STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH EDWARD BUCK, Complainant, vs. RUAN TRANSPORTATION MANAGEMENT SYSTEMS and TEAMSTERS UNION LOCAL NO. 346, Respondents.	Case 3 No. 39168 Ce-2063 Decision No. 25074-B

Appearances:

Mr. Ronald Gustafson, 911 Clough Avenue, Superior, Wisconsin, 54880, appearing on behalf of the Complainant.

Mr. Kenneth Kessler, Attorney at Law, P.O. Box 855, Des Moines, IA, 50304, appearing on behalf of the Respondent Ruan.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. William Kowalski, 788 N. Jefferson Street, Milwaukee, Wisconsin, 53202, appearing on behalf of Respondent Teamsters Local 346.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Joseph Edward Buck, hereinafter the Complainant, filed a complaint with the Wisconsin Employment Relations Commission on July 28, 1987, alleging that Ruan Transportation Management Systems had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act (WEPA). Scheduling of the complaint was held in abeyance to permit the parties to engage in settlement discussions. On November 30, 1987, Complainant amended his complaint and named Teamsters Local 346, hereinafter the Union, as a party Respondent. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Sec. 111.07(5), Stats. On January 14, 1988, the Union filed a Motion to Dismiss which was denied by the Examiner on January 27, 1988. A hearing was held in Superior, Wisconsin on February 8, 1988 at which time the parties were given full opportunity to present their evidence and arguments. The parties filed briefs and the record was closed on April 8, 1988. The Examiner having considered the evidence and arguments of counsel 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 Joseph Edward Buck, hereinafter referred to as Buck or Complainant, is an individual who resides at 3702 E. 3rd Street, Superior, Wisconsin 54880; that at all times material herein, Complainant has been employed by Respondent Ruan as a mechanic at the Company's Superior, Wisconsin terminal; and that at all times material herein, Complainant has been a member of the bargaining unit represented by the Respondent Union.

2. That Respondent Ruan Transportation Management Systems, hereinafter referred to as the Company, is an interstate leasing company with a terminal located at 322 Winter Street, Superior, Wisconsin 54880; and that its headquarters are located at 3200 Ruan Center, 666 Grand Avenue, Des Moines, Iowa 50309.

3. That Respondent Teamsters Local 346, hereinafter referred to as the Union, is a labor organization with offices located at 2802 West 1st Street, Duluth, Minnesota 55806; and that the Union is the exclusive representative of certain of the Company's employes including the Complainant in a bargaining unit consisting of all mechanics, greasers, washers, servicemen and tire men at the Superior, Wisconsin terminal.

4. That the Company and the Union have been, and are, parties to a collective bargaining agreement covering the wages, hours and conditions of

employment for employes in the bargaining unit set forth in Finding of Fact 3; that the parties contractually agreed to a wage freeze for bargaining unit employes for the period from late 1981 through late 1986; and that the parties present agreement covering the period from November 15, 1985 through November 14, 1988 contains, among its provisions, the following:

ARTICLE 12

GRIEVANCE PROCEDURE:

Section 1. Should any grievance arise, every effort shall be made to settle the grievance in the following manner:

First: Between the employee affected and his foreman within seven (7) days.

Second: Between the employee affected, his foreman, and the shop steward jointly.

Third: Between the Union official representative, if and when called in by the shop steward, and the shop superintendent or Employer.

Section 2. If such grievances are not satisfactorily adjusted between the management and the shop steward or the Business Representative within thirty (30) days, the matter shall be referred to arbitration if either party shall so request. The request for arbitration shall be in writing from one party to the other.

. . .

. . . The executive Board of the Local Union will have the right to determine whether or not a grievance is qualified to be submitted to arbitration by the Union.

. . .

5. That on two separate occasions prior to 1986, the bargaining unit position of lead mechanic was created and utilized at the Superior terminal; that when this leadman position was utilized, the employe so designated received an increase in pay over the regular mechanic wage rate for performing office duties in addition to regular mechanic duties; and that the parties' 1973-1975 labor agreement contained a leadman classification which provided an hourly wage 15¢ higher than that for the mechanics, but that the last three labor agreements (1979-1981, 1982-1984 and 1985-1988) did not provide for this leadman classification.

6. That in February, 1986, the Company unilaterally reinstated the position of leadman at the Superior terminal; that when it did so, the Company advised the Union of this fact and the Union did not object; that the position of leadman, which is not in the current labor agreement, was not posted; that the manager of the Superior terminal, Robert Lewandowski, notified the employes at the terminal that the leadman mechanic position was being reinstated, but did not tell them what hourly wage the leadman mechanic would be paid; that Lewandowski promoted Jeff Little to fill the position of leadman; that the basis for this decision was Lewandowski's judment that Little was the best qualified employe for the position; that no other mechanics at the Superior terminal were offered the leadman position other than Little; and that Little received an increase in pay of 40¢ an hour after becoming leadman.

7. That although the other mechanics at the Superior terminal were aware that Little had been promoted to leadman, they were unaware of the pay increase Little had received with the position until they learned of it in the summer of 1986; that Buck, the most senior mechanic at the Superior terminal, learned of Little's additional 40¢ an hour pay increase in either the summer or October of 1986; that Buck though it was unfair that one employe in the terminal received a 40¢ an hour pay increase while the others were under a wage freeze, and further thought is unfair that the other employes at the Superior terminal had not been made aware of Little's pay increase when it occurred; that Buck briefly discussed

his concerns with Lewandowski who, in effect, told Buck he had done nothing wrong in promoting Little; and that at some point thereafter, Lewandowski asked Buck if he wanted the job of leadman and Buck replied that he did not want the job.

8. That on October 30, 1986, Buck wrote Union Business Representative Roy Niemi a letter in which he contended that he, rather than Little, should have been made leadman; that Buck also contended in this letter that the Company had made a special promise to him in negotiations in 1983 regarding paying him additional money; that Niemi did not respond in writing to Buck's letter; that on November 12 or 15, 1986, Niemi met with Buck and Union Steward Rick Edington on another matter and at that time, Niemi obtained additional facts and background information on the leadman mechanic situation; that at the conclusion of this meeting, Niemi told Buck that in his (Niemi's) opinion, it would be a very difficult grievance to win due to timeliness questions; and that the basis for Niemi's conclusion in this regard was his interpretation of the labor agreement as requiring grievances to be filed within seven days after they arise, and Buck's complaint dealt with a situation that arose in February, 1986.

9. That thereafter, Edington and Buck met with Lewandowski to discuss the lead mechanic situation, but nothing was resolved at this meeting; that following this meeting, Niemi asked Lewandowski to look into the allegations raised by Buck that the Company had made a special promise to him in the 1983 contract negotiations to pay him additional money; that on December 3, 1986, Lewandowski wrote Niemi and advised him that he had looked into Buck's contention that special promises were made to him during the 1983 contract negotiations, and could find no records to that effect nor did he have any (personal) knowledge of this; that this letter further indicated that the Company believed it was paying all mechanics properly and in accordance with the labor agreement; that on January 14, 1987, Niemi called Lewandowski regarding Lewandowski's letter of December 3, 1986 and the outcome of this conversation was that there was no change in the leadman situation; that Niemi then discussed the matter with Buck and Edington at which time Niemi explained the Company's position to Buck; and that Niemi then advised Buck that he did not think the Company had violated the contract by its actions in appointing Little as the leadman mechanic.

10. That on February 14 or 15, 1987, Buck filed a grievance protesting the Company's actions with regard to the lead mechanic situation; that Buck's grievance alleged that he should have been awarded the leadman position which had been awarded to Little, or else that the (leadman) position should have been eliminated; that this grievance was sent to Niemi; that on February 16, 1987, Niemi, in turn, sent Buck's grievance to Lewandowski; that on February 24, 1987, Lewandowski wrote Niemi with a response/answer to Buck's grievance; that this letter gave a history of the lead mechanic's position at the Superior terminal and noted that the position had been reinstituted in 1986 with the Union's knowledge and permission; that with regard to the merits of Buck's grievance, Lewandowski responded as follows:

1) Buck had worked under two lead mechanics prior to Little

2) since the current lead mechanic's position had been in existence since February, 1986, the grievance was untimely

3) Buck's grievance did not cite an article of the agreement which the Company had violated

4) past practices indicated that the Union was in agreement with the Company on the lead mechanic concept

5) Buck had indicated to both Union Steward Edington and Lewandowski that he did not want the position of lead mechanic;

that Lewandowski concluded the letter by denying Buck's grievance; and that Niemi sent Lewandowski's response/answer to Buck for his review.

11. That Niemi then discussed the merits of Buck's grievance with the Secretary/Treasurer of Local 346; that thereafter, Niemi discussed Buck's grievance with Union legal counsel; that after considering the applicable contract language covering the timeliness of grievances, the absence of contract language

covering lead mechanics and the Company's past practice with regard to filling the leadman mechanic position, the Union determined that the Company did not violate the collective bargaining agreement when it unilaterally selected Jeff Little for the position of lead mechanic and gave him a 40¢ an hour pay increase; that the Union therefore determined that Buck's grievance was without merit and that the Union would not proceed to arbitration on it; that in early March, 1987, Niemi orally told Buck, either at the shop or in a phone call, that the Union would not arbitrate his grievance; that Niemi did not put this in writing; and that Niemi indicated that only a very small percentage of grievances are appealed by the Union to arbitration.

12. That the Complainant was not, and is not, satisfied with the way he was treated in the leadman mechanic situation by both the Company and the Union; that Complainant believes his contractual rights have been violated by the Company; that this belief led him to write the President of Ruan, Larry Miller, a letter on March 17, 1987 in which he complained about the leadman mechanic situation at the Superior terminal; that Miller responded on April 10, 1987 that he was disappointed this situation was upsetting to Buck, but that the Company felt its use of a leadman at the Superior terminal was justified; that Buck wrote Miller again on April 27, 1987 regarding the leadman mechanic situation at the Superior terminal, but Miller did not respond in writing to this letter; that Complainant also believes he was not treated fairly by the Union in that the Union refused to process his grievance to arbitration; and that this belief led him to write the President of the Minnesota Joint Council of Teamsters, Howard Fortier, a letter on April 17, 1987, in which he advised Fortier that Niemi had refused to take his grievance to arbitration, but Fortier did not respond in writing to this letter.

13. That on November 17, 1987, a meeting was held at the Superior terminal concerning the leadman mechanic position; that those present at the meeting were Niemi, Edington, Lewandowski, Buck and Buck's representative, Ron Gustafson; and that at this meeting, Niemi acknowledged that the leadman mechanic position is not in the parties' current labor agreement, that he knew that Little was being paid an additional 40¢ an hour for his leadman duties and that he was satisfied with Lewandowski's response/answer of February 24, 1987 to Buck's grievance.

14. That the Union, through the actions of its agent Niemi, did not process Buck's grievance in such a manner so as to establish that its actions in regard thereto were arbitrary, discriminatory or made in bad faith; and that, to the contrary, the Union at all times material herein provided Buck with fair representation with respect to its decision not to appeal Buck's grievance to final and binding arbitration.

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

CONCLUSIONS OF LAW

1. That Teamsters Local 346 did not violate its duty of fair representation with respect to the Complainant by refusing to submit his grievance concerning the appointment of a leadman mechanic at the Company's Superior terminal to arbitration, and therefore, did not commit any unfair labor practice within the meaning of any provision of the Wisconsin Employment Peace Act (WEPA).

2. That having concluded that Respondent Union did not violate its duty of fair representation to the Complainant, the Examiner will not invoke the jurisdiction of the Wisconsin Employment Relations Commission to determine whether Ruan Transportation Management Systems violated the collective bargaining agreement existing between it and Teamsters Local 346 in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by its actions in appointing a leadman mechanic at the Superior terminal.

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

ORDER 1/

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

Dated at Madison, Wisconsin this 11th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

RUAN TRANSPORTATION MANAGEMENT SYSTEMS

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Complainant Buck filed the instant complaint on July 28, 1987 alleging that Respondent Company had committed an unfair labor practice under the Wisconsin Employment Peace Act (WEPA). On November 30, 1987, Complainant amended his complaint and named the Union as a party Respondent. The Union filed an answer on December 9, 1987, wherein it denied any breach of the duty of fair representation, and raised several affirmative defenses, including the contention that the complaint was untimely. On January 14, 1988, the Union filed a motion to dismiss which was denied by the Examiner on January 27, 1988.

POSITIONS OF THE PARTIES

Complainant contends he put a prima facie case into evidence. With regard to the Company's alleged contractual violation, Complainant notes the following: that the Company reinstated the position of lead mechanic which it had previously eliminated; that this position was filled by an employe who received a 40¢ an hour wage increase while a wage freeze was in effect; and that this was done without being brought to the bargaining unit for a vote. According to the Complainant, these actions by the Company and the employe who was awarded the leadman position undermined the integrity of the labor contract. The Complainant contends that the Union's misconduct herein was its failure to investigate the case and proceed to arbitration on it.

The Company initially contends the complaint is untimely. According to the Company, the applicable statute of limitations for this case is the six month period prescribed in Section 10(b) of the National Labor Relations Act (NLRA). Applying this statute of limitations to the instant complaint, the Company asserts that the complaint concerns events which happened a long time before the expiration of the six month time limit, so the complaint is therefore untimely. It further submits that if the complaint was filed too late against the Union, it was also filed too late against the Company inasmuch as the actions complained of involved both parties working together in concert. With regard to the merits, the Company argues that Complainant failed to prove that a unfair labor practice was committed. It therefore requests that a decision be rendered in favor of the Respondents.

It is the Union's position that under applicable federal law, the Complainant's action against the Union is untimely and should therefore be dismissed. According to the Union, the Complainant's claims against the Company and the Union herein must be treated as arising under Sec. 301 of the Labor Management Relations Act (LMRA) because it calls for interpretation of the labor contract between the parties. The Union contends that pursuant to the U.S. Supreme Court's DelCostello 2/ decision, such hybrid Sec. 301 claims are governed by the six month statute of limitations for filing unfair labor practices contained in the NLRA. Applying that statute of limitations to the facts here, the Union submits that the Complainant was aware no later than March of 1987 that the Union would not pursue his grievance, yet his claim against the Union was not filed until November 30, 1987. It therefore argues that his claim was not brought within six months of the time it arose. With regard to the merits, the Union contends the Complainant presented no evidence whatsoever showing that the Union breached its duty of fair representation. In making its determination that Complainant's grievance was meritless, the Union asserts that it considered the fact that Complainant's grievance was filed in February, 1987, but complained of events that had occurred a year earlier. Since the labor agreement requires that grievances must be discussed between the affected employe and his foreman within seven days, the Union determined that the grievance was untimely under the labor agreement and should not be pursued on that basis alone, regardless of the merits. The Union asserts that it nevertheless went further and considered the potential merits of the grievance. Based on an examination of the collective bargaining

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2/ DelCostello v. Teamsters, 462 U.S. 151, 113 LRRM 2737 (1983).

agreement, and discussions between Company and Union officials, the Union contends it eventually determined that nothing in the bargaining agreement prevented the Company from appointing a leadman as it had done. Moreover, the Company's past practice indicated that it had in the past selected individuals to hold the position of leadman. Finally, the Union's investigation indicated that the employer and the steward had asked the Complainant whether he wanted the leadman position, and he had indicated that he was not interested in it. As a result, the Union believes it did not engage in any intentional misconduct in processing Complainant's grievance, so it should not be liable under federal law.

DISCUSSION

Jurisdiction

Complainant alleges that Respondent Company has committed an unfair labor practice by violating Sec. 111.06(1)(f), Stats. That section provides that it is an unfair labor practice for an employer individually or in concert with others to violate the terms of a collective bargaining agreement. Specifically, Complainant alleges that the Company gave an employe, Jeff Little, a 40¢ an hour pay increase while other employes at the Company's Superior terminal were under a wage freeze. Although Complainant did not use the standard terms of art in his pleading, it became evident at the hearing that he was charging the Company with breach of the labor agreement in appointing a leadman mechanic at the Superior terminal.

The amendment adding the Union as a Respondent contends that Buck's grievance regarding this leadman situation could not be resolved in a meeting held November 17, 1987 and that Roy Niemi, a business representative for the Union, told Buck that he (Niemi) "was satisfied with the answer on the original grievance from Ruan Transportation." The amendment made no reference to the sections of the statute alleged to have been violated by this conduct nor did it reference in any way an alleged breach of the Union's duty of fair representation. Nevertheless, it became evident at hearing that Complainant was charging the Union with breach of its duty of fair representation by failing to take his grievance concerning the leadman mechanic to arbitration. A Union's breach of its duty of fair representation constitutes an unfair labor practice under WEPA. 3/

Section 111.07, Stats., provides the Commission with jurisdiction to hear and decide complaints concerning unfair labor practices. As noted above, Complainant opted to bring the instant action to the Commission as a complaint under WEPA. This same action though could have been commenced in federal court under Section 301 of the Labor Management Relations Act (LMRA). Section 301(a) of the LMRA confers jurisdiction upon federal district courts over suits for violation of contract between employers in industries affecting commerce and labor organizations representing such an employer's employes for the purposes of collective bargaining. 4/ In Dowd Box v. Courtney, 368 U.S. 52 (1962), the U.S. Supreme Court held that Section 301(a) does not divest state courts of jurisdiction over such suits. However, state courts are obligated to apply legal standards which are consistent with federal case law developed in Section 301 actions. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Local 174, Teamsters Union v. Lucas Flour, 369 U.S. 95 (1962). In Tecumseh Products Co. v. WERB, 23 Wis.2d 118 (1964), the Wisconsin Supreme Court concluded that Sec. 111.06(1)(f), Stats., gives the WERC (formerly called the WERB) concurrent jurisdiction with state courts to resolve Section 301 disputes in Wisconsin. Given the foregoing and the absence of a removal of the action to

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3/ Katahdin Foundation, Inc, Dec. Nos. 10599-B and 10600-B (Bellman, 1/73), aff'd. by operation of law, Dec. Nos. 10599-C and 10600-C (WERC, 2/73).

4/ Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citzenship of the parties.

federal district court by the Respondents, it follows that the WERC has jurisdiction over the instant allegations.

Statute of Limitations

The question of what statute of limitations applies to WEPA claims is clearly addressed in the statute itself; Sec. 111.07(14) provides a one year statute of limitations. 5/ This limitations period applies to claims filed thereunder.

However, the question of what statute of limitations applies in suits brought under Sec. 301 of the LMRA against the employer for breach of contract and against the Union for breach of the duty of fair representation, has proved problematic in the courts. This is because there is no federal statute of limitations governing actions brought under Sec. 301 of the LMRA. By necessity then, the courts "borrowed" the most suitable limitations period from some other source. In UAW v. Hoosier Cardinal, 383 U.S. 696 (1966), the U.S. Supreme Court held that the statute of limitations in Sec. 301 cases was to be determined by applying the most closely analogous state statute of limitations. The outcome of this approach was that these cases ended up being governed by breach of contract, tort, malpractice and other miscellaneous state statutes of limitations. In UPS v. Mitchell, 451 U.S. 56 (1981), the Court concluded that given the choices presented in that case, a state statute of limitations for vacation of an arbitration award governed a Sec. 301 suit rather than a state statute for action on a contract. Then in DelCostello v. Teamsters, 462, U.S. 151, 113 LRRM 2737 (1983), the U.S. Supreme Court rejected all choices of state law for such cases (arbitration awards, malpractice, torts or contract) and decided to instead borrow a federal statute of limitations for hybrid Sec. 301/duty of fair representation cases. One of its reasons for doing so was its view that a Sec. 301/duty of fair representation claim "has no close anology in ordinary state law." 113 LRRM at 2742. The federal statute selected, and designated as the uniform federal rule, was the six month statute of limitations specified in Sec. 10(b) of the National Labor Relations Act (NLRA) dealing with unfair labor practices. The Court's rationale for selecting this particular statute was that alleged breaches of the collective bargaining agreement and the duty of fair representation bear, said the Court, a "family resemblance" to unfair labor practices; therefore, the six month period applicable to the latter was found appropriate.

Both Respondents herein contend that the federal six month statute of limitations is applicable to the instant complaint since in essence, it is a hybrid Sec. 301/duty of fair representation suit. Consequently, at issue here is which statute of limitations applies to the instant complaint: the WEPA one year statute or the federal NLRA six month statute? This is an issue of first impression before the WERC. Based on the following rationale, the Examiner has decided to apply the WEPA statute of limitations to the instant complaint.

Despite its holding in DelCostello that it was applying a federal limitations period to hybrid Sec. 301/duty of fair representation claims, the Court concluded by conceding, however, that even when there is no "obvious state-law choice for application to a given federal cause of action . . . resort to state law remains the norm for borrowing of limitations periods". 113 LRRM at 2744. The Court declined to do so in DelCostello because there was no obvious state-law choice for application therein. In so finding, the Court cautioned that it did "not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." Id. The Examiner reads this as saying that when there is a state law that applies a "perfect analogy", the state law should be applied. In Wisconsin, there is a state law that provides a "perfect analogy" to claims filed under Sec. 301 of the LMRA and that is WEPA. As previously noted, claims alleging employer breach of

either state law (WEPA) or federal law (Section 301 of the LMRA). It therefore follows that WEPA provides a "perfect analogy" had the claims raised herein been filed in federal court under Sec. 301 of the LMRA. Thus, pursuant to the Court's rationale in DelCostello discussed above, it is appropriate to apply the "obvious state law choice" to the instant action which, here, is WEPA.

Having concluded that the WEPA statute of limitations will be applied here, the Examiner turns next to the question of whether the instant complaint was timely filed under WEPA. As previously noted, the statute of limitations established by Sec. 111.07(14) is one year. The Commission has long held that where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such disputes with such procedures, a statutory cause of action alleging violation of that collective bargaining agreement does not ripen until the grievance procedure has been exhausted. 6/ Thus, the one year statute of limitations for the filing of such a complaint is computed from the date on which the grievance procedure was exhausted by the parties to the agreement, providing that the complaining party has not unduly delayed the processing of the grievance. Here, the parties exhausted the contractual grievance procedure on or about early March, 1987 without undue delay by the Complainant. 7/ The grievance procedure was exhausted at that time because the Company denied the Complainant's grievance on February 24, 1987 and Union Business Representative Niemi told the Complainant in early March, 1987 that the Union would not arbitrate his grievance. Therefore, based on the above-noted and longstanding interpretation of the one year statute of limitations set forth in Sec. 111.07(14), the statute is computed in this case from early-March, 1987. Since both the complaint against the Company filed July 28, 1987 and the amendment adding the Union filed November 30, 1987 fell well within this period, the complaint against both Respondents is timely.

Duty of Fair Representation

The Examiner will not exercise the Commission's jurisdiction to determine the merits of the Complainant's allegation that the Company breached the collective bargaining in violation of Section 111.06(1)(f) Stats., absent a showing by a clear and satisfactory preponderance of the evidence that the Union violated its duty to fairly represent him. 8/

The Union has an obligation to represent its members fairly, a duty which derives from its status as exclusive bargaining representative. The duty of fair representation obligates a union to represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 9/ This duty applies to the

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6/ Harley-Davidson Motor Company, Dec. No. 7166 (WERC, 6/65). In that case, like here, the complaint was filed more than one year after the alleged contract violation but less than one year after the employer's final grievance disposition marked exhaustion of the grievance procedure. The Commission held that the complaint in that case was not time barred by Sec. 111.07(14).

7/ In so finding, the Examiner acknowledges that while the Complainant was not prompt in filing his grievance, his delay in doing so is somewhat understandable given the following course of events. The conduct complained of occurred in February, 1986, but Complainant did not learn of the conduct until the summer or October of 1986. Shortly thereafter though he wrote to Niemi regarding the matter. From November, 1986 through January, 1987, the parties attempted to informally resolve the underlying dispute. When it became apparent they could not, Complainant filed his grievance in February, 1987.

8/ Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975); Section 111.07(3) Wis. Stats.

9/ Vaca. v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, supra.

administration of a collective bargaining agreement by processing grievances. The standard for evaluating the Union's conduct in processing grievances is set forth in the Wisconsin Supreme Court's decision in Mahnke v. WERC. 10/ Relying on the U.S. Supreme Court's decision in Vaca v. Sipes, 11/ the Wisconsin Court held that:

> . . . Vaca, supra, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based soley on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
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> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.
>
> -Mahnke, at page 534.

Thus, Mahnke requires a union to rationally, and in good faith, analyze a grievance. It further requires that when challenged by an individual, the Union's decision with respect to said grievance must be put on the record with sufficient detail to enable the Commission and reviewing courts to determine whether the union has made a considered decision through reviewing the relevant factors as applied to the grievance and that this weighing process was not done in a perfunctory or arbitrary fashion. As long as the union exercises its discretion in good faith with honesty of purpose, the collective bargaining representative is granted broad discretion in the performance of its duties. 12/ Furthermore, absent a showing of arbitrary, discriminatory or bad faith conduct, a union need not carry a grievance through all steps of the grievance procedure or press it to arbitration, 13/ nor will the Commission sit in judgment over the wisdom of union policies and decision-making relative to the disposition of grievances. 14/

It is the burden of the Complainant to demonstrate, by a clear and satisfactory preponderance of the evidence 15/ each element of its contention. Absent such proof, the Commission has refused to draw inferences of perfunctory or bad faith grievance handling. 16/

Applying these principles to the instant case, the Examiner concludes that the Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the Union breached its duty to fairly represent him. The record indicates that Niemi became well acquainted with Buck's complaint regarding the lead mechanic situation at the Superior terminal because he reviewed the situation twice. Niemi initially investigated the matter following Buck's letter to him in

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10/ Mahnke v. WERC, supra.

11/ Vaca v. Sipes, supra.

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

13/ Mahnke, supra.

14/ School District of West Allis - West Milwaukee, Dec. No. 20922-D (Schiavoni, 10/84), aff'd by operation of law, Dec. No. 20922-E (WERC, 10/84).

15/ Section 111.07(3), Wis. Stats.

16/ City of Janesville, Dec. No. 15209-C (Henningson, 3/78), aff'd by operation of law, Dec. No. 15209-D (WERC, 4/78).

October, 1986; in this regard he met with the Complainant, gathered the facts involved and learned the Complainant's side of the matter. Thereafter, he discussed the situation with Company representative Lewandowski and attempted, albeit unsuccessfully, to resolve it. Thus, when Buck later filed his grievance concerning the same situation, Niemi was already familiar with the matter. After the Company denied Buck's grievance, Niemi reviewed the matter for a second time. While the Complainant contends that Niemi did not look into his grievance that well, he offered no evidence of any facts that the Union was unaware of or did not consider when it made its decision herein. Consequently, the Union knew the essential facts involved in the grievance when it considered whether to appeal the grievance to arbitration.

After reviewing the facts and circumstances involved, and discussing the grievance with Union counsel, the Union decided that the grievance had no merit and that the Union could not possibly prevail on the grievance in an arbitration hearing. In reaching this informed decision, the Union assessed Buck's grievance as would an arbitrator. First, it considered whether the grievance was timely filed. In this regard, the Union considered the fact that Complainant's grievance was filed in February of 1987, but complained of events that had occurred a year earlier in February, 1986. Since the labor agreement provides that grievances must first be discussed between the affected employe and his foreman within seven days of the time they arise, and that did not happen here, the Union concluded that the grievance was untimely. Thus, regardless of the potential merits of the grievance, the Union determined that the grievance was clearly untimely under the labor agreement and should not be pursued on that basis alone.

However, the Union went further and also considered the substantive merits of the grievance. In this regard, the Union eventually determined that the appointment of Jeff Little as the lead mechanic, rather than the Complainant, did not violate the contract for the following reasons. First, since the contract is completely silent on the matter of lead mechanic, it was concluded that nothing in the labor agreement prevented the Company from appointing a leadman if it so desired. Second, with regard to the selection process used to pick the new leadman, the Company's past practice was that it unilaterally selected the individual to hold the leadman position. That was exactly what happened here. Thus, the evidence fails to demonstrate that the Union's decision to not arbitrate Buck's grievance was based on anything other than a considered judgment.

The Complainant's complaint against the Union, other than the fact that the Union would not take his grievance to arbitration, appears to be that Niemi did not share his belief that his contractual rights had been violated and that Niemi ultimately accepted the Company's positon on the matter as indicated in its denial of the grievance. Such feelings are understandable. There is, though, no evidence that the Union conducted itself differently in this case than it has in processing other grievances or that its representative bore the Complainant any ill will. As noted previously, it is fully within the Union's role as the exclusive collective bargaining representative to assess the evidence and make a good faith determination as to whether to process a grievance to arbitration and the Union is given wide latitude in making that decision. 17/ The fact that the Union reviewed the evidence and came to a different conclusion from that of the Complainant is not sufficient, in and of itself, to establish arbitrary, discriminatory or bad faith conduct by the Union.

It is therefore concluded that the evidence fails to show that the Union's treatment of the Complainant was arbitrary, discriminatory or in bad faith, and therefore the Union did not breach its duty of fair representation either in the manner it investigated the Complainant's grievance or by refusing to submit the grievance to arbitration.

17/ Mahnke, supra.

Inasmuch as the Union did not breach its duty to fairly represent the Complainant, the Examiner has no authority to consider the merits of the Complainant's breach of contract claim against the Company. 18/ As a result, the Examiner has dismissed the complaint against the Respondents.

Dated at Madison, Wisconsin this 11th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Raleigh Jones, Examiner