STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROXANNE LEFLORE, Complainant, vs. MILWAUKEE TRANSPORT SERVICES, INC., Respondent.	Case 1 No. 51736 Ce-2166 Decision No. 28531-B

Appearances:

Mr. John D. Dries, Attorney at Law, Suite 3, 7251 West North Avenue, Wauwatosa, Wisconsin 53213, appearing on behalf of the Complainant.

Mr. Gregg M. Formella, Quarles & Brady, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 26, 1994, Complainant RoxAnne LeFlore filed a complaint with the Wisconsin Employment Relations Commission alleging that the Amalgamated Transit Union Local 998 and the Employer, Milwaukee Transport Services, Inc., discriminated against her when the Employer did not post an open position and gave it to another person with less seniority. The parties were offered a period of time for settlement discussions, and on August 21, 1995, the Complainant notified the Commission that she wished to have a hearing on the matter. On September 20, 1995, the Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. The Examiner wrote to the Complainant and copied the Respondents on September 23, 1995, asking for a clarification of the complaint, as well as a clarification as to the named respondents. The Complainant responded on October 24, 1995, and the Examiner wrote the parties on December 14, 1995, advising them that she viewed the October 24, 1995 letter and the allegations in it as an amendment to the original complaint, and that such allegations made claims against both the Union and the Company under the Wisconsin Employment Peace Act. The Examiner further advised the Respondents that they had a right to remove the matter to federal court within 30 days from the date of the receipt of the letter. Neither Respondent removed the matter to federal court.

Before the hearing in the matter started on May 16, 1996, the Complainant notified the Examiner that she had reached a settlement with the Union the previous evening, and that she decided to dismiss her case against the Union, and that she wished to proceed with her case against the Company. The Company objected to proceeding to a hearing without the Union as a Respondent, and the parties submitted briefs by June 20, 1996, on the issue of whether or not the Union is a necessary party in a complaint against an employer for breach of contract under the Wisconsin Employment Peace Act. On August 8, 1996, the Examiner denied the Motion to Dismiss and the Motion for Summary Judgment. The Examiner found that the Complainant could proceed against the Company without the Union joined as a Respondent. A hearing was held on October 8, 1996, in Milwaukee, Wisconsin, and the parties provided briefs by November 25, 1996. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Complainant, RoxAnne LeFlore, is an individual whose address is 3358 North 3rd Street, Milwaukee, WI 53212.

2. The Respondent, Milwaukee Transport Service, Inc., herein called the Company or MTS, is an employer within the meaning of Sec. 111.02(7), Stats., and its offices are located at 1942 North 17th Street, Milwaukee, WI 53205.

3. Amalgamated Transit Union Local Union 998, herein called the Union, is the collective bargaining representative of a bargaining unit consisting of various classifications of employes, including those at issue in this proceeding. The Union's address is 734 North 26th Street, Milwaukee, WI 53233. The President/Business Agent of the Union is John Goldstein.

4. LeFlore has worked for MTS for 18 years. She started as a bus driver, working 40 hours a week. In 1988, she drew her pension benefits out, went back to an entry level job and lost seniority in the division and department and full-time benefits when she became an entry level bus driver working 20 to 30 hours per week. She understood that she would be placed at the bottom of the seniority entry level list and that she would have to work her way up in seniority in order to obtain a full-time job again.

5. Job openings are posted on a bulletin board. Article X, Section 10.01, states in part:

> Except as otherwise specifically provided in the Contract, when a vacancy occurs or a new position is created in a job classification represented by the Union, the following shall apply:
> (a) All employees shall be notified by bulletin at least five (5) days, excluding Saturdays, Sundays and holidays, prior to the time the position is to be permanently filled. The bulletin shall state the qualifications required for the position, time of scheduled working hours, and all other relevant facts pertaining thereto.
>
> . . .

6. LeFlore learned that Mark Acker, another employe who had been working full time, took his pension benefits out and went back to part-time work at the entry level, but then got his full-time job as a material handler back within a matter of a few weeks. The parties agree that the material handler position that Acker got was not posted.

7. The collective bargaining agreement contains a grievance procedure in Article V and an arbitration procedure in Article VI. LeFlore filed a grievance on August 26, 1994, which stated:

> Individual in store room, Hillside, was full-time. Individual bid down to entry-level and was entry-level. Almost 2 1/2 weeks passed and individual was granted a full-time position, again, in the store rm. dept. Individual at that time had less seniority than I. Once entry level, we are not allowed to go back full-time under any circumstances unless we go through seniority ranks.

The "individual" referred to above is Acker. The grievance form asked for settlement desired, and LeFlore wrote:

> (Full-time position) according to the seniority guide lines according to the Union by-laws and the Company contractual agreement.

8. LeFlore presented the grievance to the Union representative at her work site, Ralph DeWall. DeWall did not do anything about the grievance, so LeFlore took it to the Union hall and gave it to the receptionist on August 26, 1994. The Union President/Business Agent, John Goldstein, came to LeFlore's work site the following day to speak with her about the grievance and asked her to explain the grievance. LeFlore read the grievance to him, and she asked Goldstein why Acker was promoted when he was not allowed to bid down to an entry level position and take his pension, and then go right back to a full-time job. Goldstein sent LeFlore the following letter on September 6, 1994:

> We have received your grievance regarding the awarding of a full-time position. I discussed this with you briefly this week, and asked if you would meet to discuss it further. You were not interested in discussing this issue further.
>
> According to 10.01(e) of the labor agreement, and consistent with all past practice, the Union and Company agreed that the person in question should be allowed to return to his or her previous position.
>
> You have asked in your grievance that you be allowed to bid on a full-time position according to the contract. You certainly have that right to exercise your seniority.

> Please let me know if you are not allowed to bid on a full-time job opening.

LeFlore disputes Goldstein's assertion in the above letter that she was not interested in discussing the issue further. She did not ask anyone from the Union to discuss it with her further after receiving the letter from Goldstein. She received the grievance back from the Union in the latter part of November of 1994, without any response from management at the first step. The Union never presented LeFlore's grievance to the Company. The Union attempted to mail the grievance to LeFlore but the letter was returned by the Post Office. Her supervisor, Warren Bohn, gave her the envelope with the grievance and told her that the Union could not find her. LeFlore testified that the Union never explained to her whether or not she had a grievance that could be pursued or whether it would pursue it.

9. LeFlore would have bid for the material handler job taken by Acker, had that job been posted. She had bid on previous openings 18 or 19 times in an effort to get a full-time position back. She bid on any job that was full time, whatever the position, but she did not receive a full-time position for any of those jobs.

10. In 1990, the Company transferred three material handler positions from the maintenance department to the material handler department. Because of the transfer and loss of positions, the Company and the Union made a side agreement to establish an eligibility list if a material handler position became open. They agreed to select the most senior person from the eligibility list for that open position and to bypass the posting procedures of the labor agreement. The following notice was posted on November 27, 1990:

JOB BULLETIN NO. 98
MATERIAL HANDLER
ELIGIBLE LIST
MATERIALS MANAGEMENT - MATERIAL HANDLER DIVISION
7:00 A.M. - 3:20 P.M.

> Per Mutual Agreement between Management and Union, three (3) Material Handlers were transferred from the Maintenance Department to the Material Management Department effective November 11, 1990.
>
> ACCORDINGLY, THIS POSTING IS ONLY FOR THE PURPOSE OF ESTABLISHING AN ELIGIBILITY LIST FOR ANY OPENINGS THAT COULD OCCUR IN THE MATERIAL HANDLER CLASSIFICATION WITHIN THE NEXT FIVE YEARS FROM THE DATE OF THE TRANSFER.
>
> This list will be made up of eligible employes from both the MAINTENANCE (E&P) and the MATERIALS MANAGEMENT DEPARTMENTS.

PLEASE BID AS YOU NORMALLY WOULD FOR ANY JOB BULLETIN. IF AN OPENING OCCURS IN THE MATERIAL HANDLER DIVISION DURING THE NEXT FIVE YEARS, THE TOP SENIOR PERSON FROM THE LIST, BASED ON COMPANY SENIORITY, WOULD BE AWARDED THE JOB.

The Material Handlers pay will be equal to that of a Disbursers rate of pay, currently $13.49/HR ($13.69/HR. SECOND YEAR RATE) (WITH A TWENTY MINUTE UNPAID LUNCH BREAK).

Applicants for the above eligible list must be forwarded, in writing, to Marilyn J. Bell, Assistant Employment Manager.

ALL TRANSFERS ARE SUBJECT TO SECTION 10.01(e) OF THE LABOR AGREEMENT. "If after a probationary period of not less than thirty (30) nor more than sixty (60) working days, the employe is found incapable of holding the job because of insufficient skill or ability or because of physical impairment, he/she shall revert to his/her former position and seniority."

Selection will be made on the basis of Wonderlic test score, past work record, experience, personal interview and evaluation and the successful applicant must have a valid Wisconsin Driver's License.

A notation on the bottom of the posting stated that applications had to be received by the Human Resources Department by December 4, 1990. Twenty-five employes signed up for the eligibility list, which was good from November 11, 1990 to November 11, 1995. LeFlore put her name on it -- she was the 24th out of 25 or second from the bottom in seniority, listing a department seniority date of April 8, 1990. LeFlore would not have received the position that Acker went back to as a full-time material handler, due to her lower status of seniority on the eligibility list.

11. Marilyn Bell is the assistant employment manager of MTS. Bell was involved with the agreement made with Acker when he left his full-time position and then went back into that position after a couple of weeks. Acker vacated his position as a material handler on July 17, 1994. The Company was not required to post this position because of the agreement with the Union as noted in Finding of Fact #10, which did not expire until November 11, 1995. Acker was having some financial difficulties and stress, and asked to go back to his old position within a month of leaving it. The Union requested several meetings with the Company to talk about Acker's request to return to his former position, and the two parties reached an agreement to allow him to go back into his full-time position. Acker had also filed a grievance regarding not being able to change insurance carriers, and the resolution of this grievance was a factor in the Company's decision to make the special agreement that got him back to his old job. Acker and his father had ties to the Union -- they had served as Union officials or negotiators in the past. LeFlore believed that Acker's

connections with the Union got him the full-time job and that he did not have to use his seniority to bid for it as other employes would have had to bid for it, due to his ties to the Union.

12. Michael Witherow, who was third in seniority on the eligibility list for an open material handler's position, also wanted the position that Acker got. He would have been first in line for it, because of the two employes ahead of him, one withdrew his application and the other did not pass the required test. Witherow was set to be awarded to the position when Acker transferred back into it. Had Acker not taken that job, Witherow would have gotten it. LeFlore would not have received the position. Witherow also filed a grievance which objected to the agreement made between the Company and the Union that got Acker his job back. Witherow's grievance was waived to the second step and denied at both the second and third steps. The grievance was apparently not taken any further.

13. LeFlore was promoted from an entry-level cleaner in the body shop to a full-time cleaner in the body shop, effective May 26, 1996. This move to a full-time position was a result of an agreement between LeFlore and the Union and the Company before the first day of hearing in this matter. LeFlore was not required to bid for this position. This agreement was part of a special agreement promoting six entry level employes to full-time positions.

14. The Company and the Union have made many special agreements, including the one made with Acker, the one made that got LeFlore promoted to full-time, and the agreement in 1990 to not post material handlers' positions but to fill them with the most senior employes from an eligibility list. Some of the side agreements are attached to the labor contract, some are not.

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

CONCLUSION OF LAW

The Employer did not violate Sec. 111.06(1)(f), Stats.

ORDER 1/

IT IS ORDERED that the complaint be dismissed in its entirety.

Dated at Elkhorn, Wisconsin this ___ day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Footnote found on following page.

By _____
Karen J. Mawhinney, 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MILWAUKEE TRANSPORT SERVICES, INC.

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant seeks to sustain a claim against the Company for breach of contract, having earlier dismissed a claim against the Union for a breach of the duty of fair representation.

THE PARTIES' POSITIONS:

The Complainant:

The Complainant asserts that the Company's action in enabling Mark Acker to resume working in a full-time job without going through the contractually mandated application and bidding process violates rights created through the collective bargaining process. Moreover, the rehiring of Acker is a discriminatory hiring practice and is prohibited by contract and by law. The Company has alleged that a special agreement negotiated between it and the union permitted it to circumvent the bidding process and rehire Acker, and it has maintained that such agreements are frequent and compatible with the General Labor Agreement.

The Complainant acknowledges that special agreements are a logical tool and useful on certain occasions, to the extent that they do not conflict with specific contractual rights. The Complainant points out that Article 11.01(j) of the labor contract states that additional rules may be jointly negotiated if they are not in conflict with the "foregoing" language, which pertains in part to full-time employes bidding down to entry level positions to collect the pension benefits.

However, the special agreement in the Acker case was really a disguised method of violating specific contractual provisions in order to accommodate him and give him special rights and privileges. Bell testified that Acker was having stress-related problems and could not handle the entry level job. If that were so, he could have qualified to resume his former job duties under Article 10.01(e) of the labor agreement, and a special agreement would not have been necessary.

The Complainant also argues that if Acker were experiencing a stress-related problem, how could the Company believe that such stress would be alleviated by transferring him to a more demanding full-time position. The Company knew that Acker would not qualify to invoke the procedure under Article 10.01(e) to revert to his old job, since he was not physically impaired and did not lack the ability to perform the entry level job. Bell's assertion that Acker had financial troubles did not justify the special agreement and discriminates against other employes with financial problems. It denies other employes the rights fought and paid for, including the right to bid for jobs.

In conclusion, the Complainant submits that a special agreement may not be used to circumvent the bidding process of the labor contract. The special agreement deprived the Complainant of her right to bid for the job and kept her in entry level status when she would have enjoyed full-time status and earned more income if treated similarly. Her ability to move ahead within the Company has been impaired. The Complainant demands $50,000 in damages.

The Respondent:

The Respondent asserts that the Complainant's action is pre-empted by federal law and that it is a claim under the National Labor Relations Act (NLRA) because her claim is that special treatment was given to another employe because of his union ties. This is an allegation under Section 8(a)(3) of the NLRA.

In the alternative, the Respondent notes that in order for the Complainant's claim against the Company to be considered on the merits, she must prove that her Union violated its duty of fair representation. At the hearing, the Complainant produced no admissible evidence to support her case and merely hypothesized that the Union violated its duty toward her. She had the opportunity to present such evidence through testimony of Union officials but did not. Further, she admitted at the hearing that the Union has procedures and bylaws regarding the handling of grievances, but she presented no evidence of what those procedures and bylaws are or whether or not the Union followed them. She even admitted that she never followed up completely. A complainant cannot proceed with an unfair representation claim where she failed to take steps within her power which might have resulted in the union processing her claim.

The Respondent also objects to the new charge at the hearing -- that the 1990 special agreement between the Company and the Union violated the collective bargaining agreement. This allegation was not contained in the complaint and is time-barred. Moreover, the parties are always free to negotiate modifications to a bargaining agreement. The Complainant herself put her name on the eligibility list created by the 1990 special agreement and did not file a grievance at that time. Furthermore, in 1996, the Complainant was awarded a full-time job pursuant to another special agreement similar to the one she claims violated the labor contract.

The Respondent asserts that the Complainant admitted that even if Acker had not filled the job, she would not have been entitled to it because of her lower seniority on the eligibility list. Because she admittedly would not have been awarded the position in question in any event, she has not met her burden of proving that she should have been awarded the job in question, and her action must be dismissed.

DISCUSSION:

The Respondent's assertion that this action is pre-empted by federal law was previously

addressed in the August 8, 1995, Order Denying Respondent's Motion to Dismiss. There is no reason to address this point again, as it was fully addressed in the Order.

Also in that Order, it was noted that pursuant to Mahnke v. WERC, 66 Wis.2d 524 (1975), the Complainant must prove that the Union breached its duty of fair representation to her before she could proceed against the Company where the Company had alleged that the grievance procedure had not been exhausted. Even though the Complainant seeks no remedy against the Union and has in fact dismissed it from this action, the Complainant still has to show why it would have been futile for her to use the grievance procedure and why she should be allowed to bring a claim for a breach of contract. As noted in the previous Order:

> Here, LeFlore alleges that the Union has acted arbitrarily, in bad faith and in a discriminatory manner, when it treated a member of the bargaining unit who was a Union negotiator and whose father was a Union negotiator differently than it treated her. These are not facts which have been developed by a record, but allegations which appear in the papers filed by the Complainant. The Complainant must come forward at hearing with facts which prove that the Union breached its duty of fair representation. The facts in the record only show that the Complainant filed a grievance, the Union's response to her was unsatisfactory, and she did not seek to pursue the grievance through the steps of the grievance procedure.
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> Mahnke forces LeFlore to prove that the Union breached its duty before a determination can be made against the Company that it breached the contract. LeFlore seeks no remedy against her Union anymore, having negotiated a settlement with the Union. Therefore, LeFlore may go forward with the Company as the sole respondent, so long as she first proves that the Union breached its duty of fair representation in order to show why she did not exhaust the grievance procedure. Then she may attempt to prove that the Company breached the labor contract by not posting the position at issue . . .

The standard to determine whether a union has breached its duty of fair representation is best known from the language of the U.S. Supreme Court's ruling in Vaca v. Sipes, 386 U.S. 171 (1967), where the Court stated:

> 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. (Page 190)

Vaca also requires a union to make a good faith decision, weighing relevant factors such as the merits of a grievance. Mahnke added that such a good faith decision should take into account the monetary value of a claim, the effect of the breach on an employe and the likelihood of success in arbitration, before making a determination of proceeding or refusing to proceed to arbitration. A union is allowed a wide range of reasonableness, subject to complete good faith and honesty or purpose in the exercise of its discretion. 2/

2/ Ford Motor Co. v. Hoffmann, 345 U.S. 330 (1953).

Mahnke also requires that a union's exercise of discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors. The Commission has held that absent a showing of arbitrary, discriminatory, or bad faith conduct, the Union is not obligated to process grievances through all steps of the grievance procedure, 3/ that the failure of a union to notify a grievant as to the disposition of his grievance is not an adequate basis for finding a breach of duty, 4/ that mere negligence in the processing of a grievance including the late filing of briefs is insufficient to constitute a violation, 5/ and that it is not for the Commission to judge the wisdom of union policies absent proof of perfunctory or bad faith grievance handling. 6/

The Complainant fails to show that the Union breached its duty of fair representation in the handling of her grievance, or in making the special agreement with Acker and the Company. The Complainant only shows that the Union did not pursue her grievance or present it to management. This standing alone would not warrant a finding of a breach of duty of fair representation. No Union witnesses were called to explain the Union's conduct, and it is difficult to determine what the Union's position was on this case. It could be inferred from the record that the Union knew that the grievance lacked merit and that the material handler's position could not be posted, because it was the Union that entered into the 1990 agreement to waive postings for those positions and to put the more senior employes from an eligibility list into those slots when openings occurred.

While the Complainant has asserted that the agreement made to give Acker his full-time job back violates the rights created through the collective bargaining process, this is not so. The job that Acker went back to would never have been posted, due to the 1990 agreement between the Union and the Company to waive the postings for those positions and fill them from the eligibility list. The Complainant claims that the special agreement with Acker discriminated

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3/ West Allis-West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84); City of Appleton, Dec. No. 17541 (1/80).

4/ UW-Milwaukee (Housing Department), sub.nom Guthrie v. WERC, Dec. No. 11457-F (1977).

5/ Wisconsin Council 40, Dec. No. 22051-A (McLaughlin, 3/85).

6/ West Allis-West Milwaukee School District, Ibid.; Marinette County, Dec. No. 19127-C (Houlihan, 11/82), aff'd, Dec. No. 19127-D (WERC, 12/82).

against her or her opportunity to bid for a full-time job. However, she admitted that she would never had received the full-time job that Acker left temporarily, since several other employes were ahead of her on the eligibility list for that position. Therefore, the special agreement between the Union, the Company and Acker had no impact on the Complainant. There is no evidence that the Complainant asked anyone from either the Company or the Union to create such a special agreement for her, and therefore, she cannot show that the Union and Company entered into an agreement on behalf of Acker but not for her. In fact, the Union and Company did eventually make a special agreement that resulted in the Complainant obtaining a full-time position before the hearing in this matter.

Although the Complainant is now the beneficiary of a side agreement, she contends that a side agreement that runs contrary to the terms of the labor agreement is a violation of that agreement. However, unions and companies often make many side agreements to fit their needs, and by their very nature, they may often have terms contrary to the master agreement. If these side agreements were not exceptions to the master agreement, there would be no need for some side agreements at all. The parties are entitled to make mutual modifications or carve out exceptions and reach any grievance settlement agreement or side agreement. These special agreements enhance and promote labor peace and stability, by resolving grievances and ongoing problems. Grievance settlement agreements and side agreements are collective bargaining agreements, or extensions of collective bargaining agreements. 7/

There are actually three special agreements involved in this case. The Complainant can hardly complain about the first one – the 1990 agreement where the Union and the Company agreed to waive the contractual posting provisions for the material handlers' positions and fill them from an eligibility list. After all, the Complainant was a potential beneficiary of that agreement, having signed the eligibility list herself. And she is a direct beneficiary of the third special agreement that resulted in her getting a full-time position. It is the middle agreement involving Acker that she is complaining about, because in her view, this special agreement diminished her ability to obtain a full-time handler's position. But that agreement only lessened her opportunity by one position, and she would not have obtained the position Acker vacated, since several other people were ahead of her on the eligibility list.

The Complainant objects to the fact that Acker put himself in the same position that she had – bidding down to an entry level job, taking out a pension – but then Acker was able to go right back to a full-time job, while she and others similarly situated waited on the eligibility list for a full-time job. There were no Union witnesses called to explore the side agreement with Acker, and on its face, this agreement does not breach the duty of fair representation. While the Complainant

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7/ See Caravello and Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO v. State of Wisconsin, Dec. No. 25281-C (WERC, 1991), aff'd, (Cir.Ct., Dane Co., Dec. No. 25281-D, 12/1992).

made allegations in pleadings that Acker and his father were former Union negotiators, she brought forth no evidence of this on the record itself or any evidence that would tend to prove that the Union gave Acker favored or preferential treatment due to his status within the Union, and that the Union would not treat others similarly situated in such a manner.

There is nothing to prove that the Union's handling of LeFlore's grievance breached its duty of fair representation to her. Goldstein sought out LeFlore after receiving her grievance and indicated his willingness to continue to discuss it with her. Goldstein's conduct does not suggest that the Union was acting in a perfunctory or capricious manner. LeFlore had the opportunity to pursue the grievance through the Union but declined to do so.

The Union processed Witherow's grievance to the third step of the grievance procedure but did not process LeFlore's grievance or present it to management at all. Again, there is no testimony or evidence on the record to show why the Union exercised its discretion in this manner. The Union might have reasoned that Witherow's grievance had some merit to it, because he was in line for the material handler's job that Acker had vacated, while LeFlore was not in line for it and would not have received it even if Acker and Witherow had declined it. There were several other employes ahead of her on the eligibility list, and the job was considered a prime job that someone would have taken well ahead of her.

It was the Complainant's responsibility to show that the Union's conduct was arbitrary, discriminatory, or in bad faith. It is difficult to determine what the Union's conduct was or how it viewed the relevant factors in the handling of the Complainant's grievance, where no Union representative testified about the grievance or the Union's conduct. The Complainant had an opportunity to call Union representatives as witnesses but did not do so. She has relied almost solely on the fact that Acker was able to bid down to an entry level job but go back to a full-time job, and she believes that the fact that Acker had ties with the Union got him some preferential treatment. This is not the kind of evidence that by itself shows that the Union's conduct was arbitrary, discriminatory or in bad faith. Acker sought a special agreement from the Company and the Union to go back to full-time, and the Company and Union entered into a special agreement to allow him to go back to his full-time job. Making special agreements and side agreements are certainly within the range of a Union's discretion, unless there is evidence that the Union's conduct was arbitrary, discriminatory or in bad faith. None of that is evident on the record in this case.

Where the Complainant has failed to show that the Union breached its duty to fairly represent her, the Examiner has no authority to consider the merits of her breach of contract claim against the Company. 8/ Therefore, the Examiner has dismissed the complaint against the Respondent.

Dated at Elkhorn, Wisconsin this 17th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

8/ Mahnke, supra.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner