STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALVIN C. BISCHOFF, Complainant, vs. CREPACO, INC., AND THE UNITED STEEL WORKERS OF AMERICA, LOCAL LODGE 1789, Respondents.	:	Case I No. 21252 Ce-1709 Decision No. 15192-B

Appearances:

Mr. Russell J. Mittelstadt, Attorney at Law, appearing on behalf of the Complainant.

Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., Attorneys at Law, by Mr. Clifford Buelow, appearing on behalf of Respondent Employer.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practice was filed with the Wisconsin Employment Relations Commission in the above-entitled matter. The Commission appointed Marshall L. Gratz, then a member of its staff, to act as an 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. The Examiner conducted a hearing in the matter at Lake Mills, Wisconsin, on March 10, May 27, and July 14, 1977. On June 15, 1978, the Commission issued an order directing that the Examiner's decision in this matter shall be the final decision of the Commission herein. The Examiner has 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. Complainant Alvin C. Bischoff, hereinafter referred to as Complainant, is an individual residing at Johnson Creek, Wisconsin. For some 13 years prior to his discharge on May 5, 1976, Complainant was an employe of Respondent Crepaco, Inc.

2. Respondent Crepaco, Inc., hereinafter referred to as Respondent Employer, is an employer with manufacturing facilities in Lake Mills, Wisconsin.

3. Respondent, Local Lodge 1789, affiliated with the United Steel Workers of America, AFL-CIO, hereinafter referred to as Respondent Union, is a labor organization. Robert Kulow is the President of Local Lodge 1789. Donald Marzec is an International Staff Representative of the United Steel Workers of America. Bertram McNamara is the Director of District 32 of the United Steel Workers of America, which District includes the Lake Mills, Wisconsin area.

4. At all times material hereto, Respondent Union has been the collective bargaining representative of certain employes of Respondent Employer including Complainant at the time of his discharge. Respondent Union and the Respondent Employer were parties to a collective bargaining

agreement effective from January 15, 1974 to January 18, 1977 which contained the following pertinent provisions:

"SECTION 10 - GRIEVANCES

. . .

10.1 Should there be any grievance or misunderstanding on the part of any employee of the Union, or should trouble of any kind arise, there shall be no suspension of work during the life of this Agreement on account of such grievance or misunderstanding, but an earnest effort should be made to adjust the grievance or clear up the misunderstanding promptly in the following manner:

1. The aggrieved employee and his shop steward, if the employee desires, shall within seven (7) scheduled working days of the occurrence, or when the Union is, or should reasonably be, aware of such occurrence giving rise to the complaint, bring such complaint to his foreman and attempt to adjust the matter satisfactorily.

2. If the matter is not satisfactorily adjusted in Step 1 above within two (2) working days, the Union standing committee may present the complaint in writing to the Personnel Manager and the Manufacturing Superintendent. Such written complaints must be submitted to the Personnel Manager and Manufacturing Superintendent within five (5) working days after the foreman has given final answer to the employee and/or shop steward in Step 1.

3. If the matter is not satisfactorily adjusted in Step 2 above within five (5) working days, the International Union may submit the written complaint to the General Manufacturing Manager of the Company. The Plant Grievance Committee may assist the representative of the International Union. Such submission must be made within fifteen (15) days after the Plant Superintendent has given his final answer in Step 2.

4. If the General Manufacturing Manager and International Union representatives are unable to reach a satisfactory settlement of the complaint within five (5) working days either party may request arbitration within five (5) working days after the Company's decision has been given.

Since it is the intent of the parties that complaints be adjusted as expeditiously as practicable, under ordinary circumstances, the time limits set forth above are to be observed.

Under abnormal circumstances, however, a reasonable request, made in writing, for an extension of time will be granted, providing such request is made before the expiration of the time limits set forth above.

SECTION 11 - ARBITRATION

11.0 When a grievance is properly appealed to arbitration in accordance with the provisions of this Agreement, each party shall designate one representative and the representatives selected shall endeavor, within forty-eight (48) hours of their appointment, to reach a mutually satisfactory agreement in

naming an impartial arbitrator. In the event an agreement cannot be reached in the appointment of an arbitrator by this procedure, the arbitrator will be selected by the American Arbitration Association in accordance with its procedure for the selection of arbitrators.

11.1 The arbitrator may interpret this agreement and apply it to the particular case submitted to him, but he shall have no authority to add to, subtract from, or in any way modify the terms of this agreement. The fees and expenses of the arbitration shall be shared equally between the Company and the Union. The arbitrator's decision shall be final and binding upon the Company, and the Union, and the employee or employees involved.

. . .

SECTION 12 - DISCHARGE

12.0 In the event that a member of the Union shall be discharged from his employment and believes he has had unfair treatment, the matter of such discharge shall constitute a case arising under the method of adjusting grievances herein provided. If as a result of the grievance settlement, it is determined that the employee has been discharged without adequate and just cause, he will be reinstated and paid his full average hourly compensation for the time lost. All such cases of discharge shall be taken up and disposed of within five (5) days from the date of discharge."

5. From time to time, Respondent Employer has promulgated and distributed to its employes copies of plant rules. Prior to 1974, said rules contained the following provision regarding the penalty applicable for employe falsification of time records:

"23. Falsification of time on job cards.
PENALTY: Reprimand to four weeks layoff."

During 1974, said rule was modified so as to read as follows:

"24. Falsifying one's own time sheet or that of another employee.
PENALTY: Reprimand to discharge."

Said modified rule was published and distributed to employes circa 1974 and was in effect at the time of Complainant's discharge, May 5, 1976.

6. For some five years prior to his discharge, Complainant worked as a furnace operator in Respondent Employer's Foundry Department. At the time of Complainant's discharge, employes in that department were required to punch time cards in and out upon their arrival and departure from the plant and the beginning and end of their meal breaks. At all material times such employes were also required to submit daily time sheets indicating the amount of time worked by them on various tasks each day and the total time worked by them daily. Such time sheets were almost always collected by supervision at or near the end of the 12:30 to 9:00 p.m. shift. Because Foundry Department employes working that shift were permitted to complete their time sheets during the 6:30 dinner break and because some employes anticipating overtime work after the end of that shift were also required to submit time sheets before the end of the shift, time sheets were routinely received with entries that constituted estimates of time that would be worked before the employe left the plant for the day. Respondent Employer used the time sheets as its basis for computation of the number of hours of work for which each employe was to be compensated. The punched time cards were not routinely utilized as a basis for determining employes' compensable hours.

7. On Friday, April 23, 1976, Complainant and a helper, Jeffrey Coleman, filled out their daily time sheets at their 6:30 p.m. dinner break. Each inserted an anticipated five hours of overtime for relining of the furnace. A subsequent inspection of the furnace revealed that a full

relining was not required, so the two employes punched out and left work for the day shortly after 9:00 p.m.

8. On Monday, April 26, 1976, shortly after the beginning of the shift at 12:30 p.m., General Foreman Ed Stein told Complainant and Coleman that the amount of work time submitted on their time sheet for the preceding Friday exceeded the time each had been in the plant as recorded on their punched time cards. Stein took the two employes to a meeting with Union representatives and Respondent Employer's Personnel Manager, Larry Zade, where the discrepancy was discussed. Complainant stated during that meeting that he had never had any such discrepancy in the past. Zade replied that if a check of Respondent Employer's time records confirmed Complainant's claim, no disciplinary action would be taken.

9. On the following Friday, April 30, 1976, Zade met with Complainant, Coleman and employe Virgil Olszewski in the presence of Union representatives and others. Zade confronted the three employes with copies of certain of their time and pay records from prior months. The displayed records appeared on their face to support Zade's charges that on numerous past occasions Complainant and at least one of the other two employees had allowed the Respondent Employer to pay them for time not worked based on time sheets that were not corrected when their inaccuracy became known to the employes, thereby falsifying their time sheets. Respondent Union Local President Robert Kulow briefly examined the records which Zade had placed on a table before the employes. Complainant's response to Zade's charges was that he had unsuccessfully attempted to locate a foreman before leaving the plant on April 23 in order to retrieve and correct the time sheet he had earlier submitted for that date. Zade concluded the meeting by informing those assembled that the three employes were suspended pending further Employer investigation of the matter.

10. Immediately after the April 30 meeting referred to above, the three suspended employes caucused with the Union Grievance Committee to discuss the charges leveled against them. During that caucus, each of the three employes admitted committing the offenses charged by Zade. Complainant asked the Union to file a grievance on behalf of the three. Kulow responded that the Union would see what could be done about the situation but that "it looked bad."

11. On or about May 5, 1976, Complainant received the following letter from Crepaco, Inc.:

"Mr. Alvin Bischoff
R.R. 1, Box 251
Johnson Creek, Wi. 53038

Dear Mr. Bischoff:

I regret to inform you that the management of CREPACO, after reviewing the seriousness of the offense for falsifying your own time sheet on numerous occasions in order to receive compensation for time not worked, is compelled to discharge you from your job and terminate your employment. The effective date of this disciplinary action is your last day of work, which was Friday, April 30, 1976.

Any personal belongings that are still on company premises may be picked up between 7:00 a.m. and 3:30 p.m. be [sic] appointment with Mr. C. L. Barker before Friday, May 14, 1976.

Any questions regarding your pension, health or life insurance should be directed to the writer.

Sincerely,

Larry Zade /s/

Larry Zade
Personnel Manager"

12. On May 6, 1976, a third-step grievance meeting took place between the Respondents for the purpose of discussing several disputes then pending. During the course of that meeting, the discharges of the three employes noted above were discussed. In that regard, Union Representative Marzec argued that in light of the employes' length of service with the Company the penalty imposed was too harsh. Marzec further stated that if the Respondent Employer would reinstate the three employes, they would make restitution for any monies which they might have wrongfully received as a result of discrepancies existing between the time which they claimed and had been paid and the time which they had actually worked. Respondent Employer indicated that it would review its action and give a written response to Respondent Union.

13. On or about May 7, 1976, Respondent Employer sent the following letter to Donald Marzek:

"Don:

The company's formal position regarding the termination of the following three employees is that the termination is final and unalterable.

Name	Seniority Date	Clock No.
A. C. Bischoff	10/17/63	115-14
V. R. Olszewski	2/22/65	135-14
J. J. Coleman	8/29/74	364-14

Enclosed are copies of the letters of termination sent certified mail to each employee.

In researching the exact facts, we investigated the time frame October '75 - April '76, although I'm quite certain further investigation would take us back into '73 and '74 in the case of Bischoff and Olszewski. Coleman's case involved falsification for five hours at time and one-half on Friday, April 23, 1976; the event that brought all this to light. Although he, too, apparently was involved in other instances.

The company's final position is that the terminations stand.

Yours very truly,

CREPACO, inc.

W. B. Cunningham
Vice President - Manufacturing"

14. Respondent Union chose not to, and did not process the grievance regarding Complainant's discharge to arbitration because it was the Union's judgment that the grievance would have been lost in arbitration. Following inquiries from Complainant's wife, Respondent Union, by its District Director Bertram McNamara, so informed Complainant's wife in response to her written inquiries in the matter.

15. Complainant has failed to prove that Respondent Union's investigation, treatment and disposition of Complainant's claims of wrongful suspension and discharge were arbitrary, discriminatory or in bad faith or that Respondent Union violated its duty to fairly represent Complainant regarding said claims.

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

CONCLUSIONS OF LAW

1. Respondent Union has not been shown to have committed an unfair labor practice in violation of Sec. 111.06(2), Stats., by its conduct in connection with Respondent Employer's suspension and discharge of Complainant and Complainant's related claims.

2. Because Respondent Union has not been shown to have violated the duty to fairly represent Complainant Alvin Bischoff when it failed to process said Complainant's grievance through the arbitration step of the Grievance Procedure as regards his claims of wrongful suspension and discharge, the Examiner declines to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purposes of determining whether Respondent Employer violated the terms of its collective bargaining agreement in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act by its suspension and discharge of Complainant.

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 22nd day of June, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant, in his complaint, alleges that Respondent Employer's suspension and later discharge of Complainant violated the collective bargaining agreement existing between Respondent Employer and Respondent Union thereby violating Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Complainant also alleges that the Union's failure to take his grievance to arbitration violated its duty of fair representation protected by Section 111.06(2) of the Wisconsin Employment Peace Act.

Respondent Union and Respondent Employer both filed written answers. Both deny that Respondent Employer violated the collective bargaining agreement existing between Respondent Union and Respondent Employer. Both further deny that the Union's actions including its failure to process the grievance to arbitration constitute a violation of the Union's duty of fair representation.

During the hearing, the Examiner refused to bifurcate the hearing between the fair representation and the merits of the discharge because the two issues were found to be inextricably intertwined. The Examiner deferred ruling on Respondents' motions for dismissal made at the close of Complainant's and Respondent Union's cases-in-chief. The Examiner has decided to consider the entire record in determining the issues joined by the pleadings because the case would be a closer one if judged solely on the earlier portions of the record evidence to which the motions relate.

To grant either motion would expose this decision to a greater risk of reversal or remand upon review without any countervailing saving of further inconvenience to any party.

POSITION OF COMPLAINANT

Complainant argues that Respondent Union's refusal to take his grievance to arbitration was tainted by its failure to investigate properly both the circumstances upon which the discharge was predicated and the propriety of the discharge itself. Specifically, Complainant places great emphasis on the testimony of Respondent Union's Local President Robert Kulow that his investigation of Respondent Company time records during the April 30, 1976 meeting at which Respondent Employer suspended Complainant took only two to three minutes. Complainant argues that had Respondent Union made a thorough investigation of the incident, it would have learned two relevant and exculpatory facts: first, that the records upon which the Respondent Employer based its decision to discharge Complainant were inaccurately kept and improperly interpreted by the Company; and second, that Company plant rule 23 then existed which provided that the maximum penalty which could be imposed for the falsification of time records was a four-week suspension. Thus, Complainant argues that his dismissal for alleged falsification of time records violated the collective bargaining agreement and that the Union, by its inadequate investigation and its failure to process the grievance through arbitration, violated its duty of fair representation.

POSITION OF RESPONDENT UNION

Respondent Union argues that its failure to take the grievance to arbitration was justified. It admits that it made only a brief investigation into the propriety of Complainant's discharge; however, it argues that the limited scope of its investigation was proper in that Complainant admitted to the Union that he had, in fact, falsified his time records. The Union contends that its decision not to take the matter to arbitration was based on its determination that the grievance could not be won.

POSITION OF RESPONDENT EMPLOYER

Respondent Employer argues that its discharge of Complainant was proper in that it possessed records from which it concluded that the Complainant had falsified his time records so that he improperly received compensation for time not worked. Respondent Employer contends, contrary to Complainant, that the applicable work rule in existence at the time of the occurrences was Rule 24 which provided that discharge is an appropriate penalty for the falsification of time records.

DISCUSSION

In order to prevail upon his charge that the Employer violated the collective bargaining agreement, which provides for final and binding grievance arbitration, Complainant must first prove that the Union's conduct in handling his grievance was arbitrary, discriminatory or in bad faith. 1/ Complainant bears the burden of establishing same by a "clear and satisfactory preponderance of the evidence." 2/ The Complainant's fulfillment of that burden is a condition precedent to the Examiner's exercise of the jurisdiction of the Wisconsin Employment Relations Commission to determine the merits of the alleged contractual violation. 3/

The Examiner's resolution of the issues in this case rests to a significant extent on his having credited the testimony of Kulow and Zade on critical issues. Specifically, Kulow testified that after Zade charged the three employes on April 30 with prior offenses of time sheet falsifications (by knowingly allowing themselves to be paid for time not worked pursuant to time sheets that were [or became] inaccurate), each of the three accused employes admitted in the Union Grievance Committee caucus that followed that they had falsified their time records. 4/ Kulow also testified that he was asked by Complainant during that caucus for assistance in challenging the discharge, and that he responded that he would see what the Union could do on their behalf but that "it looked bad" and that they might be discharged. 5/ Kulow's testimony in these regards is, for the most part, uncontradicted; in any event, it is credited by the Examiner over the testimony of others with which it may conflict.

