STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Dennis P. McGilligan having, on April 7, 1975, issued Findings of Fact, Conclusion of Law and Order in the above-entitled matter; and the above named Respondent, pursuant to Section 111.07 of the Wisconsin Employment Peace Act having timely filed a petition with the Wisconsin Employment Relations Commission for review of the Examiner's Findings of Fact, Conclusion of Law and Order as well as a brief in support thereof; and the above named Complainant having filed a brief in opposition to said Petition for Review; and the Commission having reviewed the entire record, the Examiner's Findings of Fact, Conclusion of Law and Order, the Petition for Review and brief in support thereof, as well as the brief in opposition thereto, and being satisifed that the Examiner's Findings of Fact and Conclusion of Law and Order all be amended, makes and files the following

AMENDED FINDINGS OF FACT

1. That Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union 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, 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 that should immediately leave the premises, that the Grievant then left the Respondent's premises and has not returned to work.

7. 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 thereon on Hanson's desk; that Hanson received said grievance on or about November 2, 1974, but made no response thereto; that, subsequently, a representative of the Complainant called Hanson and requested that Coon be returned to active employment; that in said conversation Hanson contended that Coon had quit and that Hanson did not desire to discuss the matter further; that Complainant's representative replied that the Complainant would contact its Counsel with respect to the matter.

8. That the Complainant, on December 13, 1974, filed a complaint, which initiated the instant proceeding, with the Wisconsin Employment Relations Commission, wherein it alleged that the Respondent violated the collective bargaining agreement existing between the parties by constructively discharging Coon, and, therefore, committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

9. That at no time material herein did any representative of the Complainant indicate to the Respondent that the Complainant desired to proceed to arbitration with respect to the Coon grievance nor did the Respondent refuse to so proceed.

Upon the basis of the above and foregoing Amended Findings of Fact, the Commission reverses and amends the Conclusion of Law as set forth in the Examiner's decision and issues the following

AMENDED CONCLUSION OF LAW

That the Respondent, Zapata Kitchens, Inc., by failing to provide Teresa Annette Coon with one warning notice in writing, with a copy to the Union, prior to her termination, pursuant to the discharge and discipline provision 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, violated said collective bargaining agreement, and by such violation of said collective bargaining agreement, the Respondent, Zapata Kitchens, Inc., has committed 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 Amended Findings of Fact and Conclusion of Law, the Commission issues the following

AMENDED ORDER

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

1. Cease and desist from suspending or discharging employes without issuing a prior warning notice in writing with a copy to the Union, except for reasons which are exempt from said warning notice requirement pursuant to the Discharge and Discipline provision in the collective bargaining agreement between it and Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695.

2. 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.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In a complaint filed December 13, 1974, Complainant alleged that Respondent violated the parties' collective bargaining agreement, and, thus, Section 111.06(1)(f) of the Wisconsin Employment Peace Act, by failing to give Coon a written warning before terminating her employment. Complainant requested that the grievance be determined on its merits and that the contractual violation be remedied. Respondent, in its answer of January 24, 1975, denied having committed any unfair labor practice and asserted that, because Coon had quit her employment, no warning notice was required. In the alternative, Respondent asserted that if Coon were found to have been discharged, the collective bargaining agreement provides for "no recourse" to remedy such discharge or the failure to give a warning notice. A hearing in the matter was held on January 28, 1975 before Examiner Dennis P. McGilligan.

The Examiner's Decision

On April 7, 1975, the Examiner issued Findings of Fact, Conclusion of Law and Order, wherein he concluded that Respondent had refused to proceed to arbitration on the grievance of Teresa Coon, had thereby violated the terms of the collective bargaining agreement between it and the Complainant, and therefore, had committed and was continuing to commit an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

The Examiner ordered that Respondent cease and desist from refusing to submit the grievance to arbitration and that it take affirmative action to comply with the arbitration provisions of the collective bargaining agreement regarding said grievance.

The Examiner, in his Memorandum, cited the Commission's established policy of refusing to assert its jurisdiction to consider alleged contract violations, where the collective bargaining agreement provides for final disposition of such issues, except when one party completely ignores or rejects the contractually provided means of disposition. After finding Respondent to have refused to arbitrate the grievance, the Examiner, therefore, declined to resolve the grievance on its merits, and deferred to the arbitration process the issues of whether Coon was discharged and, if discharged, whether she was entitled to a warning notice.

The Petition for Review

The Respondent, in its Petition for Review, urged that there was no evidence in the record of its refusal to proceed to arbitration, and, therefore, that the Examiner's Findings of Fact, Conclusion of Law and Order based thereon were erroneous. Respondent argued further that the Order to submit to arbitration was improper because arbitration of the matter involved is specifically barred by the terms of the collective bargaining agreement.

Discussion

As noted above, the Complainant alleged that the Respondent violated the collective bargaining agreement by terminating Coon. The complaint contained no allegation that the Respondent refused to proceed to arbitration in violation of the collective bargaining agreement. The Complainant, following the issuance of the Examiner's decision and the filing of the Petition for Review, in its brief in opposition to the

Petition, requested that its complaint be amended to conform to the evidence adduced "prior to the final order", thus attempting to amend its complaint to include an allegation that the Respondent also violated the collective bargaining agreement by refusing to proceed to arbitration.

