STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STERLING GRANDBERRY, Complainant, vs. J. I. CASE AND INTERNATIONAL UNION, AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND LOCAL UNION NO. 180, Respondent.	Case XI No. 19635 Ce-1639 Decision No. 14007-C

Appearances:

Mr. Duane Arena, Attorney at Law, appearing on behalf of the Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by Ms. Sandra P. Zemm, appearing on behalf of the Respondent Employer.

Zubrensky, Padden, Graf & Bratt, Attorneys at Law, by Mr. George F. Graf, appearing on behalf of the Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Thomas L. Yaeger, a member of the Commission's 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 hearing on said complaint having been held at Racine, Wisconsin on December 10, 1976; and the Respondent Employer and Respondent Union having filed briefs by June 15, 1976 and the Complainant having declined to file a brief; 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 Sterling Grandberry, referred to herein as Grandberry or Complainant, is an individual presently residing at 1514 State Street, Racine, Wisconsin.

2. That J. I. Case, referred to herein as the Respondent Company, is a corporation engaged in the manufacture of agricultural implements with facilities in Racine, Wisconsin.

3. That International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local Union No. 180, referred to herein jointly as Respondent Union, are labor organizations.

4. That at all times material herein the Respondent Employer has recognized the Respondent Union as the exclusive bargaining representative of certain of its employes, and that at all times material hereto the Respondents have been parties to a collective bargaining agreement which contains among its provisions the following that are material hereto:

"ARTICLE VII
Grievance Procedure

Section 1. Definition

The term 'grievance' as used herein shall mean a complaint subject to interpretation or application to this Agreement. Grievances of a general nature, and involving matters which are outside the jurisdiction of the foreman, will be known as policy grievances and may be presented in Step 3. Any settlement of a policy grievance shall be reduced to writing and signed by both parties.

Section 2. Grievance Steps

An employee desiring to have the Union take up his grievance may contact his steward and the grievance will then be processed in the following manner:

STEP 1: If the grievance is such that the foreman cannot settle it satisfactorily at the time of presentation it shall be reduced to writing on forms provided forthis purpose by the Company and presented to the foreman. This written grievance shall be signed by the aggrieved employee (if he is available) and the steward of the department. The foreman will give his answer to such grievance, in writing, by the end of two (2) working days from the receipt of the written grievance. In the event the foreman does not give his answer by the end of the two (2) working days, as specified above, the grievance will automatically be passed on to the next step.

STEP 2: The foreman's decision will be considered final, unless within five (5) working days of the foreman's answer the grievance is presented by the bargaining committeeman (who may be accompanied by the steward of the aggrieved), to the superintendent of the division in which the grievance originated, or his designated representative. Said superintendent will submit his written answer to the grievance within five (5) working days after the date of presentation to him. In the event the superintendent does not submit his answer within five (5) working days, the grievance will automatically be passed on to the next step.

STEP 3: The decision of the superintendent will be considered final unless within five (5) working days of the superintendent's answer the grievance is presented in writing to the Industrial Relations Department with a request that it be placed on the agenda for the next regular meeting between the bargaining committee and the Company, at which meeting a further effort will be made to settle the grievance. The Company will advise the Union of its disposition of the grievance within five (5) working days of said meeting.

Section 3. Arbitration

A. The Company's answer provided in Step 3 shall be considered final unless, within ten (10) working days after receipt of the Company's final answer, the matter is appealed in writing by the chairman of the Local Union Bargaining Committee. This written appeal shall

be submitted to the Industrial Relations Manager, with copies to the U.A.W. - J.I. Case Department and to the Corporate Director of Industrial Relations.

B. Any grievance matter appealed pursuant to Section A, above shall be reviewed by the Union's U.A.W. - J.I. Case Department. The Company's answer provided in Step 3 (under Section 2) shall be considered final, unless within thirty (30) days after a grievance has been appealed under A above, the U.A.W. - J.I. Case Department requests in writing that the grievance be submitted to an impartial arbitrator in accordance with paragraphs C and D below. Such a request shall be submitted to the Corporate Director of Industrial Relations. At any mutually, convenient time within the thirty (30) day period, the representatives from the U.A.W. - J. I. Case Department may request to meet with the Vice President of Corporate Relations, or his representative, to discuss a possible settlement of the grievance. If such a meeting is requested by the Union, it shall be scheduled to take place within the said thirty (30) day period, and it shall not serve to modify the thirty (30) day limitation on requests for grievances to be submitted to arbitration.