Zade credibly testified that in 1974, Rule 23, relied upon herein by Complainant, had been modified, published and distributed to all employes so as to provide that falsification of time records is a dischargable offense on the first occurrence. 6/

For those reasons and because of others of the factual findings reached herein, the Examiner has rejected Complainant's contention that Respondent Union investigated Complainant's claims of wrongful suspension and discharge so inadequately as to constitute a violation of its duty to fairly represent Complainant. Nothing in the record suggests that the Union representatives involved in the April 30 meetings thought that dis-

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1/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Mahnke v. WERC, 66 Wis. 2d 524, 88 LRRM 3199 (1975).

2/ Section 111.07(3), Stats.

3/ Beloit Jt. School District (14702-B, C) 4/77; City of Wauwatosa (13385-A, B) 12/75; Lake Mills Jt. School District No. 1 (11529-A, B) 8/73; Milwaukee Board of School Directors (10663-B, C) 3/73; Oostburg Jt. School District No. 1 (1196-A, B) 12/72.

4/ Tr. 182, 188

5/ Tr. 182

6/ Tr. 174

charge was precluded by existing Company Rules. An investigation on that matter would merely have revealed what Zade credibly indicated in his testimony noted above: that in 1974 the Company Rules changed so as to make falsification of time records dischargable for the first offense. As regards the nature of the documents relied upon by Employer's representatives, the record herein indicates that Kulow briefly reviewed the time records displayed by Zade during the April 30 meeting. That review, given the existence and terms of Rule 24 and the subsequent admissions of each employe in the caucus, constituted an adequate basis for Respondent Union's formulation of a belief that Respondent Employer had sufficient grounds to justify the discharge. None of the three employes contended in either meeting that the documents displayed or referred to by Zade were inaccurate on their face or incorrectly interpreted by the Employer, and each of the three has been found to have admitted to Union representatives the falsification of their time sheets. 7/ Under such circumstances, the Union's conclusion that a more detailed analysis of the documents was unnecessary was not improper. In addition, if it is Complainant's position that a further investigation would have shown that weaknesses in the Respondent Employer's timekeeping system caused the violations, such arguments must be rejected since it has been recognized in arbitration opinions that a knowing receipt of pay for time not worked pursuant to time records submitted for payroll purposes constitutes wrongful record falsification and the equivalent of theft and that the onus is on the employe to avoid being unjustly enriched rather than on the employer to develop a foolproof system to secure itself against all such conduct. 8/ For all of the foregoing reasons, then, the Examiner cannot conclude that the nature of Respondent Union's investigation violated its duty of fair representation. 9/

The Examiner also rejects any contention by Complainant that Respondent Union's decision not to take the matter of Complainant's grievance to arbitration was arbitrary, discriminatory or in bad faith. For, after the April 30 meetings, Respondent Union processed Complainant's grievance at the penultimate step of the grievance procedure, arguing that, in view of length of service, discharge was too harsh a penalty. When Respondent Employer refused to impose a lesser penalty, Respondent Union decided not to take Complainant's grievance to arbitration. Nothing in the record suggests that the Union so decided for any other than the reason its District Director later gave in writing to grievant's wife: ". . . it was dropped because quite obviously, the grievance would have been lost in arbitration."

For all of the foregoing reasons, and based (as noted) on the record as a whole, the Examiner has concluded that Respondent Union has not been shown to have treated Complainant in an arbitrary, discriminatory or bad faith manner.

Therefore, Respondent Union has not been shown to have committed an unfair labor practice or to have failed to fairly represent Complainant, and the Examiner has consequently refused to exercise the jurisdiction of

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7/ In fact Olszewski essentially admitted same in the April 30 meeting with Employer representatives.

8/ E.g., T and A Thrifty Marts, Inc., 76-2 ARB Par. 8612 at 7055 (Ipavec, 1977).

9/ See, Hershman v. Sierra Pacific Co., _F. Supp._, 95 LRRM 3294 (Dist. Nev., 1977).

the WERC to determine the merits of the grievance or of the corresponding allegation of a violation of Sec. 111.06(1)(f), Stats.

Dated at Madison, Wisconsin, this 21st day of June, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner