STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| NEIL JACOBS,<br><br>Complainant,<br><br>vs.<br><br>ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 232 and BRIGGS & STRATTON CORPORATION,<br><br>Respondents. | Case XV<br>No. 22478 Ce-1761<br>Decision No. 16069-A |

Appearances:

Robert J. LaBelle, by Mr. A. J. Palasz, Attorney at Law, 3070 North 77th Street, Milwaukee, WI 53222, for the Complainant.

Habush, Gillick, Habush, Davis & Murphy S.C., by Mr. Kenneth R. Loebel, 2200 First Wis. Center, 777 East Wisconsin Avenue, Milwaukee, WI 53202, for the Respondent Union.

Quarles & Brady, by Mr. David E. Jarvis, Attorneys at Law, 780 North Water Street, Milwaukee, WI 53202, for the Respondent Employer.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint alleging that the above-named Respondents had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act was filed by the above named Complainant on January 12, 1978 with the Wisconsin Employment Relations Commission. The Commission appointed the undersigned Marshall L. Gratz 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. The Examiner conducted hearings in the matter in Milwaukee, Wisconsin on March 16 and April 17, 1978, following which the parties filed briefs and reply briefs the last of which was received on February 21, 1979. The Examiner, having considered the evidence and arguments, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. Complainant, Neil Jacobs, hereinafter referred to as Complainant, is an individual residing in Bowler, Wisconsin. For some 9 years prior to his discharge on February 3, 1977, Complainant was an employe of Respondent Briggs & Stratton Corporation.

2. Respondent Briggs & Stratton Corporation, hereinafter referred to as Respondent Employer, is an employer with manufacturing facilities in Milwaukee, Wisconsin.

3. Respondent Local 232, affiliated with the Allied Industrial Workers of America, AFL-CIO, hereinafter referred to as Respondent Union, is a labor organization. At all times material herein, Lenard Wagner was the President of Local 232, Anna Schmidt was an International Representative of the Allied Industrial Workers of America, George Shaw was a Business Representative of Local 232 and Richard Steeger was a shop steward for Local 232 at the Respondent Employer's plant. At all times material herein, Wagner, Schmidt and Shaw were members of Respondent Union's Bargaining and Grievance Committee.

4. At all times material hereto, Respondent Union has been the exclusive collective bargaining representative of certain employes of Respondent Employer, including Complainant at the time of his discharge. Respondent Union and Respondent Employer were parties to a collective bargaining agreement effective from August 1, 1974 to July 31, 1977 hereinafter referred to as the Agreement which provided in pertinent part as follows:

ARTICLE IV

Grievances

Section 1

Complainants or grievances which may arise between the Company and the Union, or between the Company and any employee or group of employees, shall be handled in the following manner, except for grievances concerning piecework rates which shall be handled in accordance with the provisions of paragraphs (f) and (g) of Section 3 of ARTICLE IX.

Step 1: An employee having a complaint or grievance, shall have the right, initially, to present the complaint or grievance verbally and directly to his foreman or to have such complaint or grievance presented verbally to the foreman by his steward. Although the Company agrees that it will deal only with the designated representative of the Union on such matters as are properly a subject for collective bargaining, it is the desire and the intention of both the Company and the Union that minor routine complaints or grievances of individual employees shall be disposed of as promptly as possible by the foreman. If a complaint or grievance is not settled in this step of the grievance procedure, it shall not preclude the aggrieved employee from filing a written grievance under Step 1-A.

Step 1-A: Employees having a complaint or grievance may elect originally to file their complaint or grievance as a written grievance with their steward, and omit Step 1 set forth above. All written grievances shall be made out on triplicate grievance forms provided by the Union and must be signed by the aggrieved employee or employees. Two copies shall be presented to the steward and one copy retained by the employee. The steward shall present one copy to the foreman, and with the foreman attempt to bring about a settlement of the grievance. Either the foreman or the steward may request and obtain the presence of the aggrieved employee at this step of the grievance procedure. A written answer to the grievance shall be furnished to the steward by the foreman within twenty-four (24) hours after the discussion of the grievance has been concluded.

Step 2: In the event that no settlement can be reached that is mutually satisfactory to the employee, the steward and foreman, then the Plant Grievance Representative may take up the matter with the Plant Superintendent or other designated Company Representative. The Company may have a representative of the Personnel Department present at this step. At the request of either the Plant Grievance Representative or the Plant Superintendent or other designated Company Representative, the steward and/or employee or employees involved shall be called in and any foreman or other Company representative may be called in by the Plant Superintendent or other Company Representative. Except in emergencies, the Plant Grievance Representative and Plant Superintendent or other designated Company representative shall meet not oftener than once a day at a mutually agreeable time. A written answer to the grievance shall be furnished to the Plant Grievance Representative by the Plant Superintendent or other designated Company Representative within twenty-four (24) hours after the discussion of the grievance has been concluded.

Step 3: In the event that the grievance is not satisfactorily settled in Step 2, above, the Bargaining Committee of the Union may then take up the grievance with the designated representative of the Company, indicating the grievances to be discussed. At the request of either the Union or the Company the parties shall meet not less than once a week in an attempt to settle grievances. General policy grievances by the Company or the Union shall be taken up commencing at this step of the grievance procedure. Although it is contemplated that meetings between the Company and the Union shall be restricted to the meetings designated above, meetings at this step may be called by either party on shorter notice in the event of emergency.

Section 2

Should there be no settlement of a grievance or grievances between the Union and the Company after the outlined steps of the Contract grievance procedure have been exhausted, either party may submit such grievance or grievances to arbitration within sixty (60) days after the grievance has been discussed in the third stage of the grievance procedure. Either party shall notify the other in writing as to which grievance or grievances are to be submitted to arbitration.

Upon making a timely request for arbitration the two parties or their designated Representatives shall select an arbitrator from a panel of seven names obtained from the Federal Mediation and Conciliation Service. The parties shall strike names alternately from the panel until one name is left. He shall be the arbitrator. The party requesting arbitration shall strike first and thereafter the parties shall alternate in striking first.

With the exception of grievances concerning the incentive system outlined in this Contract, all grievances between the two parties shall be deemed arbitrable. Priority shall be given to discharge cases and the decision of the arbitrator shall be due within thirty (30) days after the completion of all matters pertaining to the hearing. The decision of the arbitrator shall be final and binding. The arbitrator shall have no authority to alter any part of the Contract of which this is a part.

The actual cost of the arbitrator and arbitration facilities shall be equally assumed by the parties.

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Section 4

The President of the Local Union is a member ex-officio of all committees and chairman of the Bargaining Committee, and shall have the right to attend any and all meetings held between the Company and the Bargaining Committee.

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ARTICLE V

Discipline and Discharge

Section 1

Any employee who is to be disciplined by a layoff or discharge shall be advised by the Company that he may request and obtain the presence of the Plant Grievance Representative or the steward for his department to discuss the case with him before he is required to leave the plant.

Section 2

Any employee who is called to an office for an interview, after he believes he has been sufficiently informed of the subject of the interview shall be advised by the Company that he may request and obtain the presence of the Plant Grievance Representative or the steward for his department during such interview. If, as a result of such interview, a grievance is filed by the employee, the grievance shall be submitted to the grievance procedure beginning at the second step of the grievance procedure. If a notation is made in an employee's personnel file concerning matters of discipline, a copy of such notation shall be submitted to the Plant Grievance Representative concerned.

Section 3

> Employees will not be discharged without just and sufficient cause. The company will notify the Union Office and Plant Grievance Representative of any dishcarge within twenty-four (24) hours. A grievance regarding discharge for insufficient cause shall be made in writing, signed by the discharged employee, and shall be delivered to the Personnel Department of the Company at the 124th Street Plant within three (3) working days after the discharge or within three (3) working days after the Union Office and Plant Grievance Representative have been given written notice of the discharge. Such grievance shall be a proper matter for the grievance procedure starting at the third step. Employees found to have been unjustifiably discharged, shall be reinstated to their jobs with full seniority, and unless otherwise agreed to between the Company and the Union, shall be paid for all time lost as a result of such discharge. Grievances with respect to discipline other than discharge shall be handled starting at the second step of the grievance procedure...

5. At the time of his discharge, Complainant worked as a set up man on the second shift, which shift began at 3:00 p.m.

6. On Thursday, January 27, 1977, Complainant's time card had been punched "in" at 2:54 p.m. Complainant arrived at work at approximately 4:40 p.m. in an intoxicated condition, and reported to the plant security office at that time, to obtain a "late slip."

7. On January 27, 1977, at about 3:45 p.m. Respondent Employer's first shift foreman, Floyd Anderson and second-shift foreman, Onofry Kuklinski, noticed that Complainant was not at his place of work and that his time card had been punched in. Kuklinski and Anderson thereupon attempted to locate Complainant. At approximately 4:30 or 4:45 p.m., Kuklinski received a call from his supervisor, Myron Grosneck, and Grosneck informed Kuklinski that Complainant had arrived at the plant gate and was coming inside to work.

8. At approximately 5:30 p.m. on January 27, 1977, Kuklinski located Complainant talking to some fellow employes at a coffee machine inside the plant. Kuklinski questioned Complainant as to where he had been and as to why his time card had been punched in and Complainant requested his paycheck. A brief argument ensued, whereupon Kuklinski told Complainant that he was in no condition to work, and directed him to return home. Complainant was escorted outside of the plant by plant superintendents and security guards with Steeger's assistance. Complainant did not threaten Kuklinski, or any other representative or agent of Respondent Employer at that time.

9. Following his departure from Respondent Employer's premises, Complainant left there and went to a tavern known as the Brookfield Inn, obtained his roommate's gun which he placed in the trunk of his automobile and then returned to the Brookfield Inn. Complainant thereupon telephoned his then-estranged wife, Gladys Jacobs, and requested her to pick him up. During the same conversation, Complainant told his wife that he had been discharged from his job, and that he had a gun in his possession. Complainant also gave his wife the impression that he intended some form of harm to his foreman, Kuklinski.

10. Mrs. Jacobs telephoned Peter Bungert, a fellow employe of Complainant, and the Milwaukee Police Department and requested that they pickup and disarm Complainant. Said telephone call was motivated by Mrs. Jacobs' fear that Complainant sought to harm Kuklinski. Bungert transmitted the message to Kuklinski and to Tom Naczek, a fellow employe, and Kuklinski transmitted the message to Robert Boettcher, the lead plant security officer on the second shift. Boettcher prepared a report to his supervisor concerning the message and other events of that day relating to Complainant.

11. At approximately 9:45 p.m., Naczek met Complainant at the Brookfield Inn, retrieved the gun from Complainant's automobile trunk, and placed it in his automobile. Police officers subsequently arrived at the Brookfield Inn, found that Complainant was not armed and left upon Naczek's assurances that the situation was under control.

12. Complainant did not report to work on Friday, January 28, 1977. He had conferred with Steeger by phone before his shift on that day, informed Steeger that he did not feel up to coming to work, and Steeger replied that if he did not feel up to coming in to work, he should not do so.

13. On Monday, January 31, 1977, Boettcher met with Lawrence Hermansen, Respondent Employer's Assistant Personnel Manager, concerning the events of January 27. Later that day, Complainant met with Hermansen, with Shaw, Steeger, Kuklinski, Bungert and Mr. John Trost, Respondent Employer's Vice President for Industrial Relations, present. Complainant stated that he was intoxicated on January 27 and could not recall the events of that day. Hermansen concluded the meeting by suspending Complainant pending further investigation of the facts. Hermansen further requested that Shaw conduct a similar investigation.

14. On February 3, 1977, Complainant met with Hermansen, Shaw, Kuklinski, Trost, Steeger and Boettcher. Following a discussion concerning the events of January 27, Hermansen stated that Complainant was discharged for, on that day, having reported to work in an intoxicated condition, for having had his time card falsely punched at 2:54 p.m. and for allegedly threatening to do physical harm to Kuklinski based upon his telephone conversation with his wife. Shaw stated that his investigation of the facts yielded the same conclusions as that conducted by Respondent Employer, and urged Respondent Employer to give Complainant "another chance". Respondent Employer rejected this request, upon which Complainant filed a grievance concerning his discharge, which grievance was denied by Respondent Employer.

15. On February 4, 1977, Hermansen wrote a shop memorandum concerning Complainant's discharge, a copy of which was provided to Respondent Union and which read as follows:

> On 1-27-77 Neil Jacobs came to work late under the influence of alcohol, and had to be evicted from the plant. Later that evening #33939 Peter Bungert told foreman Onofry Kuklinski that he had received a call from Neil's wife and that she told him Neil was getting a gun and plans to take care of his foreman, Onofry. The Wauwatosa Police Department was notified. It was later learned that both the Milwaukee and the Brookfield Police Departments had also been involved.

Peter Bungert later told the Lead Guard, Robert Boettcher, that everything had been taken care of. When questioned as to what he had meant, he replied that they (his friends) took the gun away from Neil, and were going to take him home.

Neil reported to the Personnel Office on 1-31-77 and was questioned as to what he had done on 1-27-77. His only reply was that he had had too much to drink, and didn't remember. His co-workers also did their best to cover up the happenings, and to deny those statements which were made on 1-31-77. As a result, Neil was told that he was being temporarily suspended pending a further investigation of the facts of what had taken place on 1-31-77.

A further investigation revealed that the facts as recorded were true, and Neil was subsequently discharged on 2-3-77 as a result of his misconduct.

16. On February 11, 1977, representatives of Respondent Union and Respondent Employer met to discuss Complainant's grievance pursuant to the third step of the contractual grievance procedure. Complainant's grievance was again denied by Respondent Employer.