C. The parties have, upon the execution of this Agreement (in a separate Letter of Understanding), agreed upon a panel of five (5) permanent arbitrators who shall have referred to them any grievances appealed to arbitration. The Union, at the time it gives its written request to arbitrate under B above, shall suggest the name of one (1) of the five (5) permanent arbitrators, and if the Company does not oppose the suggestion within twenty-four (24) hours, then the named arbitrator shall be selected. If the Company does oppose, then it shall name two (2) of the five (5) arbitrators who would be acceptable to it within the above-noted time. Then the Union, within twenty-four (24) hours, shall pick one (1) arbitrator from the two (2) thus named; the arbitrator picked by the Union shall be considered selected.

D. The arbitrator selected shall be immediately notified so that a hearing date may be set for the earliest possible time. Every effort must be made by the parties to act in an expeditious fashion to process an arbitration appeal. If the arbitrator selected is not available to schedule a prompt hearing date, then the selection procedure, under C above, shall be repeated immediately and a new arbitrator selected.

E. The Company and the Union shall each bear one-half (1/2) the cost of the fees and expenses of the impartial arbitrator.

F. The functions and jurisdiction of the impartial arbitrator shall be fixed and limited by this Agreement, and he shall have no power to change, add to, or delete from its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement; and any matter coming before the impartial arbitrator which is not within his jurisdiction as herein defined shall be returned to the parties without decision or recommendation. In the event any disciplinary action (including reprimands) taken by the Company is made the subject of an arbitration proceeding, the arbitrator's authority shall, in addition to the limitation set forth herein, be limited to the determination of the question of whether the employee involved had been disciplined for proper cause, except that if the arbitrator finds that the penalty assessed by the Company is inappropriate for the offense or offenses committed, he may modify that penalty.

G. If an insurance issue involving medical findings is not resolved in the insurance review under ARTICLE XIV, Section 4,B, and is appealed to arbitration, any conflict of written medical opinion between the Company's physician and the employee's physician may be submitted to a 3rd physician for his opinion. The parties will mutually agree to a 3rd physician for a referral examination of fact, tests, and consultation as he may feel necessary. The 3rd physician will send a written report as to his findings to the parties, and this report will be provided the arbitrator for his information. The expenses of the 3rd physician, including tests, etc. will be shared equally by the parties.

H. The decision of the arbitrator shall be final and binding on the Company, the Union, and the employee or employees involved.

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ARTICLE VIII

Discipline and Discharge

A. An employee will not be suspended or discharged except for good cause. In such cases an employee will have his steward made available to him before he leaves the plant, and the foreman will, if requested, immediately discuss the matter involved with the steward and the employee. In the absence of the steward and the alternate steward, the employee's committeeman will be made available.

B. If a grievance is filed on a suspension or discharge, it may be handled as an emergency matter in a special meeting to be held within two working days after the filing of such grievance.

C. Copies of written reprimands including disciplinary action will be given to the employee at the time of such reprimand or discipline with a copy to the steward. A copy will also be sent to the Union.

D. In imposing discipline on a current charge, the Company will not take into account any reprimand which was issued more than two (2) years previously."

5. That U.A.W. Local 180's By-Laws which were in effect at all times material herein contain among its provisions the following that are material hereto:

"ARTICLE XIII - APPEALS

Section 1: Any member dissatisfied with the action or decision of the Executive Board, Bargaining Committee or Steward, shall take his or her appeal or complaint to the Local Union Recording Secretary within sixty (60) days as permitted by the International Constitution with the following provisions:

(A) The Executive Board shall refer the matter to the Bargaining Committee if it involves collective bargaining; otherwise, the Executive Board shall consider the matter itself.

(B) Whichever of these bodies the matter is referred to shall consult with the grievant, permit him full opportunity to be heard, and shall reach a decision.

(C) Within thirty (30) days of receiving a notice of such a decision, the grievant, if wishing to appeal further, shall submit his appeal to the Recording Secretary in writing for consideration by the earliest possible membership meeting.";

and, that the International Union's Constitution which was in effect at all times material herein contains among its provisions the following that are material hereto:

"ARTICLE 33

Appeals

Section 1. All subordinate bodies of the International Union, and members thereof, shall be entitled to the right of appeal. In all cases, however, the decision of the lower tribunal must be complied with before the right to appeal can be accepted by the next tribunal in authority, and shall remain in effect until reversed or modified. The International President may, upon written application by an appellant waive in whole or in part requirements of such compliance, where unusual circumstances would warrant such waiver.

Section 2. Any member of any Local Union or unit of an Amalgamated Local Union who wishes to challenge any action, decision or penalty of that body or of any official or representative of that body must, in all cases and procedures where no other time limit is specifically set forth by this Constitution, initiate the challenge before the appropriate body of such Local Union or unit within sixty (60) days of the time the challenger first becomes aware or reasonably should have become aware of the alleged action, decision, or penalty of that body.

. . .

Section 4. Any member or subordinate body appealing from any action, decision or penalty of any subordinate body, shall be permitted representation before any reviewing body by counsel of his own choice. The appellant and/or counsel shall be afforded full opportunity to present to any reviewing body the appellant's position on all matters bearing upon the action, decision or penalty under review; providing that this right to appear shall be limited to an appearance before a committee or panel of any reviewing body where the reviewing body has established the committee or panel to conduct a hearing and submit recommendations to the full reviewing body.

Section 5. Any member feeling himself aggrieved by any action, decision or penalty of his subordinate body shall be entitled to appeal that action, decision or penalty to the International Executive Board only when it has been passed upon by the Local Union membership or delegate body, as the case may be; except where direct appeal to the International Executive Board from some action, decision or penalty of a body other than the Local Union membership or delegate body shall be specifically permitted by another Article of this Constitution. An appeal to the Local Union may be made at a meeting or in writing to the Recording Secretary. An appeal to the International Executive Board may be made without action by the membership or delegate body if the membership or delegate body does not meet and act on the appeal within forty-five (45) days following the appeal to the Local Union. When no membership or delegate body meeting is held during this forty-five (45) day period the Local Union Executive Board may consider and pass on the appeal.

Section 6. Any member wishing to appeal from the action, decision or penalty of his subordinate body shall do so in writing within thirty (30) days after the aforesaid action, decision or penalty. He shall send such appeal to the International Union President and should send a copy of the appeal to the Recording Secretary of the subordinate body. The appeal should set forth the action, decision or penalty being appealed and should include any and all information available in support of the appeal. The International President shall secure from the subordinate body a complete statement of the matters in issue, including copies of all charges, and any records, minutes, transcripts of testimony and other material relating to the appeal.

Section 7. (a) The International Executive Board shall appoint a two (2) member committee to consider the appeal and make recommendations. This two (2) member committee shall be composed of members of the International Executive Board, but shall not include the Regional Director of the region from which the appeal originates. The appeal and any information secured by the International President, pursuant to Section 6 of this Article, shall be forwarded to the committee. After a review of the appeal the committee may hold a hearing, before either the full committee or, in its discretion, one of its members, unless the committee concludes that no useful purpose would be served by a hearing, in which event the committee, in its discretion may make recommendations on the appeal without a hearing. If a hearing is held, it shall be held as close to the locality from which the appeal originates as is possible in order to minimize expense and inconvenience to the appellant. The appellant and appellee (or their representatives) shall be required to appear before the Appeals Committee, with such counsel and witnesses as they may choose, and shall answer fully and truthfully all questions put to them by members of the Appeals Committee. The extent and scope of the hearing shall be such as in the discretion of the committee shall bring to light all facts and issues involved. The appellant and/or appellee shall each be entitled to submit any briefs or any other written statements of position that either of them may wish. The committee shall consider the files and records of the case, and such briefs as may be submitted by either side. Based upon this consideration, the Appeals Committee shall make a recommendation which, together with all of the aforesaid documents, shall be submitted to a nine (9) member committee of the International Executive Board, of which five (5) members shall constitute a quorum. The nine (9) member committee of the International Executive Board shall consider said documents, together with the Appeals Committee recommendation, and shall make a decision on the appeal.

(b) The International President may decide an appeal, rather than submitting it to a two (2) member committee of the International Executive Board, if he concludes that such procedure is appropriate. In such case, the International President may designate a representative to conduct any investigation or hearing deemed necessary, in accordance with the procedures set forth in subsection (a) hereof. The International President shall base his decision on the files and records of the case, and such briefs as may be submitted by either side.

(c) Both where the appeal has been decided by the nine (9) member committee of the International Executive Board and where it has been decided by the International President, copies of the decision shall be sent to all members of the International Executive Board and the decision shall become the decision of the International Executive Board unless, within ten (10) days, one or more members of the International Executive Board shall raise an objection to the decision, in which case the appeal shall be referred, for decision, to the International Exectuive Board at its next

regular meeting. The International President shall promptly notify all parties concerned of the decision of the International Executive Board. The International Executive Board shall use its best efforts to render its decision within sixty (60) days of receipt of the appeal by the International President.

Section 8. Any subordinate body or member thereof wishing to appeal from any decision of the International Executive Board or an International Trial Committee may, in all cases, take such appeal to the Constitution Convention Appeals Committee of the International Union. The Convention Appeals Committee shall have the authority to consider and decide all appeals submitted to it from decisions of the International Executive Board and International Trial Committees under this Section. All decisions of the Committee shall be final and binding.

The Constitution Convention Appeals Committee shall consist of a member and a first and second alternate from each region to be selected by lot from the delegates, when they elect their Regional Director. To provide continuity, members of the Convention Appeals Committee shall be selected from one-half of the regions at each Convention. Such members selected shall serve for two (2) Convention terms. In the event a vacancy occurs on the Committee, it shall be filled by the ranking alternate from that region. All remaining vacancies shall be filled by lot at the next Constitutional Convention.

The Convention Appeals Committee shall meet semi-annually, at International Union Headquarters, to act upon all appeals that have been submitted under this Section at least thirty (30) days prior to the date established for their meeting. The administrative procedures for the Convention Appeals Committee shall be established by the International Executive Board, subject to review by subsequent regular Constitutional Conventions.

The appellant shall, however, have the alternative of appealing such decision of the International Executive Board or an International Trial Committee to the Public Review Board established in Article 32 of this Constitution in the following cases:

(a) Any case arising under the procedure set forth in Article 10 (Section 13), Article 12 (Sections 2 and 3), Articles 30 and 31, Article 33 (Sections 9 and 12), Article 36 (Sections 9 and 10), Article 38 (Sections 11 and 12), Article 48 (Sections 5 and 6) of this Constitution, or

(b) Those cases decided by an administrative arm of the International Executive Board, pursuant to Article 12, Section 17, or by the International Executive Board, which concern action or inaction relative to the processing of a grievance, in which the appellant has alleged before the administrative arm or the International Executive Board that the grievance was improperly handled because of fraud, discrimination, or collusion with management

(c) In any other case in which the International Executive Board has passed upon an appeal from the action of a subordinate body.

Section 9. Regardless of which alternative the appellant decides to utilize, he must take the appeal within thirty (30) days of notification of the International Executive Board's decision, (unless such time is extended by the International Union President, where, in his opinion, justice will be served by such an extension), by serving a notice of appeal upon and filing a written statement of his reasons for appeal with the International President.

Section 10. If the appellant elects to appeal to the Public Review Board, the appeal shall be considered by the Board or a panel thereof. The International President shall forward to the chairman of the Public Review Board all documents and records in

the case. After studying said documents and records, the Board or the panel shall hold a hearing; provided that where the Board or panel concludes after preliminary consideration and/or investigation that the appeal is insubstantial or that no useful purpose would be served by a hearing, the Board may, in its discretion, decide or dismiss the appeal without a hearing. The extent and scope of the hearing, as well as other matters of procedure and timing, shall be controlled by the rules of procedure which shall be established for such hearings by the full Board pursuant to Article 32, Section 6.

Section 11. The Board or panel thereof shall, upon due consideration, issue its decision which shall be final and binding upon all parties. In cases coming within Section 8 of this Article, with the exception of cases concerning the processing of grievances, the Board or panel shall decide and dispose of all matters raised by the appeal. In cases that do involve the processing of grievances, the Board or panel shall first determine whether the specific allegation upon which the appellant claims the Board's or panel's jurisdiction to be based is, or is not, true. If such allegation is found to be true, the Board or panel shall proceed to dispose of all facets of the appeal; provided that in no event shall the Public Review Board have the jurisdiction to review in any way an official collective bargaining policy of the International Union. If the Board or the panel shall decide that such jurisdictional allegation is not true, it shall dismiss the appeal in which event the appellant shall, within thirty (30) days of notification of such dismissal, be entitled to appeal the matter to the Constitutional Convention of the International Union; provided that in such appeal, the appellant may not again raise any issue which the Board or the panel negated in its decision dismissing for lack of jurisdiction.

Section 12. It shall be the duty of any member or subordinate body who feels aggrieved by any action, decision, or penalty imposed upon him or it, to exhaust his or its remedy and all appeals therefrom under the laws of this International Union prior to appealing to a civil court or governmental agency for redress."

6. That Grandberry first worked for Respondent from 1969 to 1970 when he was discharged; that he was rehired by Respondent in 1971 and continued in Respondent's employ until his discharge, effective February 5, 1976; and that at all times material hereto he was a member of Respondent Union.

7. That on June 6, 1973, Grandberry was warned by Respondent Employer about his excessive absenteeism; that on June 26, 1973, he was given a disciplinary lay off for absenteeism; that on July 17, 1973, he was taken before an absentee committee comprised of representatives of both Respondent Company and Respondent Union where he was counseled concerning his absenteeism and advised that he had been processed through all of the progressive disciplinary steps prior to discharge and if his attendance did not improve he would be subject to discharge;

8. That Grandberry was absent from work the week of January 27, 1975; that on February 3, 1975 he was indefinitely suspended; and that this suspension was converted to discharge for excessive absenteeism effective February 5, 1975.

9. That on or about February 6, 1975 Grandberry returned to Respondent Employer's plant where he worked and presented the plant nurse with a doctor's statement; that the nurse gave Grandberry a medical release slip to present to his general foreman; that Grandberry presented the general foreman with the slip he had received from the plant nurse; and that the general foreman refused to accept the aforesaid slip or allow Grandberry to return to work and advised him he had been terminated.

10. That on February 8, 1975 a grievance was filed protesting the action taken against Grandberry; that said grievance was processed through the third step of the grievance procedure; 1/ that after receiving Respondent Employer's Step 3 answer to the grievance Respondent Union bargaining committee withdrew the grievance; that the decision to withdraw the grievance was made in the belief that, Respondent Employer, has sufficient evidence to establish that there was just cause to discharge Grandberry; that Respondent Union had been party to prior arbitration decisions wherein arbitrators held Respondent Employer had just cause to discharge employes for excessive absenteeism even where the employe's absence was medically justified; and that Grandberry was advised in writing on April 16, 1975 of the bargaining committee's decision to withdraw his grievance.

11. That subsequent to the decision to withdraw the grievance but, prior to May, 1975, three Respondent Union officials met with Grandberry and explained to him why the grievance had been withdrawn by the bargaining committee and the procedure to follow if he wished to appeal the bargaining committee's decision; that sometime in May 1975, another meeting was held between Grandberry, Respondent Union Local President and, the International Union Representative wherein Grandberry was again advised as to why his grievance had been withdrawn and the procedures to follow if he wished to appeal said decision; that at no time did Grandberry initiate internal Respondent Union procedures available for appealing the bargaining committee's decision to withdraw his grievance.

12. That the Respondent Union did not act arbitrarily, capriciously or in bad faith in deciding to withdraw Grandberry's grievance.

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

CONCLUSIONS OF LAW

1. That the Complainant's failure to exhaust internal Union procedures available to him does not foreclose him from prosecuting his complaint herein.

2. That Respondent Union did not violate its duty to fairly represent Complainant, Sterling Grandberry, by withdrawing his grievance protesting his discharge by Respondent Employer.

3. That the Commission will not exercise its jurisdiction to review the merits of Respondent Employer's alleged breach of the collective bargaining agreement in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that the Complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 31st day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

1/ This is the last step prior to arbitration.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent Employer discharged him in violation of the collective bargaining agreement subsisting between it and Respondent Union. 2/ Complainant also avers that Respondent Union failed to provide him with adequate representation in protecting his job rights when it withdrew his grievance from the contractually established grievance and arbitration machinery.

Respondent Employer's answer to the instant complaint denies Complainant was discharged in violation of the collective bargaining agreement and contends affirmatively that Complainant was discharged for good cause. Respondent Union's answer to the complaint filed herein denies it failed to provide adequate representation to Complainant and, further, alleges that Complainant "failed to exhaust internal Union remedies available to him in disposing of his claimed unfair representation by the Union."

This Commission has enunciated often and clearly the circumstances prerequisite to asserting its jurisdiction to review the merits of an alleged breach of contract where said agreement provides for final and binding arbitration as the exclusive means for the resolution of disputes arising thereunder. 3/ In Manke (11017-B) 8/74, the Wisconsin Supreme Court set forth the prerequisites to prosecution of the breach of contract claim.

> "If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted, then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the employer." (See also Vaca v Sipes, 64 LRRM, 2469).

The court therein also held that the employer carries the burden of establishing the failure to exhaust and is obligated by way of affirmative defense to aver that the grievance procedure has not been exhausted. In the instant case, Respondent Employer's answer did not allege Complainant's failure to exhaust the contract grievance procedure, however, the instant complaint alleges the Union withdrew Complainant's grievance from the system thus, failing to exhaust the procedures available. In view of these factors the undersigned concludes that the requirements of Manke, supra, have been complied with inasmuch as the complaint itself admits failure to exhaust the contractual grievance and arbitration process. 4/

2/ Although Complainant did not specify which section of the Wisconsin Employment Peace Act was violated, it may be fairly read to allege a violation of Section 111.06(1)(f) of said statute.

3/ As noted in Manke (11017-B) 8/74, and Republic Steel Corporation, 379 U.S. 650, there exists a presumption that, unless the contract expressly provides that arbitration is not intended as an exclusive remedy, it will be treated as though it is. In the instant case the parties' agreement does not contain such an express proviso.

4/ The instant complaint recites the Respondent Union's letter addressed to Complainant advising him of its decision to withdraw the grievance. Manke, supra, holds "If this fact [grievance procedure has not been exhausted] has been established by proof, admission or stipulation the employe cannot prosecute his claim unless he proves the union breached its duty of fair representation to him" (emphasis added).

Exhaustion of Internal Union Remedies

Respondent Union, in its answer, alleged that Complainant did not exhaust intra-Union procedures, available to him for review of his charge of breach of duty, prior to filing the instant complaint. In its brief Respondent Union contends that the federal courts as well as the Wisconsin Supreme Court have consistently held that failure to exhaust intra-Union remedies established by the Union's constitution and by-laws precludes an action against the Union or labor organization. On this basis Respondent Union concludes the instant complaint should be dismissed.

The principal question raised by the aforesaid defense is, if it be established that Complainant did not exhaust his intra union remedies prior to filing the instant action for breach of contract, should said failure preclude Complainant from attempting to prove Respondent Union breached its fiduciary duty owed him. There are both federal and Wisconsin cases that have dealt with whether an employe must exhaust his internal union remedies prior to maintaining an action against the union. However, in all of the Wisconsin cases cited, and most of the federal cases cited the question of what role the doctrine of exhaustion plays in a breach of contract action against the employer has not been dealt with.

In Orphan v. Furnco Construction Co., 81 LRRM 2058 (CA 7 1972), the Court of Appeals touched briefly on the question.

> "The employer argues that failure to exhaust intra-Union remedies should also be available to it as a defense because that would facilitate the national labor policy in favor of arbitration. However, that policy would be furthered only if an intra-Union appeal procedure could result in a reversal of the Union's action in refusing to process a grievance and a concomitant timely filing or reinstating of the grievance according to the provisions of the collective bargaining agreement. Since this will not always be the case, the employer's argument has only selective appeal. Here it is simply not established whether any intra-Union remedy affords such relief. Moreover, the employer has shown us no formal appeal or other procedure provided by the Union constitution or by-laws which so certainly holds out the prospect of such relief that the plaintiffs could justifiably be expected to have recourse to it before filing suit."

A more recent and more exhaustive discussion of the question appears, however, in Brookins v. Chrysler Corp., (87 LRRM 3024 (E.D. Mich. 1974). Therein the District Court dismissed the action against the Union on a motion for summary judgement because of plantiff's failure to exhaust the Union's (UAW) internal remedies and, thereafter, had this to say:

> "The crucial question then in determining whether Chrysler may be sued despite plaintiff's failure to exhaust contractual grievance procedures is whether the union's dismissal from the case (and the reasons therefor) leaves the plaintiff in a position to 'prove that the union . . . breached its duty of fair representation'.
>
> The answer seems to turn on whether the union's successful exhaustion defense goes to the merits of the claimed unfair representation or merely to the ripeness of the controversy or plaintiff's capacity to sue. If the former -- i.e., if a failure to exhaust internal remedies means that the duty of fair representation has not yet been breached -- then plaintiff clearly cannot prove the contrary and the employer may properly rely on the employee's failure to exhaust contractual remedies, for he has through the judgment of dismissal

as to the union lost his only legally valid excuse for failing to exhaust. In that sense the employer does indeed get a 'free ride' on the union's defense. However, if the union's dismissal for failure to exhaust internal remedies recognizes that a breach of the duty of fair representation may have occurred, and holds only that a judicial remedy for that a [sic] breach is not presently available, then it seems that the plaintiff would be in a position to prove the existence of the breach despite the fact that he cannot at present maintain an action thereon. The wrong could still exist, and would be subject to proof; only the timing of the remedy would be affected by the union's dismissal from the case.

The other grounds for summary judgment raised here by the union, but not decided, illustrate the two possibilities. The union's success in escaping liability on grounds that the statute of limitations has run does not alter the plaintiff's ability to prove that the union breached its duty of fair representation. De Arroyo v. Sincicato de Trabajadores Packinghouse, 425 F.2d 281, 284, 74 LRRM 2028 (1st Cir. 1970). On the other hand, dismissal of the union for plaintiff's failure to plead facts sufficient to state a claim for unfair representation is a conclusive determination that the plaintiff is not in a position to prove unfair representation, and the company cannot thereafter be sued for breach of contract without exhaustion of contract remedies. Compare Dill v. Greyhound Corp., 435 F.2d 231, 237-238, 76 LRRM 2070 (6th Cir. 1970), with Balowski v. International Union, UAW 372 F.2d 829, 834-835, 64 LRRM 2397 (6th Cir. 1967). Letting the union out because the employee has failed to exhaust internal union remedies seems to fall somewhere between these extremes.