Even if we were to permit the Complainant to so amend its complaint, the record does not establish that the Complainant at any time requested the Respondent to proceed to arbitration on the grievance involved. Nor is there any evidence on the record that the Respondent refused to arbitrate the Coon grievance pursuant to a specific request by the Complainant to do so. Accordingly, because there is no evidence supporting the Examiner's findings that the Respondent refused to proceed to arbitration on the Coon grievance, the Examiner's Findings of Fact and Conclusion of Law based thereon are erroneous.

Because of the above mentioned finding, an issue arises as to whether the Commission should exercise its jurisdiction to determine the dispute involved herein on the merits.

Ordinarily, where final and binding arbitration is available to the parties to resolve disputes arising under a collective bargaining agreement, the Commission will not assert jurisdiction to determine whether the agreement has been violated unless 1/ the issues in dispute are exempted from the arbitration procedure contained in the collective bargaining agreement 2/, or where the party opposing the Commission's exercising its jurisdiction fails to timely object thereto on the ground that a collective bargaining agreement contains a provision for the final and binding arbitration of the matter and that the Complainant has failed to utilize said procedure. 3/

In the instant matter, a final and binding arbitration procedure does exist in the parties' collective bargaining agreement.

The Respondent has argued that because the agreement provides that "Warning notices, suspensions and discharge shall be without recourse and are not subject to the grievance - arbitration procedure", its alleged failure to issue a warning notice in the instant matter is not subject to said procedures. In addition, the Respondent has never objected to the Commission's exercising its jurisdiction in the matter on the grounds that the complaint failed to exhaust the contractual grievance and arbitration procedure available to it.

Even though the Commission is of the opinion that the dispute presented herein is arbitrable under the agreement (for reasons discussed hereinafter), it will exercise its jurisdiction to determine whether the collective bargaining agreement has been violated, since the Respondent has failed to object to the Commission's exercising its jurisdiction because of the Complainant's failure to exhaust the contractual grievance and arbitration procedure.

The threshold question pertinent to the alleged contractual violation which must be resolved is whether Coon quit or whether she was constructively discharged. It is manifestly clear from the record

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1/ The following reasons being pertinent to the instant dispute.

2/ I.e. where the agreement does not provide a mechanism for the final and binding resolution of such disputes, see American Motors Corp. 32 Wis (2d) 237, 10/66.

3/ Fiore Coal and Oil Co. (3234) 8/52; Pet Milk Co. (6209) 1/63; Bi-State Trucking Corp. (9924-A, B) 8/71.

that Coon did not intend to terminate her employment when she refused to perform the frying work as directed.

In fact, Coon specifically told Hanson on November 1 and again in writing on November 4 that she had not quit; she refused to punch out when she was ordered to do so; and she reported to work on the work day following the incident when she was ordered to leave the premises by Hanson.

Thus, since it is clear that Coon did not intend to quit, an issue arises as to whether her refusal to accept an assignment is sufficient to constitute a quit as opposed to a constructive discharge.

It is the Commission's opinion that although Coon demonstrated insubordinate behavior which she had reason to believe would result in her discharge, she did not intend to sever her employment by so acting and thus her conduct cannot properly be characterized as a quit.

Since the Commission has determined for the foregoing reasons that Coon was constructively discharged, the next issue to be resolved is what rights she had under the agreement; and thereafter what jurisdiction, if any, the Commission has to enforce said rights.

The parties' collective bargaining agreement provides, in pertinent part, that "Warning notices, suspension and discharge shall be without recourse and are not subject to the grievance and arbitration procedure." This provision clearly precludes the Commission from reviewing the substantive grounds for any discharge, suspension, or prior warning, and from measuring said grounds against any "just cause" or similar standard. The Commission, however, does not believe that said provision precludes employes from seeking to enforce their contractual right to a written warning notice prior to discharge either through the grievance and arbitration procedure, or as in this instance, where the parties have waived said procedure, before the Commission. Accordingly, the Commission is of the opinion that it may exercise its jurisdiction to determine whether Coon's contractual right to a written warning notice prior to her constructive discharge has been violated.

The record clearly demonstrates that Coon did not receive a written warning notice prior to her discharge. It is also clear that she was not discharged for any of the reasons set forth in the agreement which do not require a prior written warning notice.

Thus, the Commission is of the opinion that the Respondent has violated Coon's contractual right to a written warning notice prior to her discharge and thereby has violated Section 111.06(1) of the Wisconsin Employment Peace Act.

The next and last issue to be resolved by the Commission in this matter involves the development of an appropriate remedy for the contractual violation found herein. Because the agreement does not afford Coon the right to arbitral (or Commission) review of the grounds for either warnings or discharge, it is not reasonable to assume that she would have been afforded any degree of job security by virtue of the Respondent's compliance with its contractual obligation to provide her with a prior written warning notice. Had such anotice been issued, she could have been subsequently discharged for any reasons without recourse at any time. Therefore, the Commission does not believe it is appropriate to order either reinstatement or backpay in the matter, since such relief would provide Coon with a measure of job security which she has not been afforded by the parties' collective bargaining agreement.

In effect, the parties have negotiated a contractual procedural requirement, which affords employes no substantive protection. The Commission cannot provide employes of the Respondent such protection in light of the limitations set forth in the collective bargaining agreement.

For the foregoing reason, the Respondent has been ordered to cease and desist from discharging employes without first providing them with a written warning notice in accordance with its agreement with the Complainant, but Coon has not been afforded any traditional forms of relief, i.e. reinstatement and/or backpay, since the parties' agreement has precluded her from obtaining substantive review of the grounds for any warning, suspension or discharge.

Dated at Madison, Wisconsin this 14th day of April, 1976.

WISCONSIN EMPLOYMENT RELATION COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner