STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SALLY SMITH, and DIANE TALBERT, Complainants, vs. ST. CROIX CORPORATION, and UNITED PAPERMAKERS & PAPERWORKERS, AFL-CIO LOCAL NO. 883, 1/ Respondents.	Case II No. 18797 Ce-1586 Decision No. 13343-A

Appearances:

Ms. Sally Smith and Ms. Diane Talbert, Complainants, appearing on their own behalf.

Mr. Gary Talbert, Representative, appearing on behalf of the Complainants.

Mr. Jim Litwaitis, Representative, appearing on behalf of the Respondent Employer.

Mr. Raymond Long, International Representative, appearing on behalf of the Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, in the above-entitled matter; 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, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and a hearing on such complaint having been held at Phillips, Wisconsin, on March 26, 1975, before the Examiner; and the Complainants and Respondent Union having completed the briefing schedule on April 14, 1975; 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 Sally Smith, hereinafter referred to as Complainant Smith, is an individual residing at 123C Shady Knoll Rt., Park Falls, Wisconsin.

2. That Diane Talbert, hereinafter referred to as Complainant Talbert, is an individual residing at Route 1, Box 12B, Butternut, Wisconsin.

3. That St. Croix Corporation, hereinafter referred to as Respondent Employer, is a company engaged in the business of the

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1/ Complainants moved at the hearing, without objection from the parties, to amend their complaint to name the Respondents as stated above.

manufacture and sale of fishing and other recreation equipment, with facilities located at Park Falls, Wisconsin.

4. That at all times material herein, the Respondent Employer has recognized United Papermakers & Paperworkers, AFL-CIO, Local No. 883, hereinafter referred to as the Respondent Union, as the exclusive bargaining representative of certain of its employes including the Complainants herein who were members of the Respondent Union at all times material herein.

5. That at all times material herein, the Respondent Employer and the Respondent Union have been signators to a collective bargaining agreement effective from May 1, 1974 to April 30, 1976, covering wages, hours and working conditions of said employes and, among other provisions, provides:

"SECTION 19: ADJUSTMENT OF COMPLAINTS

The Union shall select from the Local membership a standing adjustment committee to handle, as hereinafter provided, complaints that may arise for members of their Union. The names of the Committee members shall be filed with the Company. The following procedure shall be used.

A. An aggrieved employee must make his or her grievance known within seventy-two (72) hours (Saturdays, Sundays or holidays excluded) to his or her foreman, or at the option of the aggrieved employee, between him or her, or one member of the standing committee and the foreman, the department head, or both.

B. If not [sic] satisfactory settlement of the claim is made within three (3) operating days, the employee may then refer the question to the Union Adjustment Committee who will then present the complaint in writing to the Company's appointed representative.

C. If the Company's appointed representative and the Union adjustment Committee are unable to come to a satisfactory settlement within five (5) days thereafter, the question may, upon request of either party, be referred to the President or General Manager of the Company, or his designated representative, and the International President or his designated representative.

D. If no settlement is reached within twenty (20) days thereafter it may be referred to arbitration. The Union and the Company shall endeavor to select the impartial arbitrator by mutual agreement within ten (10) days after the request for arbitration has been received. For such purpose, each party shall submit to the other party a list containing the names of at least three (3) persons considered qualified to serve in such capacity.

E. On their failure to select an arbitrator, a written request shall be made for the Federal Mediation and Conciliation Service to submit the names of five (5) qualified arbitrators. The parties shall alternately strike two (2) names from the list and the one (1) remaining shall be selected as the impartial arbitrator. The arbitrator shall convene to render a decision within fifteen (15) days to be final and binding upon both parties to this Agreement.

F. It is understood that the function of the arbitrator shall be to interpret and apply this Agreement. However, this arbitrator shall have no power to add to or to subtract from, or to modify and extend any of the terms of this Agreement or

any Agreement made supplementary hereto except by mutual consent of the Company and Union.

G. Each party to an arbitration of a grievance shall bear the expense of preparing its case and shall share equally the expense of the arbitrator.

H. Any employee who claims injustice over disciplinary action shall file a grievance within seventy-two (72) hours. The seventy-two (72) hour period shall begin from the time the employee first learned of the disciplinary action and shall not include Saturday, Sunday or Holiday hours.

