STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 391, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Complainant, vs. WEBSTER ELECTRIC COMPANY, INC., Respondent.	Case VII No. 20805 Ce-1689 Decision No. 14909-B

Appearances:
Zubrensky, Padden, Graf and Bratt, Attorneys at Law, by Mr. James P. Maloney, appearing on behalf of the Complainant.
Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by Ms. Sandra P. Zemm, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having, on September 7, 1976, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed an unfair labor practice within the meaning of Section 111.06 of the Wisconsin Employment Peace Act (WEPA); and said complaint having subsequently been amended on September 29, 1976 and October 20, 1976; and the Commission having appointed Peter G. Davis, 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 WEPA; and a hearing on said complaint having been held before the Examiner in Racine, Wisconsin, on November 4, 1976; and briefs having been received until January 11, 1977; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 391, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, herein Complainant, is a labor organization functioning as the exclusive collective bargaining representative of certain individuals employed by Webster Electric Company, Inc.

2. That Webster Electric Company, Inc., herein Respondent, is an employer operating a plant in Racine, Wisconsin, who employed Jeff Kent, Roger Kotleski, and Larry Brown until their discharge on June 25, 1976.

3. That the parties' 1974-1977 collective bargaining agreement contains the following provisions, but does not provide for the final and binding arbitration of unresolved grievances.

"ARTICLE 3

Grievance Procedure

3.01 Grievance Procedure. 1. A grievance for the purposes of this Agreement shall be defined as any difference

between the Company and employees covered by this Agreement as to the meaning and/or application of any provision of this Agreement.

STEP 1. An employee who has a grievance other than a rate grievance shall present it to his department steward. The department steward and the employee shall discuss the grievance with the foreman. The foreman shall give his verbal decision without undue delay, but not to exceed one (1) working day from the time of the discussion of the grievance.

STEP 2. If no satisfactory settlement is reached as outlined in Step 1 above, the grievance shall be stated fully in writing on a grievance form in triplicate provided by the Company. Both the employee and the department steward will sign the form. The department foreman will note his comments on the form and sign his name and return it to the steward without undue delay, but not to exceed one (1) working day. The steward will give the copies of the form to a member of the bargaining committee. He will forward them to the superintendent. The superintendent, after conferring with this member of the bargaining committee, the steward and the foreman involved, will give his reply in writing on the grievance form within three (3) working days retaining one copy and giving the other two to the member of the bargaining committee who was present in the conference. One copy will be given to the employee as his record of the action taken.

STEP 3. If no satisfactory settlement is reached as outlined in Step 2 above, the Union or the Company will notify the other party by placing the grievance on the agenda for a meeting between the Company and the bargaining committee to be on the first Friday thereafter. Emergencies may arise whereby the Company or the Union may call a special meeting. The Company will give an answer to the grievance in writing within five (5) working days after the meeting. The period may be extended if it is necessary for the Union to bring representatives of the International Union, or the Company to bring in Company representatives to the discussion.

. . .

ARTICLE 4

Seniority

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4.05 Loss of Seniority. 1. Loss of seniority consists of the following:

. . .

B. If he should have been discharged for just cause. If such discharge shall have been determined as unjust, the Company shall reinstate him and pay such employee his going rate of pay, making it retroactive to the date of discharge. If protest of discharge is to be made it will be considered a grievance and taken up in the third step of the grievance procedure. Both parties agree that a discharged employee must peaceably leave the plant after he has registered his grievance.

. . .

ARTICLE 12

Management

1. The management of the business and the direction of the working forces, including, but not limited to, the right to plan, direct and control operations; to hire, promote and transfer; to suspend, discipline or discharge for cause, or to relieve employees because of lack of work or for other legitimate reasons; to make and enforce rules and regulations; to introduce new and improved methods, materials or facilities, or to change existing methods, materials or facilities; and to manage the plant in the traditional manner is vested exclusively in the Company; provided, however, that such rights shall not be applied in any manner violative of any of the specific provisions of this Agreement.

. . ."

4. That the Respondent has promulgated Rules and Regulations which contain the following provisions:

"DISCIPLINARY PROCEDURE

Purpose

Rules and regulations are necessary to maintain order, safety, and the efficiency of an organization. When these rules are violated appropriate action must be taken for the protection of all employees. It is the objective of the Company to take only such actions as are appropriate and necessary to treat all employees in a fair and uniform manner. The purpose, then, of this procedure is to ensure a consistent and fair application of disciplinary action whenever there is a violation of plant rules and regulations.

. . .

PLANT RULES

The purpose of this list of violations is not to restrict the rights of anyone, but to indicate responsibilities, protect the rights of all, and insure [sic] cooperation. Committing any of the following violations by any employee will be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, depending upon the number and frequency of past violations, and the seriousness of the offense in the judgment of Management.

. . .

23. Reporting for work under the influence of alcohol or drinking or possession of alcoholic beverages within the plant."

5. That on June 25, 1976, at 2:00 a.m. foremen Papala and Thurmond found employes Kent, Kotleski, Brown and Cvengros eating pizza in Department 7 of Respondent's plant; that as the two foremen arrived Kent was seated on a stool with an open beer can between his knees, Kotleski had a can of beer to his lips, Brown was seated within reach of an open beer can, and Cvengros had an open can of soda in his hand; that three unopened beer cans were sitting on a bench; that Cvengros immediately held up his can of soda and stated "Not me, gentlemen" while Kent, Kotleski, and Brown said nothing; that the two foremen left the four employes, told Ed Sloan, a member of the Complainant's bargaining team, what they had observed and returned with Sloan to the department where the employes had been observed; and that upon their arrival only a pizza wrapper remained.

6. That as foremen Papala and Thurmond returned to the foreman center, accompanied by Sloan, they began discussing the disciplinary action which should be taken against employes Kent, Kotleski and Brown who they believed had been drinking beer; that Papala and Thurmond had never before confronted the type of misconduct which they perceived to have occurred and thus were uncertain as to the disciplinary action which would be appropriate; that as the options of discharge or five day suspension were discussed, Sloan interjected his opinion that such discipline was too severe in light of the three day suspensions received in the past by employes Kopecky and Schuster for being intoxicated in the plant; that foreman Thurmond checked Kopecky's records and found that said employe had come to work intoxicated with an empty liquor bottle in his pocket and had received a three day suspension; that Papala and Thurmond ultimately decided that three day suspensions were appropriate and prepared reports detailing the alleged misconduct and the action taken; and that Kent's suspension was to commence at 5:00 p.m. on June 25, while the suspensions of Brown and Kotleski were to begin at 11:00 p.m. on June 25.

7. That Papala and Thurmond then summoned Kent, Kotleski, and Brown to the foreman center; that Kent had already left the plant because his shift was over; that Kotleski and Brown reported to the foreman center and received documents indicating that each had received a three day suspension for "Drinking alcoholic beverages (beer) on company property during working hours"; that Kotleski nodded his head in agreement while Brown shrugged his shoulders; that both employes were instructed to and did in fact finish out their shift; and that Brown prepared a grievance regarding the suspension which he attached to the time card of Complainant's president before leaving the plant.

8. That after the meeting with Kotleski and Brown, foreman Thurmond left a note for Howard Miller, plant superintendent, detailing the action taken against the three employes; that Miller read the note upon the commencement of the first shift on the morning of June 25 and immediately contacted Russ Anderson, vice-president of manufacturing, to discuss whether adequate disciplinary action had been taken; that Miller and Anderson had been concerned for some time about the development of a drinking problem within the plant and their inability to identify the source of said problem; that in light of this difficulty Miller and Anderson decided that the three employes should be discharged for violating Plant Rule 23; that Kent was immediately contacted by telephone and informed of his discharge while Kotleski and Brown could not be reached and thus received discharge letters on June 26, 1976; that at the time of the discharge decision and the attempt to contact the three employes, none of them had begun to serve the three day

suspensions originally imposed by foremen Papala and Thurmond; that on June 28, 1976, Kent, Kotleski, and Brown filed the following grievance regarding their discharge:

> "An incident, having beer on company property, occurred on 6/24/76 in which we were given 3 days off. This punishment was excessive, but accepted. The following morning we were terminated for the same incident for which we got 3 days off. It is not just to be given 2 punishments for the same incident.
>
> In the past similar incidents were dealt with either by written warning, or by 3 days off, but not termination. For example there were 3 individuals that were involved in similar situations, they are Adolph Kopecki, Cindy Schuster and Todd Radle. These individuals were dealt with fairly, as we wish to be. Therefore, we wish to be reinstated with the time already lost as our punishment."

and that said grievance was processed through the contractual grievance procedure.

9. That aside from the past disciplinary incident involving employe Kopecky, the Respondent had in the past issued a three day suspension to employe Radle for being intoxicated on the job and to employe Schuster who was intoxicated in the plant and later admitted that she had been drinking in the women's rest room.

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

CONCLUSION OF LAW

That Webster Electric Company, Inc., violated Articles 4 and 12 of the parties' 1974-1977 bargaining agreement by discharging Jeff Kent, Roger Kotleski and Larry Brown without "just cause" and thereby 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 Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That Webster Electric Company, Inc., its officers and agents shall immediately:

1. Cease and desist from violating the parties' 1974-1977 collective bargaining agreement.

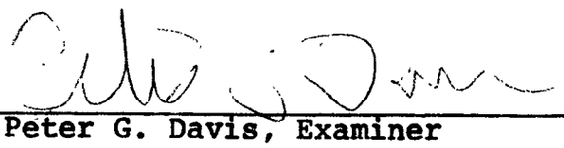
2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

   (a) Proffer immediate reinstatement to Jeff Kent, Roger Kotleski, and Larry Brown without back pay but with full seniority rights.

(b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 31st day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its answer to the instant complaint and at the commencement of the hearing, Respondent asserted that the Wisconsin Employment Relations Commission lacked jurisdiction to determine whether it had violated the collective bargaining agreement existing between it and the Complainant. However, Respondent abandoned this position in its brief and stated that "the jurisdiction of the Wisconsin Employment Relations Commission is limited to determining whether or not the Respondent violated the terms of the existing collective bargaining agreement." Given the disappearance of Respondent's jurisdictional contention, the Examiner does not feel compelled to launch into an extended discussion of the Commission's jurisdiction under Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Suffice it to say that inasmuch as the parties' bargaining agreement does not provide for final and binding impartial resolution of the instant grievance, the Commission will assert its 111.06(1)(f) jurisdiction to determine whether the Respondent violated said agreement when it discharged the three grievants.

POSITIONS OF THE PARTIES

The Complainant initially asserts that the three day suspensions originally received by the three employes represented a negotiated "settlement" of a "grievance" under Article 3 of the bargaining agreement and that said "settlement," reached by Sloan and the two foremen, was binding upon both parties. It thus contends that Respondent's subsequent unilateral decision to discharge the employes violated Article 3 and thus constituted an unfair labor practice within the meaning of Section 111.06(1)(f).

Complainant further contends that the Respondent violated Articles 4 and 12 of the bargaining agreement in that it lacked "just cause" for the discharges. This contention is premised in part upon Complainant's belief that the employes were placed in double jeopardy by the subsequent discharge and that the Respondent should be estopped from unilaterally rescinding the three day suspension "settlement". However, Complainant places primary emphasis upon the lesser penalties received by other employes for similar violations of Plant Rule 23 and its belief that such an inconsistent disciplinary response violates the concept of "just cause" as well as the Respondent's obligation "to insure [sic] a consistent and fair application of disciplinary actions" as stated in the Rules and Regulations.

Finally, with respect to employe Brown, Complainant asserts that there is no evidence that justifies the conclusion that Brown was in fact drinking beer and thus that the Respondent clearly lacked "just cause" for any disciplinary action against said employe.

The Respondent argues that it did not violate Article 3 of the bargaining agreement by increasing the discipline imposed upon the three employes. It contends that no "grievance" and thus no "settlement" could exist until some discipline had actually been imposed upon the employes, and that no settlement discussions took place after the employes had initially been disciplined. If it were to be determined that a grievance had arisen prior to the imposition of discipline, Respondent adamantly urges that the three day suspension was not a negotiated settlement but rather a unilateral decision reached by the two foremen. Furthermore, even if the disciplinary suspensions were deemed to be a grievance settlement, Respondent alleges that management had the authority to overrule the foremen and convert the suspensions into discharges under both Article 3 and commonly accepted precepts of labor law.

With respect to the alleged violations of Articles 4 and 12, Respondent asserts that it had "just cause" to discharge the three employes. It contends that employes found both possessing and drinking intoxicants are committing a serious violation of a known plant rule and that said violation clearly warrants discharge. Respondent argues that past incidents involving other employes constituted substantially different violations of Rule 23 in that the employes involved in said incidents were not discovered drinking or in possession of intoxicating beverages. It alleges that the record contains sufficient evidence to warrant the conclusion that all three employes were drinking beer. It urges that the testimony regarding Kent and Kotleski stands unrebutted given said employes' absence at the hearing and believes that Brown's testimony denying his involvement should be dismissed as self-serving and thus lacking in credibility. Respondent therefore requests that the instant complaint be dismissed in its entirety.

DISCUSSION

The first question to be resolved herein is whether, as asserted by the Complainant, the three day suspensions constituted a "settlement" of an Article 3 "grievance" and, if so, whether Respondent was bound by said settlement. Initially the undersigned finds Respondent's argument that there could be no grievance and thus no settlement until the disciplinary decision had been made and communicated to the employes to be persuasive. Indeed it would seem rather illogical that a difference "as to meaning and/or application of any provision of this Agreement" could arise before representatives of the Employer have actually determined their response to misconduct. Furthermore, even if a grievance could arise prior to said response, Article 3 clearly supposes that the employes involved in the dispute will at least have a substantial role in the decision to initiate the grievance procedure. In the instant situation no such employe involvement occurred until after discipline had been imposed. However, assuming arguendo that a grievance had arisen prior to the actual imposition of discipline, the record simply does not support the Complainant's assertion that Sloan in fact negotiated a settlement of said grievance or that the resultant discipline was even viewed by the employes as some compromise disciplinary action. To be sure, Sloan had an impact upon Papala and Thurmond as they decided what disciplinary action to take. However, his role was that of a critic of the decision making process rather than a participant. Furthermore, it is difficult to conceive of a "settlement" regarding disciplinary action which does not involve prior consultation with the employes involved. No such consultation occurred. Lastly it is noteworthy that employe Brown clearly did not view the three day suspension as a settlement inasmuch as he prepared a grievance immediately following his receipt of the suspension notice. Based upon the foregoing, the Examiner must conclude that the three day suspension did not represent the "settlement" of a "grievance" under Article 3 and thus that the subsequent conversion of the suspension into a discharge did not violate said article. However, having reached this conclusion, the undersigned must still address the general issue of whether management has a right to overrule this disciplinary decision by foremen Papala and Thurmond.

Implicit in the establishment of a managerial structure with varying levels of responsibility is the authority of those individuals with more responsibility to overrule the decisions of their subordinates. The parties' grievance procedure, with its involvement of progressively higher authority levels, constitutes a contractual confirmation of the applicability of this concept to disputes over the application of the bargaining agreement, including discipline. However the Respondent could lose this authority to overrule if it were to contractually agree that the disciplinary decisions of foremen were final or if, by its actions, it led the Complainant to believe that such final authority had been delegated to said foremen. The

evidence in the instant record is inadequate to support a conclusion that either of the above had occurred, and thus the Examiner concludes that in the instant situation Respondent had retained the authority to alter the disciplinary decision of foremen Papala and Thurmond. 1/ Having reached this conclusion the undersigned turns to the question of whether the Respondent had "just cause" to discharge employes Kent, Kotleski and Brown.

The record contains unrefuted evidence that Kent had an open beer can between his legs and that Kotleski had a beer can to his lips when the foremen arrived. Thus it can only be concluded that both individuals were violating Plant Rule 23 by possessing and drinking alcoholic beverages in the plant. Turning to Brown, the record reveals that he was the employe closest to the only open beer can which was not already in an employe's physical possession when the foremen arrived. While said can was also within reach of Kent and Kotleski, it would seem unlikely that they would open a new can when they had not yet finished the beer in their possession. The record also reveals that Brown did not claim his innocence a la Cvengros when the foremen appeared or later when he received the three day suspension. While it is conceivable that an innocent employe could initially be so stunned by the foremen's appearance that he would fail to proclaim his innocence, it seems unlikely that he would remain silent when actually receiving his suspension. The fact that he did file a grievance that evening lessens but does not destroy the impact of his earlier silence. It is also noteworthy that the discharge grievance signed by employe Brown did not deny the alleged misconduct, but instead asserted that the punishment was excessive. Based upon the foregoing the undersigned must conclude that Brown was also drinking beer in violation of Plant Rule 23. The question then becomes one of determining the disciplinary action merited by said misconduct.

The Examiner has already rejected the contention that the Respondent was estopped from increasing discipline because such action allegedly violated Article 3. Inasmuch as the Respondent made the discharge decision and attempted to inform the employes regarding same before said employes had begun to serve the suspensions originally imposed, the applicability of the concept of double jeopardy is also rejected. However, a "just cause" standard does preclude the imposition of discipline in an arbitrary or inconsistent manner. This principal is echoed in Respondent's Rules and Regulations which call for the "consistent and fair application of disciplinary action whenever there is a violation of plant rules and regulations." Therefore, the undersigned must turn to a consideration of the degree of misconduct involved in past violations of Plant Rule 23, the penalties imposed by the Respondent, and the affect which same should have upon the resolution of the issue at hand.

The record contains three past instances in which employes were disciplined for violating Plant Rule 23. All three involved employes who were intoxicated in the plant. However, none of the three were discovered drinking alcohol within the plant or in the possession of alcohol, although one employe later admitted that she had been drinking liquor out of her thermos in the women's rest room. While there can be no question that these incidents are closely related to the misconduct of Kent, Kotleski, and Brown, they constitute less significant violations of Plant Rule 23. The discovery of employes drinking in the plant represents a greater affront to management's

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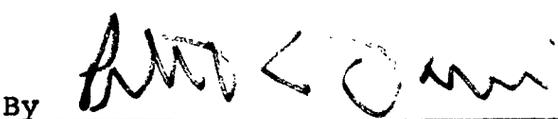
1/ However, it should be noted that this authority, if exercised after employes had served the discipline originally imposed, might well run afoul of the doctrine of double jeopardy.

authority inasmuch as it presents the employer with a conscious decision by the employe to violate a known plant rule whereas an intoxicated employe's appearance at work may well represent a well intentioned but misguided attempt to avoid missing work or the employe's inability to judge his own physical condition. Therefore an employer may legitimately conclude that it has greater need to deter such conduct and thus that a more stringent disciplinary response is required. Furthermore the record contains unrebutted testimony that the Respondent was experiencing a drinking problem within the plant which was becoming a major concern. Such a circumstance may also warrant an increase in disciplinary response. Finally there is the fact that possession and use of alcohol in the work place constitutes serious employe misconduct. It is not uncommon for arbitrators to sustain employer decisions to discharge employes for such an offense. In light of the serious nature of the misconduct, the development of drinking problems within the plant, and the fact that the misconduct involved herein is somewhat distinguishable from past violations of Rule 23, the Examiner concludes that the Respondent had just cause to impose discipline which was more severe than the three day suspensions of the past. Indeed, but for the presence of said suspensions, the Respondent would have had just cause to discharge Kent, Kotleski, and Brown. However, the misconduct of Kent, Kotleski and Brown and the severity thereof is not sufficiently distinct from the past incidents and the ensuing disciplinary responses to warrant discharge under the "just cause" standard and the "fair and uniform" proclamation contained in the Rules and Regulations. Thus, in light of the inconsistent imposition of discipline, the Examiner has ordered that Kent, Kotleski and Brown be reinstated with no back pay.

Dated at Madison, Wisconsin this 31st day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner