STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAWN J. HOLLISTER, JOYCE A. FRITZ, Complainants, vs. LIONEL HELLMER, RICHARD PATTERSON, REPRESENTATIVES, LOCAL 56, JOHN MILLER, JOHN HUMBRACHT, CLEVEPAK CORPORATION, Respondents.	Case I No. 21705 Ce-1732 Decision No. 15555-C

Appearances:

Ms. Dawn J. Hollister and Ms. Joyce A. Fritz, Complainants, appearing on their own behalf.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of the Respondent Union.

Foley & Lardner, Attorneys at Law, by Ms. Barbara J. Fick, appearing on behalf of the Respondent Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, in the above-entitled matter; and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and a hearing on such complaint having been held at Sheboygan, Wisconsin on July 12, 1977, before the Examiner; and the Complainants and Respondents having completed the briefing schedule on December 29, 1977; 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 Dawn J. Hollister, hereinafter referred to as Complainant Hollister, is an individual residing at R. R. 1, Cascade, Wisconsin.

2. That Joyce A. Fritz, hereinafter referred to as Complainant Fritz, is an individual residing at Plymouth, Wisconsin.

3. That Clevepak Corporation, hereinafter referred to as Respondent Employer, is a corporation engaged in the business of manufacturing and selling composite containers, with facilities located at Plymouth, Wisconsin.

4. That Respondent Employer, at all times material hereto, has recognized Local No. 56 of the General Drivers, Dairy Products Employees and Helpers Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as Respondent Union, as the exclusive bargaining representative of certain of its employes, including Complainants Fritz and Hollister.

5. That Lionel Hellmer, hereinafter referred to as Respondent Hellm at all times material hereto was the Business Representative of Respondent Union.

6. That Richard Patterson, hereinafter referred to as Respondent Patterson, at all times material hereto was Secretary-Treasurer of Respondent Union.

7. That John Miller, hereinafter referred to as Respondent Miller, at all times material hereto was Plant Manager of Respondent Employer.

8. That John Humbracht, hereinafter referred to as Respondent Humbracht, at all times material hereto was Production Superintendent of Respondent Employer.

9. That at all times material hereto Complainants Fritz and Hollist were members of Respondent Union.

10. That at all times material hereto Respondent Employer and Respondent Union were signatories to a collective bargaining agreement, effective from February 10, 1976 to February 9, 1978, covering wages, hours and working conditions of the aforementioned employes; and that said agreement includes the following material provisions:

"ARTICLE V
REPRESENTATION

There shall be a steward or shop committeeman to represent the employees of each department and a steward chairman to represent the employees of the entire plant. When grievances arise, an earnest effort shall be made to settle the same immediately by the following procedure:

1. By conference, between the employee involved and the foreman within one working day (24 hours) from the time of the act alleged to have caused the grievance.

2. By conference between the employee involved, a member of the grievance Committee and the foreman within one working day (24 hours) from the time of the act alleged to have caused the grievance, and the foreman shall render his decision to the employee involved and the member of the Grievance Committee within 24 hours of the time the grievance is submitted to him.

Methods 1 and 2 may be used in the alternative if there is a good reason why they both should not be used.

3. Through presentation by the shop steward to the plant supervisor within three (3) working days (72 hours) from the time of the act alleged to have caused the grievance, at which time the grievance shall be set forth in writing, and the supervisor shall render his decision to the employee involved and the member of the Grievance Committee within two (2) working days (48 hours) of the time the grievance is submitted to him.

4. By conference between a business representative of the Union and the plant manager within three (3) working days (72 hours from the time of the decision rendered by the plant supervisor and then the plant manager shall render his decision in writing within three (3) working days (72 hours) of this conference.

Time limit in step 4 may be extended by mutual agreement.

. . .

ARTICLE VI
ARBITRATION

In the event the grievance or any other dispute or misunderstanding cannot be settled to mutual satisfaction, it may become the subject matter of arbitration. Either party is to notify the other in writing of its intent to carry the grievance to arbitration within thirty (30) days of the rendering by the plant manager of his decision.

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ARTICLE XVII
EMPLOYEE TRANSFER

The temporary transfer of employees will be subject to the following rules:

1. The transferring of employees between shifts and temporarily between jobs and departments in order to maintain efficient and/or economical operations is the sole responsibility of management.

2. When a temporary vacancy occurs, it will be filled by the employee in any occupation from which the Company determines he can be spared and who is properly qualified to perform the work of the temporary assignment in a satisfactory fashion. Whenever possible consideration will be given to seniority."

11. That in April, 1977 a cutback in production by Respondent Employe resulted in layoffs of some employees; that as a result of said layoffs, certain employees on the night shift classified as Group III and Group IV attempted to bump day-shift employes in Group II to night shift, claiming that plant-wide seniority governed shift preference regardless of job group classification; that as a result of said shift change, two Group II day-shift employees, Gwyn Hogue and Lavilla Miller, filed a grievance, hereinafter referred to as the Hogue/Miller grievance; and that said grievance raised the question whether plantwide seniority or seniority within job group classifications should govern the right to exercise shift preference.

12. That said Hogue/Miller grievance was processed through step 4 of the grievance procedure as set forth above; that on May 5, 1977 representatives of Respondent Union, and Respondent Employer held a meeting in Respondent Employer's cafeteria at which time 20 or 30 employees discussed the subject matter of the Hogue/Miller grievance; that following said meeting representatives of Respondent Union and Respondent Employer agreed to a settlement of the Hogue/Miller grievance to the satisfaction of all parties; that said settlement interpreted certain provisions of the collective bargaining agreement to mean that seniority within job group classification should govern shift preference and shift transfer decisions; and that as a result of said agreement on the interpretation of the collective bargaining agreement, scheduling procedures were posted for the purpose of notifying employes of the agreed upon interpretation.

13. That as a result of the posting of said scheduling procedures, Complainant Fritz initiated a grievance, contending that the posted scheduling procedures were in violation of the collective bargaining agreement; and that Complainant Hollister, as shop steward, assisted Complainant Fritz in presenting said grievance.

14. That Complainants discussed the Fritz grievance with Respondent Humbracht; and that Respondent Humbracht informed Complainants that there was nothing he or Respondent Employer could do about it because the matter had been resolved by the settlement of the Hogue/Miller grievance.

15. That at a meeting on May 14, 1977, Respondent Hellmer, as agent for Respondent Union, informed Complainants that the subject matter of the Fritz grievance had been settled by the Hogue/Miller grievance, that the Respondent Employer's actions did not violate the collective bargaining agreement in any way, and that therefore the Union would refuse to carry her grievance any further.

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

CONCLUSIONS OF LAW

1. That Complainants did attempt to exhaust the contractual grievance procedure, but such attempt was frustrated by the Union's refusal to process the grievance further.

2. That the conduct of Respondent Local No. 56 of the General Drivers, Dairy Products Employees and Helpers Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Respondents Hellmer and Patterson as agents of Respondent Union was not arbitrary, discriminatory or in bad faith; that Respondent Union therefore did not violate its duty to fairly represent Complainants; and Respondent Union, therefore, is not in violation of Section 111.06(2)(a) and (c) of the Wisconsin Employment Peace Act.

3. That because Respondent Local No. 56 of the General Drivers, Dairy Products Employees and Helpers Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America did not violate its duty to fairly represent Complainants, and because of the total absence of conduct of an arbitrary, discriminatory or bad faith nature by the Respondent Union with regard to the Complainants, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent Clevepak Corporation or Respondents Miller and Humbracht as agents of Respondent Clevepak Corporation, breached the collective bargaining agreement with Respondent Union 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

That the complaint of Complainants Joyce A. Fritz and Dawn J. Hollister be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 8th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants charged in their complaint that the Employer had violated provisions in the collective bargaining agreement regarding seniority rights, and that the Union had actively participated in the violation. Respondent Union filed a motion to make the complaint more definite and certain, which motion was denied by Order of June 27, 1977. 1/ A hearing was held on July 12, 1977 at the Sheboygan County Courthouse, Sheboygan, Wisconsin.

At the beginning of the hearing, both the Union and the Employer moved to dismiss the complaint for failure to state a cause of action. Both motions were denied. At the close of Complainants' case, both Respondents again moved to dismiss, asserting that Complainants had failed to prove either that they had exhausted their contract remedies, or that the Union's actions were arbitrary, discriminatory or in bad faith. Both motions were again denied, and both Respondents presented further testimony. All parties filed briefs in the matter.

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

DISCUSSION:

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

EXHAUSTION OF GRIEVANCE PROCEDURE:

Individual complainants bringing contract violation actions against an employer must attempt use of the contract grievance procedure. 3/ The evidence clearly shows that Complainants made such an attempt. Complainant Fritz filed a grievance, which was ultimately discussed with Respondent Humbracht, acting for the Employer. Complainants were told that the Company could do nothing about the grievance. The evidence also shows that Respondent Hellmer, acting in behalf of Respondent Union, called Complainants to a meeting, at which time he informed them that the subject matter of the grievance had been resolved by a prior grievance settlement, and that therefore the Union would not process the grievance any further.

VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

Having shown that they attempted to exhaust the grievance procedure, and that such attempt was frustrated by the Union's refusal to proceed with the grievance, Complainants must further demonstrate, by a clear

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1/ Clevepak Corp., (15555-A) 6/77.

2/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); American Motors Corporation (7988-B) 10/68.

3/ Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965).

and satisfactory preponderance of the evidence, 4/ that such refusal was arbitrary, discriminatory, or in bad faith. 5/ Absent such conduct, the Union cannot be charged with a breach of its duty of fair representation. 6/

The Union is given a wide range of reasonableness when exercising its discretion in deciding whether to process a grievance, "subject always to complete good faith and honesty of purpose." 7/ The Union must, at least, weigh all the relevant factors before rejecting a grievance as unmeritorious. 8/

As statutory bargaining representative, the Union is responsible for weighing competing interests and reaching a decision that is fair to the bargaining unit as a whole. Such determinations may sometimes be adverse to the interests of one or more groups of employes. 9/

In Ford Motor Co. v. Huffman, supra, the U. S. Supreme Court explained:

> ". . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . . The complete satisfaction of all who are represented is hardly to be expected."

In Humphrey v. Moore 10/ the Court clarified:

> "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. . . . To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

Thus, the Union must be free to take a position with respect to conflicting interpretations of language in the collective bargaining agreement, as long as the decision to do so was not arbitrary, discriminatory or in bad faith.

Especially in the sensitive area of seniority, where a decision in favor of one group of employes will necessarily adversely affect another, the union must be permitted a "wide range of reasonableness." 11/

In the instant case, Complainants have shown only that the Union took a position, adverse to their own, with respect to a prior grievance. Nothing in the record can support an inference that the decision to take a position with respect to the meaning of the seniority provisions was arbitrary, discriminatory, or in bad faith. On the contrary, the Union presented substantial evidence to show that it carefully considered its position with respect to the Hogue/Miller grievance before reaching a

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4/ Mahnke v. WERC, 66 Wis. 2d 524 (1975); Sec. 111.07(3), Wis. Stats.

5/ Vaca v. Sipes, supra.

6/ Mahnke v. WERC, supra.

7/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

8/ Mahnke v. WERC, supra.

9/ Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964).

10/ 55 LRRM at 2037.

11/ Ford Motor Co. v. Huffman, supra.

settlement with the Employer. Once having reached that determination, and once having agreed on the meaning of the seniority provisions of the agreement, the Union could not logically take the opposite position with respect to Complainant Fritz' grievance. Complainants have failed to sustain their burden of proving that the Union acted arbitrarily, discriminatorily, or in bad faith with respect to the handling of their grievance or the previous grievance. The position the Union took on the issue was clearly within the "wide range of reasonableness" which bargaining representatives enjoy in adjusting competing and conflicting interests during the process of administering collective bargaining agreements. 12/

In Humphrey v. Moore, supra, the U.S. Supreme Court stated:

> "But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents, nor in supporting the position of one group of employees against that of another."

Likewise, this Examiner can find no such breach in the instant case.

Having determined that the Complainants failed to meet their burden with respect to the Union's conduct toward them, the Examiner finds it unnecessary to reach the question whether the Complainants should have or did exhaust their internal union remedies before bringing this action before the Commission.

The Examiner therefore concludes that the Complainants did attempt to exhaust the contract grievance procedure, but that they failed to sustain their burden of proving, by a clear and satisfactory preponderance of the evidence, that the Union's conduct toward them was arbitrary, discriminatory or in bad faith. Absent such conduct, the Union did not breach its duty to fairly represent them.

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

Dated at Madison, Wisconsin this 8th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

12/ United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581, 46 LRRM 2416 (1960).