Few cases have explicitly considered this problem. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 102, 69 LRRM 2048 (3d Cir. 1968) is occasionally cited for the proposition that '[f]ailure to exhaust internal union remedies could not be urged by the employer as a defense in a suit by the employee for wrongful discharge'. Retena v. Apartment, Motel, Hotel & Elevator Operators Union, Local 14, Supra, 453 F.2d at 1027 n. 16, 74 LRRM at 2278. However in Brady the rights asserted by the employee were statutory, not contractual, and the employer had no right to rely on the exhaustion of contract remedies. 401 F.2d at 91-96. Furthermore the union and employer in Brady were sued jointly only for Brady's wrongful discharge, and as to that the court determined that failure to exhaust internal remedies was no defense even for the union. 401 F.2d at 102. The court did hold that failure to exhaust precluded suit against the union for unfair representation, 401 F.2d at 104, but because there was no claim against the employer for breach of contract, the entire Vaca formula was inapplicable and the dismissal of the unfair representation count against the union was totally irrelevant to the employer's liability.

On the other hand, at least two courts have granted summary judgment to the employer based on the employee's failure to exhaust internal union remedies. See Davis v. Local 242, Hod-Carriers & Gen. Laborers Union, 84 LRRM 2544, 72 LC Section 14,033 (W.D. Wash. 1973); Harrington v. Chrysler Corp., 303 F.Supp. 495, 72 LRRM 2248 (E.D.Mich. 1969). Two others seem to reach a similar result, although the exact basis for decision in each is somewhat uncertain. See Dill v. Wood Shovel & Tool Co., 80 LRRM 2445, 68 LC Section 12,398 (N.D. Ohio 1972); Imbrunnone v. Chrysler Corp., 336 F. Supp. 1223, 77 LRRM 2690 (E.D. Mich. 1971). Still others seem to recognize the possibility of such a disposition while denying it on other grounds. See, e.g., Orphan v. Furnco Constr.

Corp., 466 F.2d 795, 801-802 & n. 12, 81 LRRM 2058 (7th Cir. 1972); Sciaraffa v. Oxford Paper Co., 310 F.Supp. 891, 902, 2 FEP Cases 398 (D.Me. 1970).

[RESOLUTION OF ISSUE]

The key to resolving this issue is the nature of the remedies which the employee must exhaust. If they were before an administrative agency it would seem logical to conclude that it would be the remedy and not the wrong itself which the exhaustion doctrine would deny. But where the required procedures are those available from the allegedly offending union itself, and pursuit of them 'could result in a reversal of the Union's action in refusing to process a grievance and a concomitant timely filing or reinstating of the grievance according to the provisions of the collective bargaining agreement', Orphan v. Furnco Constr. Co., supra, 466 F.2d at 801, the opposite is true. By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complaints, [sic] not merely obtain a remedy therefor in another forum. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under Vaca to sue his employer for breach of contract. This conclusion is consistent with the national labor policy in favor of arbitration. Orphan v. Furnco Constr. Co., supra. See generally United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, 46 LRRM 2414 (1960); United Steelworker of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, 46 LRRM 2416 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, 46 LRRM 2423 (1960). It is also consistent with the preference for finality and against interlocutory appeals in judicial review of administrative action generally. See K. Davis, Administrative Law Treatise Section 20.05 (1958, Supp. 1970).

In this case the remedies available to plaintiff through the internal appeal procedure were fully adequate to make him whole, should it have been determined that his grievance was improperly withdrawn. By pursuing them he would have given the union a chance to reverse its earlier actions and effectually prevent any inchoate breach of its duty of fair representation. Not having done so he is in no position to prove that the union committed such a breach and cannot therefore take advantage of Vaca to avoid Chrysler's defense of exhaustion. Summary judgment must also be entered dismissing Chrysler from the cause." [sic]

In the instant case the International Union Constitution and By-Laws explicitly requires, the union member to exhaust the internal procedures set forth therein prior to "appealing to a civil court or governmental agency for redress". However contrary to the finding in Brookins, supra, there is no evidence herein that the internal remedies available to Complainant are adequate to make him whole should it be found Respondent Union breached its duty of fair representation by withdrawing his grievance. The Complainant has brought the instant action seeking reinstatement to his job by Respondent Employer, however, said Respondent Employer is not contractually obligated by the collective bargaining agreement to reinstate the grievant upon the request of the Respondent Union. 5/

5/ There was testimony that the Respondent Employer has acceded to such requests in the past but there is no evidence it is contractually bound to do so in this instance.

