STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEROY S. OBENAUER, Complainant, vs. ALLIS CHALMERS CORPORATION, JOHN S. BOLES, WILLIAM EBLI, U. RAO, Respondents.	Case XXXIV No. 21000 Ce-1701 Decision No. 15069-D

Appearances:
Mr. LeRoy S. Obenauer, Complainant, appearing on his own behalf.
Mr. Ross E. Brown, Attorney, Corporate Employee Relations, Allis Chalmers Corporation, appearing on behalf of the Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

LeRoy Obenauer, herein Complainant or Obenauer, having filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein he alleged that Allis Chalmers Corporation, John S. Boles, William Ebli, U. Rao, J. Halliburton and United Automobile, Aerospace and Agricultural Implement Workers of America had committed unfair labor practices contrary to the provisions of Section 111.06, Wisconsin Employment Peace Act; and the Commission having appointed Thomas L. Yaeger, a member of the Commission's staff, to act as Examiner in the matter; and, thereafter, Complainant on February 6, 1977, having filed a motion to dismiss the subject complaint against J. Halliburton and United Automobile, Aerospace and Agricultural Implement Workers of America; and said motion having been granted; and on March 16, 1977, Respondents having moved to dismiss said complaint for lack of jurisdiction; and said motion having been denied; and hearing on said complaint having been held in Milwaukee, Wisconsin on April 7, 1977; and the parties having filed briefs and the transcript having been received on February 1, 1978; 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 LeRoy S. Obenauer is an individual residing at 1109 Ravine Drive, East Troy, Wisconsin.

2. That Allis Chalmers Corporation, herein Corporation, is a Wisconsin corporation with facilities located in Milwaukee, Wisconsin; and that John S. Boles, William Ebli and U. Rao were at all times material hereto, employed by the Corporation as Manager, Fabrication Shop; Supervisor, Fabrication Shop and Unit Manager, Fabrication Shop respectively.

3. That at all times material hereto the Corporation has recognized the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 248, herein Union, as the exclusive bargaining agents of its production and maintenance employees; that at

all times material hereto the Corporation and the aforesaid union have been parties to a collective bargaining agreement that contains among its provisions a three step grievance procedure and a procedure for having unresolved grievances heard by an impartial referee whose decision is binding upon the Corporation, employees and international and local unions; that said contract contains no time limit for appealing grievances heard at the third step to the impartial referee; and that the Company has never claimed any such limit upon appeals other than it must be done within two contract periods.

4. That Obenauer, was employed by the Corporation since March 17, 1975, and until his discharge on September 30, 1976.

5. That on September 20, 1976, Obenauer was given an indefinite suspension for allegedly reading a magazine in the tool crib during working hours; that September 30, 1976, said indefinite suspension was converted to a discharge; that on or about the same dates on which said suspension and discharge were imposed Obenauer grieved same pursuant to the provisions of the contractual grievance procedure; and that the grievant had previously filed other grievances relating to discipline imposed on him by the Company.

6. That the aforesaid grievance relating to Obenauer's discharge has been processed through the third step of the contractual grievance procedure without resolution; that said grievance has not been dropped by the Union, but had not been heard by an impartial referee pursuant to the applicable collective bargaining agreement procedures prior to the instant hearing; and that the grievance and arbitration procedure contained in the subject collective bargaining agreement therefore has not been exhausted.

7. That the Union, in processing Obenauer's grievances, prior to the instant hearing did not act arbitrarily, capriciously 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 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 248 did not violate its duty to fairly represent complainant LeRoy S. Obenauer, in the processing of his grievance filed in protest of his discharge on September 30, 1976, and in the processing of his other grievances.

2. That the Commission will not exercise its jurisdiction to review the merits of the Respondents' 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 20th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

ALLIS CHALMERS CORPORATION, XXXIV, Decision No. 15069-D

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. 1/ Complainant also avers that Respondent Union failed to provide him with adequate representation in protecting his job rights by not expeditiously processing his grievances through the established contractual procedures to final resolution.

Respondent Corporation's answer and accompanying motion to dismiss filed in response to the instant complaint denies it harbored any animus toward complainant or that his complaint sets forth any prohibited practice committed by it. In its brief, the Respondent Corporation contends the commission lacks jurisdiction over the subject complaint inasmuch as the matter is governed by the National Labor Relations Act.

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. 2/ 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 has not processed Complainant's grievance beyond the third step of the procedure 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. 3/

1/ 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.

2/ 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.

3/ The instant complaint says, "Mr. Halliburton and Local 248 of the U.A.W. have only taken my grievances to a third step hearing,...".

Breach of Duty

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 4/ that the Union acted arbitrarily, capriciously or in bad faith by as yet not processing Complainant's grievance to arbitration. 5/ Complainant's charge that the Union breached its fiduciary duty in processing his grievance is based solely upon the failure to date of said Union to process his grievance through binding arbitration.

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. 355 (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 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.)" 6/

In the instant case, Obenauer explains that his failure to exhaust the contractual machinery is due to delays occassioned by the Union. His discharge grievance was filed on or about September 30, 1976, but had not been heard by an impartial referee or resolved in any other manner prior to April 7, 1977. However, there was no record evidence to establish why the matters had not been settled or arbitrated. Clearly, there are a myriad of plausible explanations for the delay, i.e., Employer delay and others, many of which do not involve arbitrary or capricious conduct or bad faith on the part of the Union in processing Obenauer's grievances. Also, while the Union has great latitude in the processing of

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

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

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

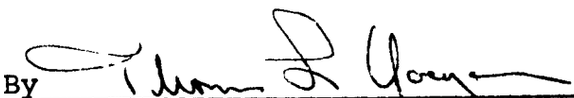
> "The language in Fray, namely, 'extreme cases of abuse of discretion,' is probably too broad. The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member."

grievances, it nonetheless can undertake in good faith and without a hostile motive or discrimination a course of action or inaction, which is so unreasonable or arbitrary or perfunctory such that it breaches its duty of fair representation. 7/ There is no record evidence herein, however, that the Union does not intend to process the grievance any further. Nor has Complainant proved prejudicial inaction by the Union merely because the grievance has as yet not been appealed to an impartial referee particularly in light of the two contract period time limitation upon appeals. 8/ Thus, without more than the mere fact that no appeal has as yet been taken, a finding of unreasonable, perfunctory or arbitrary conduct by the Union is unwarranted.

Consequently, Complainant failed to prove by a clear and satisfactory preponderance of the evidence that his failure to exhaust the contractual grievance and arbitration procedure is excused by the Union's breach of its fiduciary duty of fair representation. Therefore, because the contract grievance and arbitration machinery has not been exhausted, and Complainant's failure to exhaust same was not occassioned by the Union's breach of its fiduciary duty owed Complainant, this Commission will not assert its jurisdiction to review the merits of the alleged breach of contract by Repondents.

Dated at Madison, Wisconsin, this 20th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

7/ Griffin v. UAW, 81 LRRM 2485 (1972); Ruzika v. General Motor Corp., 90 LRRM 2497 (1975).

8/ Ruzika, Supra.