I. If it is found that any employee has been unjustly discharged, such employee shall be reinstated with full rights and privileges formerly held, and shall be compensated for all loss of earnings unless otherwise mutually agreed upon or awarded by the arbitrator.

J. The time limits in this Section 19 may be extended by mutual consent."

6. That Complainants Smith and Talbert worked for Respondent Employer at all times material herein; that on November 13, 1974, the Complainants submitted a grievance to the Respondent Employer as follows:

"We file a grievance against sec. 12 sub section B of the contract which states the employees shall be paid the rate assigned to the job they occupy. The following have been doing class 1 assembly work and receiving class 2 assembly wages.

Sally Smith 9 1/2 mos.	Suzanne Waltenburg 6 mos.
Diane Talbert 10 mos.	Richard Mayhem 5 mos."

and that on November 18, 1974, the Respondent Employer, by its agent Jim Litwaitis, the Assembly Supervisor, rejected the grievance at the first step of the grievance procedure.

7. That the parties processed the grievance through the grievance procedure; that on December 9, 1974, representatives of the Respondent Employer and Respondent Union met according to Step 4 of the grievance procedure at which time the Respondent Employer informed the Respondent Union that it would take no further action on the grievance; that since the parties could not agree upon a solution to the grievance, the Union decided to take the matter back to the Union membership for a decision on dropping the grievance or continuing the grievance on to arbitration.

8. That the next monthly meeting of the Respondent Union was held on January 2, 1975; that the meeting notices were posted over a week in advance; that the Respondent Union did not post or otherwise notify the Complainants that their grievance and the question whether to appeal the Respondent Employer's denial of same to arbitration or drop the grievance would be discussed and voted upon at said meeting; that it was the practice of the Respondent Union not to post agendas for Union meetings or otherwise notify the Union membership of matters to be taken up at said meetings; that Complainant Smith saw the notice of the Union meeting and was present at said meeting; that Complainant Smith presented her case and made arguments in favor of proceeding to arbitration on the grievance; that Respondent Union offered a plan as proposed by the Respondent Employer whereby all employes in the "mounting department" could, by the end of one year, attain the highest Class I Assembler rate; that Respondent Union told the employes at the meeting that if they did not

accept the above proposal when the employes ran out of whatever class work they were doing, they would be sent home; that a motion was made in regard to taking the grievance to arbitration and said motion lost, 8 ayes - 11 nays; that the above wage proposal was then put to a vote and was adopted by a large margin; that based on this action by the Union membership the Respondent Union refused to take the grievance to arbitration following Step 4 of the grievance procedure.

9. That Respondent Union's conduct toward Complainant Smith and Complainant Talbert was not in any way arbitrary, discriminatory or in bad faith.

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

CONCLUSIONS OF LAW

1. That Complainant Smith and Complainant Talbert by having requested that Respondent Union, United Papermakers & Paperworkers, AFL-CIO, Local 883, represent them with respect to their grievance sufficiently attempted to exhaust the grievance procedure provided in the applicable collective bargaining agreement.

2. That the conduct of Respondent Union, United Papermakers & Paperworkers, AFL-CIO, Local 883, in processing Complainant Smith and Complainant Talberts' grievance over the Respondent Employer's alleged failure to assign and pay them Class I Assembler wages, by refusing to proceed to arbitration on said grievance based on a negative vote by the membership at the Union meeting, was not arbitrary, discriminatory or in bad faith; and Respondent Union, therefore, did not violate its duty to fairly represent Complainants; and, therefore, is not in violation of Section 111.06(2)(a) and (c) of the Wisconsin Employment Peace Act.

3. That because United Papermakers & Paperworkers, AFL-CIO, Local No. 883 did not violate its duty to fairly represent Complainant Smith and Complainant Talbert by not representing the Complainants and because of a total absence of conduct by the Union of an arbitrary, discriminatory or bad faith nature with regard to Complainants, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent Employer, St. Croix Corporation breached its collective bargaining agreement with Respondent Union, thereby violating Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants, in their complaint, alleged that the Respondent Employer violated the collective bargaining agreement between the Respondent Employer and the Respondent Union. The Examiner held a hearing on March 26, 1975, on the threshold issue of whether the Respondent Union denied the Complainants fair representation in processing their grievance. At the close of the hearing the Respondent Employer moved to dismiss the complaint on the grounds that the Respondent Union had fairly and properly represented the Complainants. Likewise, at the end of the hearing, the Respondent Union moved to dismiss the complaint on the grounds that it had represented the Complainants fairly and to the best of its ability when processing their grievance. The Complainants filed a brief on April 11, 1975; and the Respondent Union filed a brief on April 14, 1975. The Respondent Employer did not file a brief.

Upon reviewing the entire record, and for the following reasons, the Examiner hereby dismisses the complaint.

DISCUSSION:

Before the Examiner will reach the merits of Complainants' claim that the Respondent Employer violated the applicable collective bargaining agreement between the Respondents in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act, the Complainants must show that they attempted to exhaust the collective bargaining agreement's grievance procedure and that such attempt was frustrated by the Respondent Union's breach of its duty of fair representation. 2/

Exhaustion of Grievance Procedure:

This Commission has required that individual complainants bringing such contract violation actions against employers conform to the requirement stated by the U.S. Supreme Court in Republic Steel vs. Maddox (U.S. Sup. Ct., 1965, 58 LRRM 2193) that such complainants "must attempt use of the contract grievance procedure." 3/ The Examiner concludes that the Complainants have met this requirement.

The evidence clearly establishes that the Complainants requested and received Respondent Union's assistance through all steps of the applicable grievance procedure except arbitration, and that such arbitration was available to Complainants only by vote of the Union membership and with Union representation. The record indicates that Complainants repeatedly told the Union president that they wanted their grievance pushed and were unsatisfied with the results at each step of the grievance procedure. Both Respondent Union's president and International Representative understood Complainants' desire to proceed to arbitration; but, nevertheless, the Union membership voted to refuse to process Complainants' grievance to arbitration, and the Respondent Union did so refuse.

2/ VACA vs. Sipes 386 US 171, 64 LRRM 2369 (1967); American Motors Corporation (7988-B) 10/68.

3/ American Motors Corp., 7488 (1966); American Motors Corp., 7798 (1966).

Violation of the Duty of Fair Representation:

The law concerning a union's obligation of fair representation is quite clear. The U.S. Supreme Court in VACA vs. Sipes 4/ stated:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."

In addition, the U.S. Supreme Court in Ford Motor Co. vs. Huffman 5/ stated:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the Union it represents, subject always to complete good faith and honesty in purpose in the exercise of its discretion."

The Complainants bear the burden of proving the Union's failure to fulfill its duty to fair representation by a clear and satisfactory preponderance of the evidence. 6/ This burden of proof is coupled with the fact that the Union is given a wide range of reasonableness in serving the individuals it represents.

It should be pointed out that the Union's duty of fair representation does not necessarily require that it carry any given grievance through all the steps of a contractual grievance procedure. Instead, the Union must investigate and prosecute each grievance in a manner that is untainted by arbitrary, discriminatory, or bad faith motives. However, the duty of fair representation is more than an absence of bad faith or hostile motivation. 7/ It confers upon the Union an affirmative responsibility with regard to the allocation of benefits the Union has secured for the employes in a collective bargaining agreement. 8/ This affirmative responsibility gives the employe a "right to fair and impartial treatment from his statutory representative." 9/

VACA provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. VACA also requires the union, in good faith and in a non-arbitrary manner, to make decisions as to the merits of each grievance. The Wisconsin Supreme Court seems to support the idea of the duty of fair representation as an affirmative responsibility when it suggests that at least

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4/ Supra, note 2.

5/ 345 U.S. 330, 338 (1953).

6/ See Section 111.07(3) of the Wisconsin Employment Peace Act.

7/ See Retana vs. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO, 453 F.2d 1018, 1023, 79 LRRM 2272 (C.A. 9 1972); Griffin v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, 469 f.2d 181, 183, 81 LRRM 2485 (C.W. 4, 1972).

8/ See Teamsters, Local 317 (Rhodes & Jamieson, LTD.) 89 LRRM 1049, 1051, April 30, 1975.

9/ Miranda Fuel Co., Inc., 140 NLRB 181, 188, 51 LRRM 1584 (1962).

the union must in good faith weight the relevant factors before making a determination whether a grievance should go to arbitration. 10/ The Court submits that such a decision should take into consideration such factors as the expense of arbitration, the monetary value of the claim, the affect of the breach of the employe and the likelihood of success in arbitration. 11/

The duty of fair representation being an affirmative duty, the obligations and responsibilities it encompasses cannot be avoided by delegating the authority to make decisions 12/ In the present case, the Union allowed the Union membership to decide whether to take the grievance to arbitration. While the Union delegated that authority, it cannot give up the responsibility for fair treatment of the employes affected by the decision. By selecting the method for determining its course of action, the Examiner finds that the Union underwrote the fairness of the method. The Examiner concludes that the method did meet the minimum statutory standard of fairness.

The Complainants, pursuant to the grievance and arbitration procedure, filed the grievance on November 13, 1974. As noted above, they pursued their grievance through Step 4 of the grievance procedure. At the January Union meeting, members voted not to take the grievance to arbitration. The Complainants maintain that the Union failed to post the January 2, 1975, Union meeting properly by not listing on an agenda that the matter of their grievance and the question whether to appeal said grievance to arbitration would be discussed and voted upon at the meeting. The Complainants argue that neither they nor the Union membership knew the matter would come up. The Complainants argue further that this lack of proper notification adversely affected the outcome of the decision by not allowing them (the grievants) the necessary opportunity to prepare and present their case, and by holding down membership attendance at the meeting.

The Union argues that the majority of Union meetings are held in such a manner - without notice of the agenda. The record reveals that the Complainants were aware of this Union practice, and the Examiner finds that, knowing this, they should have been present at all Union meetings immediately following the filing of their grievance in order to be there when the grievance came up for decision whether to proceed to arbitration. Although Complainant Smith saw the meeting notice a week prior to the date, the record does not reveal whether she asked the Union if the grievance would come up. As it turned out Complainant Smith was the only grievant present at the meeting. However, the Union did give Complainant Smith an opportunity to present her position and Complainant Smith did argue her case before the Union members present; although, after considerable discussion, the members voted 8 ayes - 11 nays not to take her grievance to arbitration. The record does not indicate whether Complainant Smith asked for referral of the matter to another meeting because she felt the forum was unfair or in order that other grievants and/or interested Union members could attend.

At the January Union meeting, the Respondent Union offered a plan as proposed by the Respondent Employer whereby all employes in the "mounting department" could, by the end of one year, attain the highest Class I Assembler rate. The Complainants argue that the vote on the

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10/ Mahnke vs. WERC, 66 Wis. 2d 524 (1975).

11/ Id. at 534.

12/ Supra, note 7 at p. 1053.

above proposal may have affected the outcome of their grievance. Said proposal did, in part, meet the relief demanded by the Complainants' grievance. However, the record does not reveal any support for the proposition that the Respondent Union offered said proposal with the intent and purpose of denying Complainants' request for arbitration.

The Complainants also maintain that the meeting was not held on the customary date - the first Wednesday of the month - so that not everyone attended the meeting who wanted or could be expected to attend. Yet, the record reveals that Union meetings were not always held on the first Wednesday of the month, only near that date. Secondly, the first Wednesday in January, 1975, was New Year's Day; and, most people were unavailable by the Complainants' own admission. Instead, the Union meeting was held on Thursday, January 2, 1975, the next day, at a time when a quorum was more likely.

As noted previously, the Complainants bear the burden of proving the Union's failure to fulfill its duty of fair representation by a clear and satisfactory preponderance of the evidence. Based on the aforementioned, the Examiner finds that the Complainants did attempt to exhaust the collective bargaining agreement's grievance procedure, but did not prove that the Respondent Union's conduct toward them was arbitrary, discriminatory or in bad faith, and, therefore, Complainants did not meet their burden of proof concerning the alleged failure of the Respondent Union to fulfill its duty of fair representation.

Therefore, the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent Employer breached its collective bargaining agreement with the Respondent Union in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 1st day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner