STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CARA BOCKAROVSKA, Complainant, vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, BELLE CITY LODGE NO. 437 and E.S.B. WISCO, INCORPORATED, Respondents.	:	Case II No. 24987 Ce-1830 Decision No. 17216-B
MARIJA BOCKAROVSKA, Complainant, vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, BELLE CITY LODGE NO. 437 and E.S.B. WISCO, INCORPORATED, Respondents.	:	Case III No. 24988 Ce-1831 Decision No. 17217-B

Appearances:

Mr. Charles Swanson, Attorney at Law, appearing on behalf of the Complainants.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Robert E. Gratz, appearing on behalf of the Respondent-Union.

Brown, Black, Riegelman & Kruel, Attorneys at Law, by Mr. Richard J. Kruel, appearing on behalf of the Respondent-Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaints of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-captioned cases, and the Commission having appointed Stephen Pieroni, a member of its staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and the Commission having consolidated the cases for hearing purposes, and a hearing on said complaints having been held at Racine, Wisconsin, on November 15, 1979, before the Examiner, 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 Cara Bockarovska and Marija Bockarovska, hereinafter referred to as the Complainants, are mother and daughter respectively,

residing at 1612 Taylor, Racine, Wisconsin, 53403; and Cara Bockarovska and Marija Bockarovska are natives of Yugoslavia; Cara Bockarovska does not understand or speak English but Marija Bockarovska understands and speaks English sufficiently well to be understood on matters of every day concerns.

2. That the International Association of Machinists and Aerospace Workers, Belle City Lodge No. 437, hereinafter referred to as the Respondent-Union, is a labor organization located at Racine, Wisconsin; that Raymond S. Marhefke at all times relevant hereto was employed by said labor organization as a business representative.

3. That E.S.B. Wisco, Inc., hereinafter referred to as the Respondent-Employer, is a corporation engaged in the business of manufacturing batteries in a plant at Racine, Wisconsin.

4. That at all times material hereto, Respondent-Union was the exclusive collective bargaining representative of certain employes, including Cara Bockarovska and Marija Bockarovska, who worked at the Respondent-Employer's Racine plant.

5. That at all times material hereto, Respondent-Employer and Respondent-Union were signatories to a collective bargaining agreement covering wages, hours and working conditions of the aforementioned employes; and that said agreement includes the following pertinent provisions:

ARTICLE VII
GRIEVANCE PROCEDURE

The parties agree that the desired results of this Grievance Procedure as intended depend largely on prompt and fair disposition of complaints or matters of difference. An employee who believes that he has a justifiable request or complaint regarding the interpretation of the terms and provisions of the Agreement, may proceed as follows:

1. The grieved party shall discuss the matter with the appropriate Supervisor and the parties shall strive honestly and diligently to resolve the matter in the best interest of all concerned. The grievant may have a member of the Shop Committee with him if he so desires.

2. If any matter involving the interpretation or application of the terms and provisions of this Agreement is not resolved, it shall be reduced to writing as a numbered grievance, signed by the employee and submitted to the Plant Manager, or his designate, by a member of the Shop Committee or the Union within five (5) scheduled work days after the alleged violation.

. . .

ARTICLE XII
LEAVE OF ABSENCE

Section 1. Personal Leave of Absence

When the requirements of the plant will permit, the Company agrees to grant employees,

upon request, a Leave of Absence without pay for a period of time not to exceed thirty (30) calendar days, for good cause shown. If during the course of this three (3) year agreement an employee requests a leave in excess of thirty (30) calendar days, one such leave may be granted, but not to exceed ninety (90) calendar days total including all other leaves within the three (3) year period. The request for such Leave of Absence is to be submitted by the employee in writing, on the form provided by the Company (60) days and no later than twenty-one (21) days prior to the commencement date of the Leave of absence. The Company shall provide an answer to such request within ten (10) days from the date of submittal. Such leaves of absence, if granted, will be limited to one (1) such leave in a twelve (12) month period. In a verified emergency situation, the limit of one (1) such leave in a twelve (12) month period, and/or the twenty-one (21) day notice may be waived.

Granting of such request, while not mandatory, will not be withheld on an arbitrary basis, and should there be a denial, it will be in writing, clearly stating the reason for denial of said leave and this shall be subject to the grievance procedure in this Agreement.

It is understood that this provision for leave of absence is intended for emergency or unusual conditions and not to encourage time away from the job.

6. That on or about March 9, 1978, Cara Bockarovska and Marija Bockarovska each filed a written request with the Respondent-Employer's personnel office requesting a leave of absence for the period of June 26, 1978, to August 31, 1978, for the purpose of visiting Yugoslavia.

7. That Complainants' supervisory shop foreman initially told Complainants it was unlikely that the plant manager would grant their request for leave of absence.

8. That sometime during the period between March 9, 1978 and mid-April, 1978, Marija Bockarovska on two occasions spoke to Marhefke, the Union's representative, for the purpose of seeking his assistance in obtaining a leave of absence for herself and her mother. However, while discussing the matter with Marhefke, Marija Bockarovska informed Marhefke that she was to be married in Yugoslavia and was not sure if she would return to the United States. Because her plans for returning to the United States were indefinite, and since she thought it would be less difficult to obtain a leave of absence for her mother, Marija Bockarovska asked Marhefke to attempt to persuade the Employer to grant a leave of absence only for her mother, rather than for herself and her mother. Marhefke informed Marija Bockarovska that the leave of absence provision in the collective bargaining agreement granted the Employer the right to deny her mother's request for a leave of absence, but Marhefke agreed to see what he could do.

9. That pursuant to Marija Bockarovska's request, Marhefke and two shop stewards met with management representatives sometime around

the first week of April, 1978, in an attempt to at least obtain a leave of absence for Cara Bockarovska. At said meeting the Employer took Cara Bockarovska's request for leave of absence under consideration. On April 7, 1978, Respondent-Employer informed Cara Bockarovska and Marija Bockarovska, in writing, that their requests for leave of absence were denied by stating as follows:

> These requests are not granted. An operation of our size cannot successfully operate with several of its people off for extended vacations. The purpose of a leave of absence is, in fact, not intended to encourage extended vacations but is rather to provide for emergencies or unusual conditions.
>
> When someone is out of the plant for two or three months there is no one here to do their job. We cannot hire replacements and then let them go when the regular employee returns.
>
> If your job is so unimportant to you that you feel you can leave for over two months, you may want to consider quitting. In that way your personal aspirations will not interfere with our business requirement.
>
> As a secondary consideration for not granting these two leaves, another employee with greater seniority has also requested extended time off. We cannot afford to have everyone off at once.
>
> W. E. Miesegaes /s/
> (Joint Exhibit No. 4)

10. That one of the Union shop committeemen who attended the meeting with management described in Finding of Fact No. 9, also informed Marija Bockarovska that the Union representatives were unsuccessful in persuading the Employer to change its mind with respect to its denial of the leave of absence requests.

11. That there is insufficient evidence in the record to conclude that Marija Bockarovska or Cara Bockarovska requested Marhefke or any other Union representative to file a grievance on their behalf regarding the denial of their requests for a leave of absence.

12. That Cara Bockarovska and Marija Bockarovska informed Respondent-Employer that they would be leaving for Yugoslavia on June 26, 1978 despite the denial of their request for a leave of absence. Three weeks before Complainants left for Yugoslavia, Respondent-Employer hired two employes to be trained to replace Complainants. The Respondent-Employer considered Complainants to have quit their employment when they left for Yugoslavia. Said Complainants were not rehired at a later date.

13. That Complainants effectively filed the instant complaints with the Wisconsin Employment Relations Commission on May 21, 1979.

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

CONCLUSIONS OF LAW

1. That Complainants, Cara Bockarovska and Marija Bockarovska, did not attempt to exhaust the contractual grievance procedure.

2. That the conduct of the International Association of Machinists and Aerospace Workers, Belle City Lodge No. 437 and its agents was not arbitrary, discriminatory or in bad faith; that Belle City Lodge No. 437 therefore did not violate its duty to fairly represent Complainants; there is therefore no violation of the Wisconsin Employment Peace Act.

3. That because Belle City Lodge No. 437 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 Respondent-Union with regard to Complainants, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent-Employer breached the collective bargaining agreement with Belle City Lodge No. 437 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 complaints of Cara Bockarovska and Marija Bockarovska be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 19 day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background and Position of the Parties

The complaints filed herein allege that Respondent-Employer violated the collective bargaining agreement by arbitrarily denying Complainants a leave of absence. The complaints further allege that Respondent-Union, by its agent Raymond Marhefke, violated its duty of fair representation by failing to process Cara Bockarovska and Marija Bockarovska's grievance concerning said denial through the steps of the grievance procedure.

Respondent-Employer asserts that the instant complaints are barred by the one-year statute of limitations [Section 111.07(14)]. Further, that its denial of an extended leave of absence did not violate the collective bargaining agreement inasmuch as its production requirements would not permit the extended absence of these two women who held skilled positions in the plant. Further, another employe's request to return to Yugoslavia was denied while a more senior employe was allowed to visit Yugoslavia for a shorter period of time than was requested by Complainants, and during a less busy time for the Company.

Belle City Lodge No. 437 contends that the matter is barred by the one-year statute of limitations. Further, Respondent-Union denies that the Respondent-Employer violated the applicable terms of the collective bargaining agreement and that in any event, Complainants quit their employment and never filed a grievance as required by the collective bargaining agreement.

Discussion

Respondent-Employer and Respondent-Union first contend that the denial of the requests for leave of absence occurred on April 7, 1978. (Joint Exhibit No. 4) The instant complaints were filed on August 7, 1979 by Complainants' counsel. Therefore, all facts complained of in the instant complaints occurred more than one year prior to the filing of said complaints and therefore, must be barred by the one-year statute of limitations as enunciated in Section 111.07(14).

Issue of Timeliness

Agreeing with Complainants' counsel, the Examiner concludes that the instant complaints were timely filed. The record demonstrates that the Complainants attempted to file a handwritten complaint with the Commission on April 27, 1978. On the same date, the Commission, by Chairman Slavney, wrote to the Complainants and informed them of certain deficiencies in said complaints. Thereafter, on May 21, 1978, Complainants provided the additional information which was necessary to file a complaint. By letter dated May 31, 1979, George Fleischli, General Counsel for the Commission, notified Respondent-Employer and Respondent-Union of receipt of the complaints and enclosed copies of same. In said letter, Mr. Fleischli informed the Complainants that they may wish to consider obtaining the services of an attorney or other representative since they would have the burden of proving their case. Thereafter, the Complainants did obtain the services of counsel who filed formal complaints on August 7, 1979. Said complaints did not change the substance of the allegations contained in the complaints which were received by the Commission on May 21, 1978.

During argument on the motion to dismiss because of the statute of limitations bar, Respondent-Union placed much emphasis upon their contention that they never received the letter with the enclosed complaints from Mr. Fleischli dated May 31, 1979. The first time Respondent-Union became aware of the complaint was upon receipt of the formal complaint filed by counsel on August 7, 1979. Although not articulated by the Examiner at hearing, it is now concluded that the statute of limitations is tolled as of the date of filing of the complaint with the Wisconsin Employment Relations Commission. 1/ Thus, the fact that the Respondent-Union did not receive notice of said complaint until some later date does not change the critical fact that the complaints were effectively filed with the Commission on May 21, 1979.

Turning to the Respondent-Employer's argument: the denial of the leave request occurred on April 7, 1978, therefore the statute of limitations should have run out on April 7, 1979. This argument has some merit. However, the leave request was to begin June 26, 1978, and in fact that is the date on which the Complainants left for Yugoslavia. During the period from April 1, 1978 to June 26, 1978, Complainants believed that the Employer could have changed its mind regarding their request for a leave of absence. It was not until the Complainants actually left their employment on or about June 26, 1978 that the Employer's denial became operative. Hence, the Examiner concludes that the alleged violation concerning the leave of absence provision did not ripen until June 26, 1978. The instant complaints were effectively filed on May 21, 1978, a month before the statute of limitations became effective.

Merits of the Complaints

Exhaustion of the contractual grievance procedure is a condition precedent to the Examiner's assertion of his jurisdiction to determine the claim that the Employer breached the collective bargaining agreement unless Complainants have been frustrated in their attempts to exhaust the grievance procedure by the Union's breach of its duty of fair representation. 2/

Here, the testimony establishes that no written grievance was filed by either Complainant. It cannot be overlooked that Complainants suffer from a language barrier and, as they assert, they believed that they did everything necessary to file a grievance. Despite the language problem, the record is abundantly clear that Marija Bockarovska told Marhefke that it wasn't necessary for him to pursue a leave of absence for herself, but that her mother, Cara Bockarovska, would need the leave of absence. (TR 126, 136; see Findings of Fact No. 8) Hence, it must be concluded that Marija Bockarovska did not file nor did she intend to file a grievance on her own behalf.

With regard to Cara Bockarovska, her testimony was offered through an interpreter. There was no testimony offered by Cara Bockarovska which indicated that she personally desired to file a grievance. Cara Bockarovska essentially testified that she relied on her daughter, Marija to make that decision. Marija testified that she knew what a grievance was and thought that she had signed a grievance while discussing the matter with Marhefke. However, Marija was vague and evasive

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1/ Stanley-Boyd Area Schools 12504-B, 1/76; M.T.I. vs. Jt. School Dist. No. 8, et al. 14866 8/76; School Dist. of Kettle Moraine 15188-B 3/77.

2/ American Motors Corp. 12788-B, 10/68.

when asked to describe the circumstances in which she requested that a grievance be filed. (TR 138-139) In contrast, Marhefke unequivocally denied that Marija requested the filing of a grievance concerning the denial of leave of absence. Marhefke stated that Marija requested that he talk with management in order to try to obtain permission for her mother. Marija understood and conveyed to Marhefke that it was unlikely that the Employer would allow both of them a leave of absence for the time period which was requested. Marija wasn't sure if she would return to the United States anyway, and suggested that Marhefke focus on obtaining permission for her mother.

With this in mind, Marhefke and two Union stewards met with management but were unable to change the management's decision. Thereafter, Marhefke did not directly inform the Complainants of the Employer's decision. His testimony was that a shop steward did so and that the normal procedure was for the Company to write a response to the employe, which was in fact done. (Joint Exhibit No. 4) After this meeting with management, Marhefke was not contacted by Complainants concerning the leave of absence issue. In August, 1978, Complainants requested Marhefke's presence at an unemployment compensation hearing, but did not apparently inquire concerning a grievance over the leave of absence at that time.

It is the Examiner's opinion that based upon the facts of this case, it simply would not be reasonable for the Union representative to believe that either of Complainants desired to file a grievance concerning the leave of absence issue. Further, I credit Marhefke's testimony which unequivocally denied that such a request was made. (TR 49 and 50) Rather, Marija Bockarovska appeared to understand that the Employer had legitimate reasons for denying the request, but held out hope that a change of heart would occur. It was not until after they returned from their trip to Yugoslavia in August, 1978, that they learned that a co-employe (with more seniority) obtained permission to visit Yugoslavia and then concluded that they had been treated arbitrarily.

Having determined that Complainants failed to prove by clear and satisfactory preponderance of the evidence that they attempted to exhaust the contractual grievance procedure or that they were frustrated in doing so by the Union's breach of its duty of fair representation, 3/ the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent-Employer breached the parties' collective bargaining agreement.

Dated at Madison, Wisconsin this 19 day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

3/ Mahnke vs. WERC, 66 Wis. 2d 524 (1975).