Thus, the reinstatement portion of relief sought herein is not within the scope of remedial relief available through the Union's internal procedures.

The evidence herein establishes that Complainant did not attempt to utilize the internal procedures provided for by the Local and International Constitution and By-Laws even though he was advised on two occasions that such procedures were available to him. Notwithstanding, for the reasons stated above the undersigned does not believe Complainant should be precluded from attempting to prove Respondent Union breached its duty of representation. To conclude otherwise, would cause the Complainant to follow a procedure which, were he to prevail, would provide only partial relief 6/ and concommitantly leave him remediless with respect to prosecuting his breach of contract action against Respondent Employer in order to gain reinstatement.

Moreover, it should also be noted that this conclusion follows even though the Commission, upon a finding of breach of duty and breach of contract, might fashion a remedy wherein liability is apportioned between the Respondent Employer and Respondent Union. 7/ It is clear from the pleadings filed herein that Respondent Union was named as a Respondent only to facilitate Complainant's breach of contract action. No claim was made for damages against the Union.

Breach of Duty

As noted earlier herein, prior to the Commission asserting jurisdiction over the merits of Respondent Employer's alleged breach of contract, Complainant must prove by a clear and satisfactory preponderance of the evidence 8/ that Respondent Union acted arbitrarily, capriciously or in bad faith when it withdrew Complainant's grievance prior to arbitration. 9/ Complainant's charge that Respondent Union breached its fiduciary duty in processing his grievance is based solely upon the withdrawal of said grievance.

The law is quite clear that unions are afforded great latitude in deciding whether to exhaust the contract grievance machinery in every instance wherein a grievance has been filed. In Humphrey v. Moore, 375 U.S. 335 (1964) the U.S. Supreme Court said:

> ". . . 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual

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6/ Wiechering (4187-A) 11/56.

7/ The Commission has the authority to fashion an appropriate remedy (See Sec. 111.07(4) WEPA) for breach of contract and that remedy might include apportioning liability between the Union and Employer if it could be proven that the Union's breach of duty had the effect of increasing the employee's damages beyond that caused by the employer's breach of contract. In such a circumstance the Employer should not be liable for increases in the employee's damages caused by the union's illegal conduct just as the union should not have to bear the entire cost of the employer's breach of contract merely because it breached its duty to the employee by foreclosing said employe from relief under the contractual grievance and arbitration system. However, apportionment of damage against the Union would only be incidental to the suit against the employer for breach of contract.

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

9/ Vaca v. Sipes., Supra.; Manke, Supra.

employees and classes of employees. The mere existence of such differences does not make them invalid. The complete reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' . . .Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. . . ."

Similarly, Wisconsin's highest court said in a pre Vaca case, Fray, Supra.

". . . The union has great discretion in processing the claims of its members, and only in extreme cases of abuse of discretion will courts interfere with the union's decision not to present an employee's grievance. See 44 Virginia Law Review (No. 8, 1958), 1337, 1338. In certain cases for the greater good of the members as a whole, some individual rights may have to be compromised. Whether or not a cause of action is stated depends upon the particular facts of each case. [Case cited.]" 10/

In the instant case Respondent Union withdrew the grievance at the conclusion of the third step of the grievance procedure. The bargaining committee met after receiving the Respondent Employer's third step answer to the grievance and concluded upon the basis of the evidence presented by Respondent Employer and its prior experience with arbitration of similar cases that Respondent Employer had good cause to discharge Complainant. Complainant on the other hand adduced no other evidence upon which to conclude the Respondent Union's action was arbitrary, capricious or taken in bad faith. Thus, the withdrawal, standing alone, does not pursuade the Examiner that the Union breached its fiduciary duty of fair representation to Complainant.

Therefore, because the contract grievance and arbitration machinery has not been exhausted, and Complainant's failure to exhaust same was not occasioned by Respondent Union's breach of its fiduciary duty owed Complainant, this Commission will not exercise its jurisdiction to review the merits of the alleged breach of contract.

Dated at Madison, Wisconsin this 31st day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

10/ It modified this statement later in Manke, Supra., when it said:

"The language in Fray, namely, 'extreme cases of abuse of discretion,' is probably too broad. The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member."