17. Following the meeting referred to in Finding of Fact 16, above, Respondent Union's Bargaining and Grievance Committee immediately met to discuss the possibility of appealing Complainant's grievance to arbitration. Complainant was not present at said meeting but Shaw, Schmidt and Wagner were present. The Committee considered the circumstances and merits of Complainant's grievance and the outcome of several previous arbitration cases concerning employes of Respondent Employer and involving similar facts. At the close of said meeting, the Committee voted not to appeal Complainant's grievance to arbitration. The Committee's decision was communicated to Complainant by letter dated February 14, 1977, which letter advised Complainant of the right to appeal said decision to the Respondent Union's membership at the next membership meeting to be held on February 20, 1977.

18. At some point between February 14 and February 20, 1977, Wagner, acting alone and without the concurrence of Respondent Union's Bargaining and Grievance Committee, determined that Complainant's grievance was worthy of further consideration, and he determined to appeal said grievance to arbitration. He so advised Complainant, and also advised Complainant to attend Respondent Union's February 20, 1977 membership meeting as a sign of his determination to pursue his grievance. Complainant did attend such membership meeting, at which time he was advised by Wagner that it was not necessary for Respondent Union's membership to consider his grievance inasmuch as the decision had been made to appeal said grievance to arbitration.

19. By letters dated February 21, 1977, Wagner gave notice to

20. At some point between February 21 and March 3, 1977, Respondent Union's Bargaining and Grievance Committee decided to investigate Complainant's grievance and reconsider the advisability of appealing said grievance to arbitration. On March 3, 1977, the members of said Committee, together with Kenneth Loebel, attorney for Respondent Union, met to discuss Complainant's grievance during which meeting Complainant and several additional witnesses were interviewed. Following said meeting, the Committee again decided not to appeal Complainant's grievance to arbitration.

21. Respondent Union advised Complainant by letter dated March 7, 1977, of its decision not to appeal his grievance to arbitration and further advised Complainant that he could appeal the Committee's decision to the membership of Respondent Union at the membership meeting scheduled on March 20, 1977.

22. Complainant consulted with Steeger and Shaw following receipt of the letter referred to in Finding of Fact number 21, above. Shaw informed Complainant that an appeal of his grievance to the membership of Respondent Union at the March 20 membership meeting would likely be unsuccessful due to the nature of the matter and to the costs of arbitration, and advised him that such an appeal would be futile. Complainant did not attend the March 20 membership meeting.

23. On March 21, 1977, Respondent Union withdrew its earlier request for submission of Complainant's grievance to arbitration; and on March 22, 1977, counsel for Respondent Employer advised the Federal Mediation and Conciliation service that Respondent Union had withdrawn said request for arbitration.

24. Respondent Union chose not to and did not process Complainant's grievance regarding his discharge to arbitration because it was the Union's judgment that the grievance would have been lost in arbitration and because of the costs involved in arbitration. Respondent Union reached such a conclusion following a thorough investigation of the circumstances underlying Complainant's grievance and of applicable arbitral precedent bearing on the likely outcome of said grievance, and promptly and fully advised Complainant of its decision and of Complainant's rights of appeal therefrom.

25. Complainant did in fact exhaust both his contractual and intra-Union remedies prior to bringing the instant action before the Commission.

26. Complainant has failed to prove either that Respondent Union's investigation, treatment disposition of Complainant's claims of wrongful 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 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 Neil Jacobs when it failed to process said Complainant's grievance through the arbitration step of the Grievance Procedure as regards his claims of wrongful 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 Milwaukee, Wisconsin this May 22, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

Both Respondents filed written answers, in which they deny that Respondent Employer violated the collective bargaining agreement then existing between Respondent Employer and Respondent Union. Respondent Union further denied that it violated its duty to fairly represent the Complainant by failing to process his grievance to arbitration. Both parties further alleged that Complainant lacked standing to bring the instant action due to his purported failure to exhaust his intra-Union and contractual remedies prior to filing this action.

The Examiner deferred ruling on the motion for dismissal made by both Respondents at the close of Complainant's case-in-chief, in order to permit consideration of the record as a whole in his determination of the issues involved herein.

POSITIONS OF THE PARTIES:

Complainant alleges that Respondent Union failed to fulfill its duty to fairly represent him throughout the entire course of processing his grievance. Complainant charges that Respondent Union failed, without justification, either to inform him of his right to have his case discussed pursuant to Article V Section 1 of the Agreement prior to his having been escorted from Respondent Employer's plant on January 27, 1977, or to inform him of his right to grieve his suspension from January 31 until February 3, 1977 thereby causing him to lose four days of work. Complainant further alleges that Respondent Union failed to vigorously contest his discharge, preferring instead to merely ask Respondent Employer to "give him another chance"; in effect, to merely ask for mercy. He further states that Respondent Union failed to provide any satisfactory explanation for its subsequent reversal of course once it initiated the arbitration machinery on February 20-21, 1977, and that based upon the record as a whole, its refusal to proceed to the arbitration step was arbitrary and undertaken in bad faith.

Complainant argues that he had no obligation under the law to exhaust his intra-Union remedies prior to commencing the instant action, and that his obligation extends only to exhaustion of the Agreement's grievance procedure, which obligation was fulfilled by Complainant. In the alternative, Complainant states that he did exhaust his intra-Union remedies, and that his failure to appear at Respondent Union's March 20, 1977 membership meeting is immaterial insasmuch as representatives of the Union specifically discouraged him from doing so as being a futile gesture, and as attendance at such a meeting (for the purpose of appealing a decision of the Union's Bargaining and Grievance Committee) was not prescribed by Respondent Union's constitution or by-laws.

Complainant further argues that Respondent Employer violated the Agreement by discharging him without "just and sufficient cause." Specifically, he alleges that his reporting to work late and in an intoxicated state on January 27, 1977 did not constitute sufficient cause for discharge and that the evidence of intoxication was at best doubtful. He further alleges that there was no evidence in the record to tie him to the punching of his time card several hours before he reported to work on January 27. He finally alleges that he at no time threatened to do harm to Kuklinski or to any other representative, agent or employe of Respondent Employer, and that he at no time carried a firearm onto the Employer's premises. Complainant refers to the fact that the allegation that he threatened Kuklinski was based upon multiple hearsay (i.e. a telephone call from his wife to Bungert which was in turn relayed through Boettcher and Kuklinski to Hermansen in which his wife stated that he had a gun in his possession, and that she feared that he would do harm to Kuklinski).

Respondent Union alleges that Complainant failed to exhaust his intra-Union remedies prior to filing the instant action and that therefore he is barred from asserting that the Union failed to fulfill its duty of fair representation with respect to Complainant. The Union refers in this regard to Complainant's failure to attend the March 20, 1977 membership meeting in order to appeal to its membership the decision of its Bargaining and Grievance Committee not to appeal his grievance to arbitration. It notes that Complainant received specific notice of his right to make such an appeal, and that the membership had in the past on several occasions reversed the decisions of the Bargaining and Grievance Committee on matters of this nature. The Union further argues that it processed Complainant's grievance in a thorough, nonarbitrary and nondiscriminatory manner, and that it acted in the belief that the grievance could not be won, based on applicable precedent, well within the scope of its discretion and with proper motives in determining not to proceed to arbitration with Complainant's grievance.

Respondent Employer joins the contention of Respondent Union in arguing that Complainant failed to exhaust his intra-Union remedies prior to instituting this action, and it further contends that Complainant failed to exhaust the remedies available to him under the Agreement's grievance-arbitration procedure. As a result, the Employer states that Complainant, as a non-party to the Agreement, lacked standing to bring the instant matter. Respondent Employer contends, as to the merits of the matter, that there existed more than sufficient cause to justify Complainant's discharge. It cites the fact that Complainant reported to work on January 27 in an intoxicated state, that his time card had been punched to show he arrived to work on time when in fact he was several hours late, that he threatened the life of Kuklinski and that he had in fact communicated the threat to his wife and had obtained a gun with which to carry out the threat.

DISCUSSION:

Two issues are presented with regard to Complainant's contention that Respondent Union failed to fulfill its duty to fairly represent him in the processing of his grievance: (1) whether Complainant in fact exhausted available contractual and intra-Union remedies prior to bringing the instant action given his failure to attend the March 20, 1977 membership meeting and (2) whether Respondent Union in fact failed to fulfill the duty of fair representation as set forth by the courts. In addition, Complainant has raised the issue of whether exhaustion of intra-Union (as opposed to contractual) remedies is required prior to instituting an action for breach of the duty of fair representation.

A. Exhaustion

Most of the cases discussing the duty of fair representation incumbent upon a labor union focus upon the obligation of the aggrieved individual employee to exhaust contractual grievance and arbitration machinery prior to instituting an action for breach of that duty.

The leading case in this area, Vaca v. Sipes, 1/ stated the general rule as follows:

> Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procures established by the bargaining agreement. . . . 2/

There is authority for the view that the requirement of exhaustion applies equally to intra-Union remedies. Thus, in Newgent v. Modine Manufacturing Company, 3/ the court dismissed an employe's action for the breach of the duty of fair representation due to the employe's failure to follow the appeals procedure set forth by the union's constitution as applicable to all members claiming to be aggrieved by any action of the union, stating as follows:

> Where, as here, there is no question as to the adequacy and mandatory nature of the intra-Union remedies it is well settled that an exhaustion of the remedies is an indispensable prerequisite to the institution of a civil action against a union. 4/

Similarly, in the analagous case of Baldini v. UAW Local 1095, 5/ the court dismissed the claim of an employee against his union on identical grounds and stated as follows:

> The point of the exhaustion requirement is that a union should have a right to attempt to satisfy disgruntled members, and a court should know just what the union did or did not do with

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1/ 385 U.S. 895, 64 L.R.R.M. 2369 (1967).

2/ Id., 64 L.R.R.M. at 2374 quoting Republic Steel Corp. v. Maddox 379 U.S. 650, 58 L.R.R.M. 2193 (1964). See also, Mahnke v. W.E.R.C., 88 L.R.R.M. 3199, 3201-3202, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975); St. Regis Paper Co. (12880-C, D) 12/74; Oscar Mayer & Co. Inc. (11591-B, C) 10/74.

3/ 495 F.2d 919, 86 L.R.R.M. 2468 (CA7, 1974).

4/ 86 L.R.R.M. 2468, 2474 (CA7, 1974).

5/ 581 4.2d 145, 99 L.R.R.M. 2535 (CA7, 1978).

> respect to the complainant before trying to decide if fair representation really was denied and what relief would be just in the circumstances. 6/

Although a number of cases have thus established a defense of failure to exhaust intra-Union remedies, the Examiner notes that several factors distinquish those cases from the circumstances of this case. First, in those cases where the defense was held applicable, the intra-union appeals procedure was shown to have been set forth in writing in the union's constitution or by-laws. Second, in those cases, the mandatory nature of the intra-union remedy prior to instituting an action against the union was made clear to the aggrieved employee. Third, in the extant circumstances the intra-union remedy provided a real opportunity for the aggrieved employe to obtain a reversal of the allegedly wrongful action of the union. None of these factors are present under the circumstances of this case. There was no showing that the intra-Union appellate procedure allegedly available to and not followed by Complainant -- i.e. appeal to the full membership from an adverse decision of Respondent Union's Bargaining and Grievance Committee-- was contained in or established by Respondent Union's constitution or by-laws or any similar document. Furthermore, there was no showing of any kind that Respondent Union ever communicated to Complainant that such an appeal to the membership was of a mandatory nature or that failure to make such an appeal would preclude Complainant from instituting a civil action against the Union. Union's letters of February 14 and March 7, 1977 (which informed Complainant of the availability of such an appeal) stated to Complainant that "you have the right to appeal this decision at the next Regular Membership Meeting . . . if you choose," at least permitting the conclusion that such a procedure was permissive rather than mandatory in nature.

Finally, the circumstances of this case clearly demonstrate that Complainant did attempt to exhaust his intra-Union remedies prior to instituting the instant action, and that he instituted this action only upon his reasonable belief that further resort to intra-Union procedures would be futile. Complainant did attend the February 20, 1977 Union membership meeting in order to appeal the February 11, 1977 decision of the Union's Bargaining and Grievance Committee not to submit his grievance to arbitration. He was told at that time that such an appeal would not be necessary, and that his grievance would proceed to arbitration. The Bargaining and Grievance Committee subsequently changed its mind regarding the advisability of arbitration of Complainant's grievance. However, while it did advise Complainant of the existence of an appeal procedure, Shaw--a representative of the Union and a member of its Bargaining and Grievance Committee--informed Complainant that resort to that procedure at the March 20, 1977 membership meeting would be a useless gesture, due to the nature of the case and the

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6/ 99 L.R.R.M. at 2537. Cases in accord include among others, Hedge v. Deere & Co., 99 L.R.R.M. 3401 (S.D. Ill. 1978); Neipert v. McKee & Co., 98 L.R.R.M. 2152 (E.D. Pa., 1978); Brookins v. Chrysler Corp., 381 F.Supp. 563, 87 L.R.R.M. 3024 (E.D. Mich., 1974); Orphan v. Furnco Construction Corp., 466 F.2d 795, 81 L.R.R.M. 2058 (CA7, 1972); Morin v. General Motors Corp., Buick Div., 91 L.R.R.M. 2578 (E.D. Mich. 1976); Neal v. System Board of Adjustment, 348 F.2d 722, 59 L.R.R.M. 2840 (CA8, 1965). The Examiner notes that the defense of failure to exhaust intra-Union remedies has often been held to be available only to unions and not to employers, Niepert v. McKee & Co., supra, Orphan v. Furnco Const. Corp., supra, but this point need not be addressed herein since the defense has not been established in the instant circumstances.

costs of arbitration. 7/ Thus, Complainant did resort to an apparently permissive appellate procedure at one point and his failure to so a second time is easily explained by his reasonable belief that a second attempt to appeal to the membership would be futile. The rule of exhaustion of intra-Union remedies is clearly subject to the exception of futility 8/ and that exception applies to the circumstances underlying this action.

Given that Complainant cannot be barred from instituting this proceeding on the theory that he failed to exhaust his intra-union remedies, it is equally clear that he cannot be similarly barred on the theory that he personally failed to exhaust the grievance-arbitration procedures provided by the Agreement. Complainant filed a grievance pertaining to his discharge and pursued it as far as he could--even to the point of attending the Union's February 20, 1977 membership meeting in the event that an appeal to the membership would be necessary to reverse the earlier decision of the Bargaining and Grievance Committee not to appeal the grievance to arbitration. The fact that the grievance-arbitration did not fully run its course stemmed from two events: Respondent Union's reversal of position in early March on the advisability of submitting Complainant's grievance to arbitration, and Shaw's advice to Complainant that appeal from the decision of the Bargaining and Grievance Committee not to proceed to arbitration would be futile. Therefore, if any failure to exhaust the Agreement's grievance-arbitration procedure did occur, it must be attributed to Respondent Union and not to Complainant.

B. Duty of Fair Representation

Before he is entitled to a consideration of the merits of his discharge by this contract-enforcement forum, Complainant must first prove that Respondent Union's conduct in handling his grievance was such as to violate the Union's duty of fair representation. Complainant bears the burden of establishing the facts constituting such a violation by a clear and satisfactory preponderance of the evidence. 9/ 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 violation

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7/ Tr. pp. 36, 37, 56-57, 137, 138.

8/ Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 70 L.R.R.M. 2097 (1969); Orphan v. Furnco Const. Corp., supra, n. 6; Waters v. Wisconsin Steel Works, 427 F.2d 476 (CA7, 1970); Ruggirello v. Ford Motor Co., 92 L.R.R.M. 2228 (E.D. Mich., 1976); Foy v. Norfolk & Western Ry., 377 F.2d 243, 65 L.R.R.M. 2391 (CA4, 1967); Deluhery v. Marine Cooks & Stewards Union, 211 F. Supp 529, 51 L.R.R.M. 2682 (S.D. Cal., 1962). This holds true under the circumstances presented herein even though instances may have existed in the past in which Respondent Union's full membership overruled its Bargaining and Grievance Committee, given that the Union's own representatives represented to Complainant that further resort to the intra-Union appellate procedure would be futile.

9/ Wis. Stats. Sec. 111.07(3), Crepaco Inc. (15192-B) 6/78; C & J Transport Co. (11558-A) 6/73.

of the Agreement. 10/

The U.S. Supreme Court has defined a labor organization's duty of fair representation as follows:

> The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, and was soon extended to unions certified under the N.L.R.A. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . .
>
> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. . . .
>
> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. . .
>
> If the individual employee could compel arbitration of his grievance, regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. . . . It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedure . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke

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10/ Crepaco Inc., supra, n. 9; Beloit Jt. Sch. Dist. (14702-B, C) 4/77; City of Wauwatosa (13385-A, B) 12/75; Kroger Co. (10004) 11/70; American Motors Corp., (7955) 3/67.

> arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract merely because it settled the grievance short of arbitration. 11/

Similarly, the Wisconsin Supreme Court has stated as follows:

> The Supreme Court in Vaca left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith. . . .
>
> 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.
>
> . . . In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. 12/

A labor organization is given a wide range of reasonableness and discretion, subject to the foregoing standards, in the performance of its representational obligations vis-a-vis its members. 13/ Although a union must act with special care to avoid arbitrary and/or discriminatory behavior in its handling of a discharge grievance, it may lawfully screen grievances and process only those that it concludes will justify the expense and time involved in terms of benefitting the membership at large. 14/

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11/ Vaca v. Sipes, supra, n. 1. The National Labor Relations Board first defined a breach of the duty of fair representation as an unfair labor practice under Sec. 8(b) of the N.L.R.A. in Miranda Fuel Co., 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962).

12/ Mahnke v. W.E.R.C., supra, n. 2; see also, Moore v. Sunbeam Corp., 459 F.2d 811 (CA7, 1972).

13/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 L.R.R.M. 2548 (1953).

14/ Griffin v. UAW, 469 F.2d 181, 81 L.R.R.M. 2485 (CA4, 1972); Encina v. Tony Lama Boot Co., 448 F.2d 1264, 78 L.R.R.M. 2382 (CA5, 1971).

A review of the record herein demonstrates that Respondent Union's Bargaining and Grievance Committee gave serious and unbiased consideration to Complainant's grievance, and concluded that Complainant was not likely to prevail in arbitration. On that basis, it decided on two occasions (February 11 and March 3, 1977) not to submit the grievance to arbitration. The testimony of Shaw, Wagner and Schmidt concerning the Committee's February 11, 1977 meeting was that the merits of Complainant's grievance were thoroughly discussed; that the outcomes of previous arbitrations involving employes of Respondent Employer and comparable fact situations were discussed (particularly those involving the grievances of Israel Salva in 1974 and Lester Kuehl in 1975); and that the Committee voted down arbitration of Complainant's grievance at the conclusion of the meeting. 15/ Schmidt testified that Complainant's grievance generated much discussion at that meeting; that Complainant's grievance was a "hard and controversial case to make a ruling on"; and that the outcomes of the two previous arbitrations referred to above played a significant role in the Committee's eventual decision.

Following Wagner's subsequent submission of Complainant's grievance to arbitration, the Committee decided to conduct a second investigation of the grievance and held a meeting March 3, 1977 for the purpose of reconsidering Wagner's action. 16/ The testimony of Complainant, Shaw, Steeger, Wagner and Schmidt establish that the facts underlying the grievance were once again thoroughly discussed, that Complainant and several other witnesses were questioned by the members of the Committee and by Respondent Union's counsel, and that the Committee again voted not to take Complainant's grievance to arbitration. 17/ Steeger indicated that there was sympathy for Complainant's point of view, but that the Committee once again

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15/ Tr. 135-136, 154-155, 175-180.

16/ Wagner himself testified that his decision of February 21, 1977 to submit Complainant's grievance to arbitration was reached entirely on his own, based upon conversations with Shaw, Steeger and Complainant, and that his purpose in doing so was to avoid the Agreement's 60-day time limit for submission of grievances to arbitration, and to hold the grievance open for further investigation. (Tr. 153-154, 156-157). Wagner apparently acted without the authorization of the Union's Bargaining and Grievance Committee in doing so. While Wagner's action may have been unnecessary and/or unusual under the circumstances, it does not bear upon the issue of whether Respondent Union fulfilled its duty to fairly represent Complainant in its handling of his grievance. Clearly the Union possessed the discretion to withdraw Complainant's grievance from arbitration even after its initial submission, and the exercise of its discretion will be upheld unless its change of heart is shown to be arbitrary, discriminatory or motivated by bad faith. For a case involving circumstances quite parallel to those present herein in this respect see, Freeman v. O'Neal Steel Inc., 103 L.R.R.M. 2398 (CA5, 1980).

17/ Tr. 53-54, 94-96, 136-137, 157.

reached its determination of the belief that Complainant would lose in arbitration. 18/

The record thus clearly demonstrates that Complainant's grievance was thoroughly investigated and debated on two occasions and that, if anything, Complainant's grievance may have received more consideration than other members' grievances. 19/ The record also indicates that none of the members of Respondent Union's Bargaining and Grievance Committee bore any ill will or hostility towards Complainant and that in fact the Committee was sympathetic to his position and wished to handle his grievance in the fairest possible manner. 20/ Therefore, there is no basis for concluding that Respondent Union's handling of Complainant's grievance was arbitrary or discriminatory, or that the Union acted in bad faith with respect thereto. 21/

On the basis of the foregoing, the Examiner concludes that Respondent Union has not been shown to have committed an unfair labor practice under the Wisconsin Employment Peace Act or have failed to fairly represent Complainant. Consequently, the jurisdiction of the Wisconsin Employment Relations Commission to determine the merits of Complainant's grievance or the corresponding allegation of a violation by Respondent Employer of Section 111.06(1)(f), Wis. Stats., shall not be exercised in this instance, and the complaint filed in this matter must be dismissed.

Dated at Milwaukee, Wisconsin this May 22, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

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18/ Id. at 94-95, 110.

19/ Id., 181, 183.

20/ Id., 60, 138, 181-183. The fact that the members of the Bargaining and Grievance Committee may have felt sympathy with Complainant's position might explain the thoroughness with which his grievance was investigated.

21/ The Examiner finds it unnecessary to discuss Complainant's contentions with respect to his suspension from January 27 - February 3, 1977 inasmuch as he failed to file a grievance with respect thereto.