STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. CARLSON, Complainant, vs. LABORER'S INTERNATIONAL UNION, LOCAL 237 and WISCONSIN ASSOCIATES, INC., Respondents.	Case I No. 27871 Ce-1909 Decision No. 18661-A

Appearances:

Roger C. Higbie, Attorney at Law, 131 West Wilson Street, Suite 904, Madison, Wisconsin 53703, for the Complainant.

Arvo R. Mattson, Business Manager, 6758 - 14th Avenue, Kenosha, Wisconsin 53140 for the Respondent Union.

No appearances were made on behalf of Wisconsin Associates, Inc. 1/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mark J. Carlson having filed a complaint with the Wisconsin Employment Relations Commission on April 20, 1981 alleging that Laborer's International Union, Local 237 and Wisconsin Associates, Inc., had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Douglas V. Knudson, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Kenosha, Wisconsin on May 20, 1981; and a transcript of the hearing having been prepared; and the Complainant having filed a brief by July 7, 1981; 2/ and the Examiner, having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Mark J. Carlson, herein Carlson, was a member of Laborer's International Union, Local 237 in 1979 and 1980, and, that at the time the instant complaint was filed, Carlson resided at 1402 Regent Street, Room 308, Madison, Wisconsin 53711.

2. That Respondent Local 237, Laborer's International Union, herein the Union, is a labor organization with offices at 6758 - 14th Avenue, Kenosha, Wisconsin 53140, and, that at all times material herein, Arvo R. Mattson was the Business Manager of the Union.

1/ As noted above, the Employer did not appear in person, or otherwise, at the hearing. Notice of Hearing on Complaint was sent to the Employer by certified mail on May 6, 1981 and was received by it on May 7, 1981.

2/ The Union made oral argument at the hearing in lieu of filing a post-hearing brief.

3. That Respondent Wisconsin Associates, Inc., herein the Employer, is an employer with an office at 8100 95th Street, Pleasant Prairie, Wisconsin 53158.

4. That, at all times material hereto, the Union and the Employer were parties to a collective bargaining agreement effective for the duration of the construction of the Pleasant Prairie power plant, which agreement provided in pertinent part as follows:

ARTICLE V
HIRING PROCEDURES

Section 1. For Local Unions now having job referral system in their local agreements, the CONTRACTOR agrees to abide by the terms of its contract with the Local Unions. Such job referral systems must be operated in accord with Federal and State Laws.

Section 2. The CONTRACTOR shall have the unqualified right to select and hire directly all supervisors it considers necessary and desirable without such persons being referred by the Unions. Foremen, journeymen, apprentices and laborers required by the CONTRACTOR shall be referred to the CONTRACTOR by the Unions. The CONTRACTOR shall have the right to reject any applicant referred by the Unions for good cause. Such good cause rejection may be submitted to the Grievance Procedure.

Section 3. The CONTRACTOR shall be the sole judge as to the number of employees and supervisors required to perform the work. There shall be no restriction, other than may be required by safety regulations, on the number of men assigned to any crew or to any service.

Section 4. The Unions shall accept for registration and refer all applicants for employment without discrimination against any applicant by reason of membership or non-membership in the Union, and such referrals shall not be affected in any way by the rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of union membership policies or requirements.

Section 5. No party to this Agreement shall discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age or physical handicaps.

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ARTICLE XVI
GRIEVANCE PROCEDURE AND ARBITRATION

Section 1. Any question arising out of and during the term of this Agreement involving its interpretation and application, grievance and arbitration procedures shall be handled under the following procedures:

(A) Any such grievance shall be first adjusted between representatives of the Local Union and the Project Superintendent and, if not settled,

(B) within five (5) days assistance may be requested of representatives of the International Union involved and the CONTRACTOR and if not settled,

(C) then the grievance shall be submitted within ten (10) calendar days to an arbitration committee . . .

5. That the Employer was one of several contractors for the construction of an electric power plant at Pleasant Prairie; that Carlson worked for the Employer as a Laborer for approximately two months in 1979, until he was terminated in early August, when the Employer discovered that Carlson had falsified the date of birth on his employment application to reflect that he was eighteen years old, even though he was then only seventeen years old.

6. That in late May or early June, prior to June 9, of 1980, the Employer's Project Manager, M. Grammer, informed Mattson that he did not want Carlson referred for work because Carlson had falsified his date of birth the previous year; that on June 9, 1980, a date subsequent to said conversation, the Union referred Carlson for work as a Laborer to another contractor, Brand Insulations, Inc., at the Pleasant Prairie power plant construction project; that on or about June 17, 1980 Brand Insulations, Inc., laid off Carlson and four other Laborers for lack of work; that Carlson then went to the Union's office and registered for referral; that for the remainder of the 1980 summer, Carlson was referred by the Union on one occasion for one day of work, which work was at a construction project unrelated to the Pleasant Prairie power plant; and, that on or about July 31, 1980, the Union's Assistant Business Manager advised Carlson that he had been barred from the Pleasant Prairie job site by the Employer.

7. That, subsequent to his conversation with the Union's Assistant Business Manager on July 31, 1980, Carlson contacted the officers of the Laborer's International Union and was advised by Alan Milak, the Union's International Consultant for the State of Wisconsin, that they could not help him because he had not gone through the proper grievance procedure, and further, that a grievance could no longer be filed because it would be untimely; and, that although Carlson subsequently obtained a copy of the collective bargaining agreement, he never attempted to file a grievance with Local 237 through the contractual grievance procedure.

8. That some, but not all, of the Laborers laid off with Carlson on or about June 17, 1980 were recalled to work for unspecified periods of time at the Pleasant Prairie power plant project; that however, there were no requests made to the Union for referrals as Laborers of any individuals in connection with such recalls, but rather, those situations involved the direct recall by contractors of employes who previously had been employed by said contractors; and, that the Union did not refer any of the other four individuals laid off with Carlson to other work as Laborers during the remainder of the 1980 summer months, but rather, any work as Laborers gained by said four individuals subsequent to their layoff on June 17, 1980 was obtained through a source other than the Union.

9. That the number of Laborers employed at the Pleasant Prairie project by the Employer averaged 218 during the months of June, July and August in 1979; and, that during the same months in 1980 the Employer employed an average of 177 Laborers.

10. That Carlson's failure to exhaust the contractual grievance procedure was caused by the inaccurate advice and information given to him by the Union.

11. That Carlson's falsification of his age on his employment application in 1979 constituted good cause for the Employer to inform the Union that it did not want Carlson referred to it for work.

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

CONCLUSIONS OF LAW

1. That by inaccurately advising Carlson a grievance could not be filed, since it would be untimely, the Union violated its duty to fairly represent Carlson.

2. That, because the Union's breach of its duty to fairly represent Carlson prevented him from exhausting the grievance procedure, the Commission will assert its jurisdiction to determine whether the Employer breached the collective bargaining agreement, thereby also violating the Wisconsin Employment Peace Act.

3. That since the Employer had good cause for informing the Union that it would not honor referrals of Carlson for work, said action by the Employer did not violate the collective bargaining agreement, and therefore, the Employer did not violate 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 and issues the following

ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this **20th** day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Douglas V. Knudson
Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Carlson alleges that the Employer violated the collective bargaining agreement by barring him from the Pleasant Prairie job site without good cause. Moreover, Carlson alleges that the Union breached its duty of fair representation by honoring the Employer's request that he be barred from the Pleasant Prairie job site, and, by failing to timely inform Carlson that he had been so barred.

The Wisconsin Employment Relations Commission has consistently required, that before it will exercise its jurisdiction to determine the merits of Complainant's allegation that Respondent Employer breached the collective bargaining agreement in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA), that Complainant prove by a clear and satisfactory preponderance of the evidence, 3/ that he attempted to exhaust the collective bargaining agreement's grievance procedure and that he was frustrated in such attempt by Respondent Union's violation of its duty of fair representation. 4/

In the instant case, Carlson contends that by the time he was informed that he had been barred from the construction site, a grievance would have been untimely under the terms of the contractual grievance procedure. Such a contention is based on the statement to him by an International Consultant of the Union that because of the ten day time limit in the contractual grievance procedure, it was too late for Carlson to then file a grievance. Carlson further argues that even if a grievance still could have been filed at that time, the grievance could not have been processed in time to accomplish his recall to work prior to the date he would have had to leave for school.

The record is clear that Carlson never attempted to file a grievance under the grievance procedure of the collective bargaining agreement. Carlson's uncontradicted testimony was that his failure to so file resulted from being told by Milak that a grievance filed in late 1980 would be untimely. Although such information was inaccurate, in light of the source, it was reasonable for Carlson to assume said information was correct, and as a consequence, not attempt to file a grievance. Milak's careless and negligent manner of assessing the time limits of the grievance procedure was of such an arbitrary nature that his conduct failed to satisfy the standards of fair representation expressed in Manke v. WERC. 5/ The avoidance of arbitrary conduct requires that there must be a basis for the action taken. 6/ In this case no basis was presented to explain the inaccuracy of the information given to Carlson by Milak. Accordingly, it is concluded that

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3/ Briggs and Stratton Corporation, 16069-A (5/80).

4/ Briggs and Stratton Corporation, Ibid; See also Republic Steel Corporation v. Maddox, 379 U.S. 615, 85 Supreme Court 614 (1965); Vaca v. Sipes, 386 U.S. 171, 87 Supreme Court 903 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1975).

5/ 66 Wis. 2d. 524 (1975).

6/ Teamsters, Local 315 (Rhodes & Jamieson, Ltd.) [217 NLRB No. 95 (1975)] 89 LRRM 1049.

the Union failed to meet its legal obligations to provide fair representation to Carlson when it arbitrarily gave him erroneous information about the time limits of the grievance procedure. Because Carlson's attempt to exhaust the agreement's grievance procedure was frustrated by the Union's violation of its duty to fairly represent him, the Examiner will assert the Commission's jurisdiction to determine the merits of Carlson's allegation that the Employer breached the collective bargaining agreement in violation of Section 111.06(1)(f) of WEPA. 7/

The Union admittedly complied with the Employer's request that Carlson not be referred to the Employer for work as a Laborer at the Pleasant Prairie job site. The agreement specifically gives a contractor the right to so reject an employe's referral for good cause. The Employer did have good cause to reject Carlson since he had falsified his age to gain employment with the Employer during the summer of 1979. Therefore, said rejection did not violate the contract, and consequently, did not violate Section 111.06(1)(f) of WEPA.

Dated at Madison, Wisconsin this 20th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Douglas V. Knudson
Douglas V. Knudson, Examiner

7/ Town of Menasha (Police Department), (17369-A), 3/81.

It does not appear that Carlson was alleging that the Union's manner of referring him for work constituted an independent violation of its duty of fair representation. However, even assuming the reverse, subsequent to the Employer's request that Carlson not be referred to it, the Union did refer Carlson to a different subcontractor at the Pleasant Prairie job site. Thus, the Union did not bar Carlson from working for the other contractors at that job site, as Carlson alleges. Moreover, it was the uncontradicted testimony of Mattson that subsequent to Carlson's layoff on June 17, 1980, the Union did not receive any requests for the referral of Laborers from any contractor at the Pleasant Prairie job site. Mattson further testified that because contractors have the right to recall Laborers who had worked for them in the previous year without going through the Union's referral system, it is possible that some Laborers, including one or more of those laid off with Carlson on June 17, 1980, could have been recalled to the Pleasant Prairie job site without the Union's assistance. Additionally, the record shows that the Union did refer Carlson to another construction project following his layoff on June 17, 1980. Thus, it is concluded that the Union's conduct with respect to the referral of Carlson did not breach its duty of fair representation.