceivable that an Arbitrator could find that the Respondent has violated the agreement and could fashion a remedy for the Respondent's failure to give Coon a warning notice. For reasons stated above, interpretation of said provision regarding the requirements of a warning notice prior to discharge, and the fashioning of a remedy, if any, is better left to the Arbitrator.

MERITS OF ALLEGED DISCHARGE

The Respondent argues in its brief that rules of contract construction require finding of denial of recourse to the Wisconsin Employment Relations Commission. Thus, the Respondent maintains that the sentence "warning notices, suspension and discharge shall be without recourse and ar not subject to the grievance and arbitration pro-

cedure," means without recourse to the grievance procedure and the Courts and the Wisconsin Employment Relations Commission. The Respondent says that to argue, as the Complainant does, that "without recourse" refers only to "grievance and arbitration" creates a redundancy and a surplusage. Moreover, the Respondent adds that there would be no reason to specifically preserve access to the National Labor Relations Board for the scope of the discharge and discipline clause, if "without recourse" did not mean, and was not intended by the parties to mean, without recourse of any kind, including to the Wisconsin Employment Relations Commission.

The Examiner finds the Respondent's arguments persuasive as to any grievance relating to the adequacy of the grounds for a discharge of Coon, and interprets the phrase "shall be without recourse" to mean more than the prohibition against using the grievance procedure in regard to warning notices, suspension and discharge. That this prohibition extends to the courts and the Wisconsin Employment Relations Commission becomes clear when one examines the negotiating history of the two parties. The testimony is unrefuted by the Complainant that the Respondent refused to agree to any discharge or discipline clause in the Agreement until the Complainant proposed a clause providing no recourse after discharge or discipline. The testimony, also unrefuted by the Complainant, is that the parties agreed that "without recourse" meant no recourse to the Wisconsin Employment Relations Commission as well as the grievance arbitration procedure. The Examiner concludes that the merits of a discharge, suspension or warning notice, unlike the procedural requirement that the Respondent first issued a written warning notice prior to discharge, are not governed by the terms of the contract. Therefore, the Respondent is under no obligation to proceed to arbitration on same.

Based on the above, the Examiner finds that the Respondent is under a duty to proceed to arbitration regarding the grievance of Teresa Annette Coon; that Respondent has violated the contract between it and the Complainant for refusing to proceed to arbitration on said grievance; and that, therefore, the Respondent has violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act for refusing same.

Dated at Madison, Wisconsin, this 7th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner