Comments

Disparate Treatment of Union Stewards: The Notion of Higher Responsibilities to the Employment Contract

I. INTRODUCTION

Recent decisions in *Metropolitan Edison Co. v. NLRB,*[1] *Hammermill Paper Co. v. NLRB,*[2] and *C.H. Heist Corp. v. NLRB*[3] represent a departure from prior case law[4] concerning an employer's disparate treatment of a union steward[5] for engaging in a prohibited strike to the same extent as rank-and-file employees. In these three cases the employers' more serious discipline of a union steward was found to be a violation of section 8(a)(3) of the National Labor Relations Act, as amended.[6] The courts concluded that more severe punishment meted out to union stewards than to rank-and-file employees participating in similar unprotected activity[7] would be illegal unless the employment contract specifically provided for a higher duty of the union steward.[8] In the earlier case of *Indiana & Michigan Electric Co. v. NLRB,*[9]

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1. 663 F.2d 478 (3d Cir. 1981), *cert. granted,* 102 S. Ct. 2926 (1982).
2. 658 F.2d 155 (3d Cir. 1981).
3. 657 F.2d 178 (7th Cir. 1981).
4. Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979), *cert. denied,* 449 U.S. 890 (1980); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979).
5. "Union steward," for purposes of this Comment, may be defined as follows:

> The union representative of a group of fellow workers who carries out union duties in the plant or shop, for instance handling grievances, collecting dues, recruiting new members. Elected by union members in the plant or appointed by higher union officials, the shop steward usually continues to work at his or her regular job and handles union duties only on a part-time basis.

R. DOHERTY, INDUSTRIAL AND LABOR RELATIONS TERMS: A GLOSSARY 27 (ILR Bulletin No. 44, 1979) (italics omitted).
6. 29 U.S.C. § 158(a)(3) (1976).
7. Unprotected concerted activity is employee activity that is not included in the catalogue of protected activities set forth in § 7 of the National Labor Relations Act. A. COX, D. BOK, R. GORMAN, CASES AND MATERIALS ON LABOR LAW 822–25 (9th ed. 1981). For the text of § 7, see *infra* note 16. Professors Cox, Bok, and Gorman indicate that the Board and courts have assumed the task of drawing the distinction between protected and unprotected activity, and "although a strike during the term of a labor contract, in violation of a no-strike clause, is not prohibited by the Labor Act, it is unprotected and may be met with employer discipline." A. COX, D. BOK, R. GORMAN, CASES AND MATERIALS ON LABOR LAW 824 (9th ed. 1981) (citing NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939)). *But see* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (strike, in violation of a no-strike clause, protesting serious unfair labor practices, was treated as protected activity).

In this Comment the unprotected activity referred to is an unauthorized work stoppage in violation of a no-strike clause.

8. The higher duty refers to a greater responsibility to uphold the provisions of the bargaining agreement. In these cases the courts refused to find that union officials had a greater responsibility to uphold the no-strike clauses of their employment contracts in the absence of specific contract provisions imposing such a duty. In *Metropolitan Edison* the court found that the collective-bargaining agreement did not impose an express duty on the union officials to make attempts to halt an illegal work stoppage, and therefore the company committed an unfair labor practice when it disciplined the officials more severely than others who participated in the strike. 663 F.2d 478, 483 (3d Cir. 1981). The *Hammermill* court concluded that responsibilities of union stewards must be determined by construing the employment contract and found no higher responsibilities of union stewards. 658 F.2d 155, 164–65 (3d Cir. 1981). In *Heist* the court held that a union steward did not have a higher responsibility to cross a picket line in the absence of clear contractual language providing such a duty. 657 F.2d 178, 183 (7th Cir. 1981). In a recent decision the D.C. Circuit Court of Appeals found that the collective-bargaining process had imposed higher duties upon union officials, concluding that "the officials may be more

however, the Seventh Circuit found that higher responsibilities of union officials justified disciplining them more severely than rank-and-file members participating in the same unauthorized activity.[10] The *Indiana* court did not rely on the employment contract to find a higher duty owed by union stewards. Rather, it referred to the contract to determine that the employees' acts were in violation of a no-strike clause contained in the bargaining agreement.[11] In *Gould Inc. v. NLRB*[12] the court construed the employment contract to impose explicitly a higher duty on union stewards and held that the employer did not commit an unfair labor practice when a union steward was singled out for disciplinary discharge for having participated in an illegal work stoppage with a number of rank-and-file employees.[13] Although the *Gould* court relied on the duty imposed by the bargaining agreement, it based its reasoning on the decision of the *Indiana* court.[14] The purpose of this Comment is to examine what role an individual steward's responsibilities may have in determining whether an employer has committed an unfair labor practice by disciplining the steward more severely than a rank-and-file employee who participated in similar unprotected activity. More specifically, this Comment will examine the nature of the duty, if any, that may be imposed on a union steward by virtue of the position he holds. This examination will consider the role of the contract in finding any so-called duty to take affirmative action in the face of unprotected concerted activity and whether such a duty may be found without a particular provision in the bargaining agreement.

II. BACKGROUND

The disparate-treatment cases arise when an employer disciplines a union steward more harshly than a rank-and-file employee for participating in unprotected activity, such as an illegal work stoppage. The applicable statutory law in these cases is section 8(a)(3) of the National Labor Relations Act, as amended, which prohibits discrimination in any condition of employment that would encourage or discourage membership in any labor organization.[15] Typically, the disciplined union steward files unfair labor practice charges alleging the employer's violation of section 8(a)(3) and a derivative violation

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harshly punished than the rank and file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice." Fournelle v. NLRB, 109 L.R.R.M. (BNA) 2441, 2448–49 (D.C. Cir. 1982).

9. 599 F.2d 227 (7th Cir. 1979).

10. *Id.* at 232.

11. *Id.* at 228.

12. 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

13. *Id.* at 733.

14. *Id. See infra* text accompanying notes 66–72.

15. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(3) provides, in pertinent part:

§ 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

of section 8(a)(1).[16] The employer denies any violation and justifies any disparate treatment by claiming that the steward failed to take affirmative action in the face of unprotected union activity, that is, made no effort to terminate the illegal work stoppage.

Section 8(a)(3) is frequently a subject of litigation in the labor arena and presents "[t]he most vexing problems of statutory construction"[17] under the National Labor Relations Act.[18] An unfair labor practice charge grounded primarily in section 8(a)(3) requires specifically that discrimination and a resulting discouragement of union membership be found.[19] Moreover, "discrimination to discourage" has been construed to mean that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.[20] In *NLRB v. Great Dane Trailers*[21] the Supreme Court considered these factors in establishing a two-tiered test to determine when an employer's discriminatory conduct amounted to an unfair labor practice:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[22]

Therefore, to sustain an unfair labor practice charge under section 8(a)(3), an antiunion motivation must be proved when the employer has offered "legitimate and substantial business justifications" for his conduct, unless the employer's discriminatory conduct was "inherently destructive" of important employee rights. When no antiunion motivation is alleged, a section 8(a)(3) charge may be sustained by proving that an employer's discriminatory conduct is "inherently destructive" of important employee rights. In the disparate-treatment cases the courts have tended to focus their analyses on this first part of the *Great Dane* test.[23] Whether disparate treatment of a union steward is inherently destructive of employee rights depends to a large extent on whether an employer is entitled to take into account any greater responsibility

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16. 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) provides, in pertinent part:

§ 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] . . . .

Section 7 provides that "[e]mployees shall have the right to self organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157 (1976).

17. R. GORMAN, BASIC TEXT ON LABOR LAW 326 (1976).

18. 29 U.S.C. §§ 141–144, 151–168, 171–182, 185–187 (1976).

19. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

20. *Id.*

21. 388 U.S. 26 (1967).

22. *Id.* at 34.

23. *See, e.g.*, C.H. Heist Corp. v. NLRB, 657 F.2d 178 (7th Cir. 1981); Gould Inc. v. NLRB, 612 F.2d 728

owed by the steward, and hence greater fault on the part of a union steward for failing to fulfill that responsibility.[24]

The National Labor Relations Board (NLRB) position on disparate treatment of union stewards appears to have changed with its 1977 decision in *Precision Castings Co.*,[25] according to the *Indiana* court.[26] Until then, stated the court, "the Board ha[d] recognized that the higher responsibilities of union officials justif[ied] disciplining them more severely than rank-and-file members for participating in unprotected activity."[27] The *Metropolitan Edison, Hammermill,* and *Heist* cases reflect the Board's position in *Precision Castings*, in which it found that the employer had committed an unfair labor practice by disciplining stewards based on their status as union officers.[28] The circuit courts upheld the Board's decision by finding no greater duty attaching to one's status as a steward and hence no greater responsibility on the part of union stewards.[29]

III. ANALYSIS

A. *The NLRB Position*

The NLRB's position[30] in the disparate-treatment cases is fairly clear—it has refused to distinguish between harsher discipline because of one's union membership status and harsher discipline because of greater responsibilities

24. *See* cases cited *supra* note 23.

25. 233 N.L.R.B. 183 (1977).

26. 599 F.2d 227, 230 (7th Cir. 1979).

27. *Id.*

28. 233 N.L.R.B. 183, 184 (1977).

29. Metropolitan Edison Co. v. NLRB, 663 F.2d 478, 482–83 (3d Cir. 1981); Hammermill Paper Co. v. NLRB, 658 F.2d 155, 164–65 (3d Cir. 1981); C.H. Heist Corp. v. NLRB, 657 F.2d 178, 183 (7th Cir. 1981). In *Heist* the court held that a steward's continued attempts to dissuade strikers were enough to satisfy his obligation to uphold a no-strike clause. *Id.*

30. The discussion here refers to the NLRB majority position in the disparate-treatment cases, generally reflected in the opinions of Chairman Fanning and members Jenkins and Murphy. These three members composed the majority in Precision Castings Co., 233 N.L.R.B. 183 (1977); Indiana & Mich. Elec. Co., 237 N.L.R.B. 226 (1978), *enforcement denied*, 599 F.2d 227 (7th Cir. 1979); and Gould Corp., 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). Fanning and Jenkins composed the majority in C.H. Heist Corp., 250 N.L.R.B. 1400 (1980), *enforced*, 657 F.2d 178 (7th Cir. 1981); Hammermill Paper Co., 252 N.L.R.B. 1236 (1980), *enforced*, 658 F.2d 155 (3d Cir. 1981); and Metropolitan Edison Co., 252 N.L.R.B. 1030 (1980), *enforced* 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982). Member Penello dissented vigorously in *Gould, Hammermill,* and *Metropolitan*. Member Truesdale dissented in *Gould* and *Heist*. For an analysis of Penello's dissents, in which he argues that higher responsibilities are implied in a no-strike clause, see *infra* text accompanying notes 136–57.

It is of interest that the composition of the Board has changed significantly since those decisions. Member Murphy was replaced by Don A. Zimmerman, whose appointment expires December 16, 1985. Robert P. Hunter, whose term expires August 27, 1985, replaced member Truesdale. Chairman Van de Water, serving an interim appointment, replaced member Penello. Fanning and Jenkins are serving current appointments until December 16, 1982, and August 27, 1983, respectively.

With three relatively new replacements, the Board's position in the disparate-treatment cases is uncertain. After considering member Zimmerman's comments that the Board acted in a correct and responsible manner by refusing to acquiesce in the court's unfriendly reception to *Gould*, however, it appears that he is aligned with Fanning and Jenkins in this matter. 108 L.R.R.M. (BNA) 185 (1981) (speech at the Southwestern Legal Foundation's 28th Annual Institute on Labor Law). With these comments in mind, there appears no reason why the NLRB position in the disparate-treatment cases will change in the near future.

attaching to one's union position as a steward or other official.[31] In *Precision Castings Co.*[32] and *Gould Corp.*[33] the Board found a violation of section 8(a)(3) when union stewards were disciplined for participating in an unlawful strike, even in the presence of contract language that imposed greater duties on the union stewards.[34] *Precision Castings* is the Board's leading case supporting its position that a union steward who participates in an unauthorized work stoppage may not be disciplined more severely than a rank-and-file employee participating in the same activity. In that case the employer asserted that under the contract stewards could be held to a greater degree of accountability for participating in an unlawful strike.[35] The Board rejected this argument, holding that an employer's freedom to discipline "remained unfettered so long as the criteria employed were not union-related."[36] The stewards had not been active in leading the strike and were suspended solely because they failed to urge the strikers to return to work.[37] Therefore, the Board held that the stewards had been discriminated against on the basis of their union office and that this action was "contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand."[38]

The NLRB reasserted the position it established in *Precision Castings* by adopting the rulings of an administrative law judge in *Indiana & Michigan Electric Co.*[39] The judge had concluded that the employer committed an unfair labor practice by suspending five employees because they held the position of union stewards.[40] The employer had disciplined the stewards more severely than rank-and-file employees for participating in an illegal work stoppage, contending that the stewards had a greater responsibility to uphold the collective-bargaining agreement.[41]

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31. *See, e.g.*, Miller Brewing Co., 254 N.L.R.B. No. 24, 106 L.R.R.M. (BNA) 1153 (1981); Metropolitan Edison Co., 252 N.L.R.B. 1030 (1980); Gould Corp., 237 N.L.R.B. 881 (1978); Indiana & Mich. Elec. Co., 237 N.L.R.B. 226 (1978); Precision Castings Co., 233 N.L.R.B. 183 (1977). *But see, e.g.*, Rogate Indus., 246 N.L.R.B. 898 (1979) (Chairman Fanning and member Jenkins dissenting); Midwest Precision Castings Co., 244 N.L.R.B. 597 (1979) (three separate concurring opinions); Westinghouse Elec., 243 N.L.R.B. 306 (1979) (members Truesdale and Penello found that the union stewards did not voluntarily participate in the strike).

32. 233 N.L.R.B. 183 (1977).

33. 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

34. In *Precision Castings* the Board indicated that the administrative law judge "noted that a corollary clause to the no-strike provision provided that the Union shall 'take all reasonable steps to restore normal operations' in the event of a work stoppage." 233 N.L.R.B. 183, 183 (1977). For the contract duties explicitly imposed in *Gould*, see *infra* note 69.

35. 233 N.L.R.B. 183, 183–84 (1977).

36. *Id.* at 183.

37. *Id.* at 183, 184 n.3. The Board was careful to distinguish mere participation from leading a strike, citing J.P. Wetherby Constr. Co., 182 N.L.R.B. 690 (1970).

38. 233 N.L.R.B. 183, 184 (1977).

39. 237 N.L.R.B. 226 (1978), *enforcement denied*, 599 F.2d 227 (7th Cir. 1979). Administrative Law Judge Thomas R. Wilks held: "Contrary to Respondent, I find the *Precision Castings* case dispositive of the issues herein." 237 N.L.R.B. 226, 229 (1978).

40. 237 N.L.R.B. 226, 229 (1978).

41. *Id.* at 228.

In *Gould Corp.* the Board relied again on an administrative law judge's application of *Precision Castings* to find that a steward had been unlawfully discharged.[42] According to the majority, the steward "was discharged not because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsibilities of union officers while acting as union officers."[43] In *C.H. Heist Corp.*[44] the Board similarly upheld an administrative law judge who found a section 8(a)(3) violation when an employee was disciplined "not because of his actions as an employee and his role in the strike but solely because he was also a union official."[45] The administrative law judge relied on *Precision Castings, Gould Corp.*, and *Indiana*, in spite of the circuit courts' refusal to enforce the latter two NLRB decisions.[46]

In *Hammermill Paper Co.*[47] and *Metropolitan Edison Co.*[48] the NLRB reiterated its holding in *Precision Castings* and did not find any greater responsibilities accompanying the status of union steward.[49] Consistent with these decisions, the NLRB upheld an administrative law judge in *Miller Brewing Co.*[50] who had concluded that "[i]n this case, as in *Precision Castings*, and its progeny, the very heart of the Board's rationale is that an employer may not rely on union-related considerations to justify a more severe discipline for stewards."[51]

B. *Greater Responsibilities, Greater Fault, and Greater Discipline of Union Officials*

The first federal court to apply the principle that union officials should be held to a higher standard than rank-and-file union members in avoiding contract violations was the United States Court of Appeals for the Seventh Circuit in *Indiana & Michigan Electric Co. v. NLRB.*[52] The court applied the *Great Dane* test[53] to determine whether the employer had violated sections

42. 237 N.L.R.B. 881 (1978).
43. *Id.* at 881.
44. 250 N.L.R.B. 1400 (1980), *enforced*, 657 F.2d 178 (7th Cir. 1981).
45. 250 N.L.R.B. 1400, 1404 (1980).
46. *Id.* at 1403.
47. 252 N.L.R.B. 1236 (1980), *enforced*, 658 F.2d 155 (3d Cir. 1981).
48. 252 N.L.R.B. 1030 (1980), *enforced*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).
49. 252 N.L.R.B. 1236, 1236 & n.4 (1980); 252 N.L.R.B. 1030, 1030 n.1 (1980).
50. 254 N.L.R.B. No. 24, 106 L.R.R.M. (BNA) 1153 (1981).
51. *Id.* at 1154.
52. 599 F.2d 227 (7th Cir. 1979). Fifty members of the International Brotherhood of Electrical Workers engaged in a work stoppage in violation of a no-strike clause in the union's contract with the employer electric company. Five union stewards walked out with the rank-and-file employees after falsely informing their supervisors they were ill. Three of the stewards returned to work that afternoon and joined in an effort to end the strike; the other two did not. The rank-and-file employees received a written warning, the three stewards who belatedly aided the effort to end the strike received a one-day suspension. None of the stewards helped to organize or lead the walkout. *Id.* at 228–29.
53. *See supra* text accompanying notes 21–23.

8(a)(3) and 8(a)(1) of the National Labor Relations Act[54] by disciplining union stewards more severely than rank-and-file employees for participation in an unlawful strike.[55] Since the employer's business justifications were not contested and there was no contention of antiunion motivation for the employer's action, the issue before the court was whether the employer's conduct was "inherently destructive of important employee rights."[56]

The court determined adverse effect on employee rights by drawing a distinction between legitimate activity of union officials and their unlawful conduct, indicating that employer action that restricted the legitimate activity of union officials and thereby discouraged members from holding union office would have an inherently adverse effect on employee rights.[57] The court noted that "[t]he same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and a repudiation of their responsibilities as union officials."[58] The court distinguished discipline based on union status from discipline based on responsibilities that accompany union status, holding that the greater discipline meted out to the union officials was based on their breach of the higher responsibilities that accompanied their status, "a breach that makes their misconduct more serious than that of the rank-and-file."[59]

The NLRB had found unlawful employer discrimination in *Indiana & Michigan Electric Co.*,[60] relying on its former reasoning in *Precision Castings*[61] that disparate discipline of union stewards violated section 8(a)(3).[62] The court of appeals in *Indiana* rejected the Board's arguments, reasoning that *Precision Castings* was a departure from prior law and that previously the Board had recognized that the higher responsibilities of union officials justified disciplining them more severely than rank-and-file members for participating in unprotected activity.[63] The court concluded, most significantly, that "the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently

54. 29 U.S.C. § 158(a)(3), (a)(1) (1976). For the text of the statute, see *supra* notes 15–16.

55. 599 F.2d 227, 228 (7th Cir. 1979).

56. *Id.* at 229, 230 & n.5.

57. *Id.* at 230.

58. *Id.*

59. *Id.*

60. 237 N.L.R.B. 226 (1978).

61. *See supra* text accompanying notes 30–38.

62. 233 N.L.R.B. 183 (1977).

63. 599 F.2d 227, 230 (7th Cir. 1979). The court cited the following NLRB decisions to support this contention: Chrysler Corp., Dodge Truck Plant, 232 N.L.R.B. 466 (1977); Super Valu Xenia, 228 N.L.R.B. 1254 (1977); J.P. Wetherby Constr. Co., 182 N.L.R.B. 690 (1970); Riviera Mfg. Co., 167 N.L.R.B. 772 (1967); Russell Packing Co., 133 N.L.R.B. 194 (1961); University Overland Express, Inc., 129 N.L.R.B. 82 (1960); Stockham Pipe Fittings Co., 84 N.L.R.B. 629 (1949). For an analysis of the *Indiana* decision, see Note, *Harsher Discipline for Union Stewards than Rank-and-File for Participation in Illegal Strike Activity*, 56 CHI.-KENT L. REV. 1175 (1980)

destructive of important employee rights."[64] For use of *Indiana* as precedent, it is significant that the court did not base its decision on any contract provision granting union officials greater responsibilities.[65]

Contractually imposed responsibilities of union officials were recognized in *Gould Inc. v. NLRB*.[66] In *Gould* the Board had held that the employer violated sections 8(a)(1) and 8(a)(3) by singling out for discharge a union steward who had participated with a number of rank-and-file union members in an illegal work stoppage.[67] The Third Circuit refused to enforce the Board's decision and adopted the Seventh Circuit's reasoning in *Indiana* to hold that the employer had not discriminated unlawfully against the union steward.[68] Furthermore, the court found that the discharged union steward had an explicit contractual duty to take affirmative steps to terminate the illegal work stoppage.[69] The Third Circuit, following the Seventh Circuit, reasoned that a discharge for breach of the duty to take affirmative action was not inherently prejudicial of important employee rights and therefore did not amount to a section 8(a)(3) violation.[70] The *Gould* court concluded that the only union activity that would be deterred by its ruling was the seeking of union office in order to thereafter "participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed."[71]

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64. 599 F.2d 227, 232 (7th Cir. 1979).

65. The court referred to the employment contract at two places. First, the court examined the no-strike clause when referring to the illegal walkout: "This action violated Article III, § 1 of the collective-bargaining agreement, which provides in relevant part as follows:

> It is expressly understood and agreed that the services to be performed by the employees covered by this Agreement pertain to and are essential to the operation of a public utility and to the welfare of a public dependent thereon, and in consideration thereof and of the covenants and conditions herein by the Company to be kept and performed (a) The International Brotherhood of Electric Workers and the Local Union agree that the employees covered by this Agreement, or any of them will not be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the positions held by them with the Company in accord with the terms of this agreement. . . ."

Id. at 228.

The court also referred to the contract when mentioning the employer's business justifications. *Id.* at 229 & n.4.

66. 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

67. Gould Corp., 237 N.L.R.B. 881 (1978).

68. 612 F.2d 728, 733 (3d Cir. 1979).

69. *Id.* Section 3 of the bargaining agreement specifically required union officials to take positive steps to terminate unauthorized work stoppages:

> In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following: Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action. The Union, its officers and representatives will in good faith, use every reasonable effort to terminate such unauthorized action.

Id. at 730 n.3.

70. *Id.* at 733.

71. *Id.*

In *Gould* the Third Circuit applied the principle that a union official may be disciplined more severely than rank-and-file members participating in similar unlawful activity, but departed from *Indiana* to the extent that *Gould* looked to a specific contractual provision to find a greater responsibility on the part of union officials. Moreover, the Seventh Circuit itself appeared to restrict its decision in *Indiana* by enforcing a Board order in *C.H. Heist Corp. v. NLRB.*[72]

C. *The Departure from* Indiana

In *Heist* the Seventh Circuit upheld a Board decision[73] that an employer had violated section 8(a)(3) by discharging an employee who participated in a contractually prohibited work stoppage, when the discharge was because the employee was a union steward at the time of the illegal walkout.[74] The court concluded that the company's action was destructive of the employee's right to hold union office.[75]

In *Heist* the court did not find that the discharge of the union steward was a result of antiunion motivation. Rather, the issue again facing the court was whether the discharge was "inherently destructive of important employee rights."[76] The court acknowledged its previous decision in *Indiana* by noting that "[i]f the discharge was 'not based merely on the officials' status but upon their breach of the higher responsibilities that accompany that status,' . . . then it is not inherently destructive of employee rights."[77] Focusing its attention on the lack of a definition of "higher responsibility," the court held that the discharged steward had met his obligation to uphold the no-strike clause by repeatedly attempting to dissuade the strikers.[78] The court found the discharge inherently destructive of employee rights in general, indicating that "[i]t is sufficient that the employer's actions have a substantial tendency to discourage employees from holding union office or engaging in other protected activities."[79]

In light of its holding in *Indiana*, it is significant that the *Heist* court looked only to the employment contract to impose higher responsibilities on union officials. The court did not object to higher responsibilities imposed by the bargaining agreement; had the contract been as specific in imposing a duty as that in *Gould*, the court apparently would have upheld the discharge.[80] For some unexplained reason, the *Heist* court justified its reliance solely on the

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72. 657 F.2d 178 (7th Cir. 1981).
73. 250 N.L.R.B. 1400 (1980).
74. 657 F.2d 178, 183 (7th Cir. 1981).
75. *Id.*
76. *Id.* at 182.
77. *Id.*
78. *Id.* at 182, 183.
79. *Id.* at 183.
80. *Id.* at 182. "The collective-bargaining provision [sic] in *Gould Inc.* . . . were quite specific and would alone be sufficient to impose a higher responsibility upon the union officials to end the strike." *Id. See also supra* note 69.

contract language by construing the no-strike clause[81] in *Indiana* as establishing a steward's higher responsibilities.[82] It then distinguished *Heist* from *Indiana* by indicating that "[t]he contractual basis for the union steward's 'higher responsibility' in this case is even more tenuous than in *Indiana & Michigan Electric Co.*"[83]

At this point the *Heist* court retreated completely from its reasoning in *Indiana*. At no time in *Indiana* did the court look to the employment contract to determine a higher responsibility of union officials to refrain from unlawful conduct. Rather, the *Indiana* court based its holding on prior NLRB decisions and its view of the law that the higher responsibilities of union officials justified disciplining them more severely than rank-and-file members for participating in unprotected activity.[84] The court quoted the no-strike clause in *Indiana* merely to show that the strike activity in which approximately fifty members participated, including the union stewards, was in violation of the bargaining agreement, and hence unprotected activity.[85]

The *Heist* court further complicated the holding in *Indiana* when it found that the contractual basis for a union steward's higher responsibilities was more tenuous than in *Indiana*.[86] As pointed out, the *Indiana* court did not rely on the contract language to impose a greater duty on union stewards.[87] Furthermore, even if *Indiana* had been decided on the contract language, it is inconceivable that the *Heist* court could find less of a duty in that case than in *Indiana*. In addition to a no-strike clause,[88] the *Heist* contract contained a specific provision indicating that the "steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with."[89] *Heist* completely undermined the holding in *Indiana* when the court essentially held that a specific contractual provision requiring the steward to cross the picket line would have been necessary to sustain the discharge.[90] Without such a specific contractual requirement, the court held that the stewards

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81. *See supra* note 65.
82. 657 F.2d 178, 182 (7th Cir. 1981).
83. *Id.*
84. 599 F.2d 227, 230 (7th Cir. 1979).
85. *Id.* at 228.
86. 657 F.2d 178, 182 (7th Cir. 1981).
87. *See supra* text accompanying notes 84–85.
88. Article XXI Dispute/Grievance Procedure:

Section 5. There shall be no strike or lockout, slowdown, interference, or work interruption on any job over any grievance or dispute while it is being processed through this grievance procedure, and until the said procedure has been exhausted. If any employees engage in any such activity, they may be disciplined by management, without recourse *except to establish that they actually participated in or were a part of such activity* . . . .

657 F.2d 178, 181 (7th Cir. 1981) (emphasis added).
89. Article VIII Stewards:

Section 1. The Union shall have the right to appoint one chief shop steward . . . [who] shall be [and [sic] employee] covered by this Agreement . . . .

Section 2. The steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with . . . .

657 F.2d 178, 181 (7th Cir. 1981).
90. 657 F.2d 178, 183 (7th Cir. 1981).

fulfilled their obligation to the contract by attempting to dissuade other strikers.[91] This is inconsistent with *Indiana*, in which the mere participation of stewards in the unlawful activity justified their more severe punishment, although it should be noted that the punishment in *Indiana* was suspension[92] as opposed to discharge in *Heist*.[93]

It appears that the Seventh Circuit retreated from its former findings at law of a greater responsibility of union stewards and that mere participation in unlawful activity was sufficient to justify more severe punishment of union stewards than rank-and-file employees participating in the same unlawful activity. In *Heist* the greater responsibilities of a union steward, to the extent the court recognized any, were defined only by the employment contract and were fulfilled by a steward who participated in the unlawful activity, but made some attempts to induce other employees on the picket line to return to work.[94] The Seventh Circuit shifted its focus from that of justifying disparate treatment of a union steward for participating in unprotected activity because of greater responsibilities accompanying his union status to that of determining unlawful treatment by specific contract language and any affirmative acts by the steward.

While the Seventh Circuit was busy chipping away at its own decision in *Indiana*, the Third Circuit was also fashioning law concerning the disparate treatment of union stewards. Previously, the Third Circuit in *Gould* had relied on the reasoning in *Indiana* to uphold the discharge of a union steward who failed to fulfill his contractual obligation to take affirmative steps to end an unauthorized work stoppage.[95] But in *Hammermill Paper Co. v. NLRB*[96] the Third Circuit did not uphold the discharge of a union steward who had participated in illegal strike activity.[97] In that case, while other employees with no record of disciplinary problems were suspended, the union steward, who also had a clean record, was discharged for his failure to take affirmative action as a union representative in the face of activity in violation of the bargaining agreement.[98] The *Hammermill* court refused to look beyond the language of the contract to impose any higher responsibilities on the union steward and concluded that "whether responsibility does, or does not, accompany the status of union stewardship is a conclusion that must be reached by construing the contract, rather than a condition dictated purely by operation of law."[99] The court held that the no-strike clause, which stated "The Union agrees that there will be no strikes, slowdowns, or work stoppages,"[100] did

91. *Id.*
92. 599 F.2d 227, 229 (7th Cir. 1979).
93. 657 F.2d 178, 181 (7th Cir. 1981).
94. *See supra* text accompanying notes 90–91.
95. *See supra* text accompanying notes 66–72.
96. 658 F.2d 155 (3d Cir. 1981).
97. *Id.* at 163.
98. *Id.* at 156.
99. *Id.* at 164.
100. *Id.*

not impose a higher duty on union stewards and refused further interpretation of the contract language on the ground that the arbitrator made specific findings that negated the inference that higher responsibilities accompanied the union steward position.[101]

The court reached this decision in *Hammermill* by relying on *Gould* and *Indiana*. That reliance, however, was ill-placed to the extent the underlying analysis rested on *Indiana*. The *Hammermill* court indicated that the *Indiana* court found a higher responsibility and greater fault of union stewards from the language of the employment contract.[102] As indicated previously, the *Indiana* court relied on the contract to show only that the employees' strike was unprotected activity.[103] Despite language to the contrary,[104] the *Hammermill* court implicitly recognized the inconsistency of relying on *Indiana*: "*Indiana* thus suggests a short step beyond *Gould*. It allows a court to find that an employee's status as a union official carries responsibilities to take affirmative steps to prevent unlawful work stoppages, even absent the emphatic and unmistakably clear language of individual duty in *Gould*."[105] Concurring Judge Higginbotham was more explicit: "Insofar as the Seventh Circuit based its conclusion on the theory that a union steward's status conveyed rights and responsibilities, not specifically enumerated in the contract, which justified more severe discipline, I would reject its decision completely."[106]

The Third Circuit considered another disparate-discipline case in *Metropolitan Edison Co. v. NLRB*,[107] in which it upheld the Board's decision that an employer violated section 8(a)(3) by disciplining the union president and vice president more harshly than rank-and-file members for participating in an illegal work stoppage in violation of the no-strike clause[108] in the bargaining agreement.[109] The officials made attempts to get the employees to return to work, but would not cross the picket line as the employer requested.[110] Again the Third Circuit relied only on the contract language to determine higher responsibilities of union officials: "If the collective bargaining agreement

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101. *Id.* at 165.

102. *Id.* at 164–65.

Thus the contract . . . provided that employees will not be called upon *or permitted to* cease or abstain from the continuous performance of their jobs. 599 F.2d at 228 (emphasis supplied). By use of this language, the contract implicitly differentiated between two tiers of union membership—those who could engage in strike activity, and those who could wield the additional power to promote or deter strike activity by others—and imposed higher duties on members of the latter tier.

Id.

103. *See supra* text accompanying notes 84–85.

104. "Thus, the result we reach is not at all inconsistent with *Gould* and *Indiana*." 658 F.2d 155, 165 (3d Cir. 1981).

105. 658 F.2d 155, 164 (3d Cir. 1981).

106. *Id.* at 167 (Higginbotham, J., concurring).

107. 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).

108. The contract provision was as follows: "The Brotherhood and its members agree . . . there shall be no strikes or walkouts by the Brotherhood or its members . . . it being the desire of both parties to provide uninterrupted and continuous service to the public." *Id.* at 480.

109. *Id.* at 483.

110. *Id.* at 480–81.

does not specify that union officials have some responsibility to try to end an illegal work stoppage, then the company may not impose any greater discipline on union officials than on other participants in the strike." [111] The court reasoned that imposing disparate treatment in a case such as this puts the union official in an untenable position—either obey the company and lose authority, or follow his own judgment and risk harsher punishment.[112] Because of this dilemma the court held that it would not interpret a collective-bargaining agreement "to impose additional responsibilities on union officials absent clear language showing that the union agreed to it." [113] It is significant that the *Metropolitan Edison* court reached this decision in light of two previous arbitration decisions justifying disparate treatment of union leaders who participated in an illegal work stoppage.[114]

The *Metropolitan Edison* court did not attempt to reconcile its decision with that of the Seventh Circuit in *Indiana*. In a footnote the court indicated that to the extent *Indiana* was inconsistent with *Gould, Heist,* and *Hammermill*, they declined to follow it.[115] This appears to be a clear indication that the Third Circuit intends to recognize only explicit, contractually imposed higher responsibilities of union stewards.

D. *The Reappearance and Continued Vitality of* Indiana

Even in the Seventh Circuit *Indiana* would appear to have diminished import after *Heist*,[116] yet less than a month after that decision the Seventh Circuit turned to *Indiana* to uphold the discharge of union officials in *Caterpillar Tractor Co. v. NLRB*.[117] In *Caterpillar* the court concluded that a strike held by employees was a breach of the collective-bargaining agreement and therefore could not be considered protected activity.[118] The company discharged three employees, two of whom were union officials, for taking part in the strike.[119] In reaching a decision to discharge the company used the following criteria: "(1) front line activity during the strike; (2) active confrontation involving either impeding entry to the plant or other words or actions against management during the strike; (3) presence on the scene during most of the

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111. *Id.* at 482.

112. *Id.*

113. *Id.* at 483.

114. The arbitrators had interpreted contract language identical to that in the instant case and held that more severe discipline of union officials than rank-and-file members for participating in an illegal work stoppage was justified. The court quoted one of the arbitrators:

> It is well-established that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties. Indeed, the mere *participation* by Union leaders in an illegal work stoppage is sufficient to justify a differential penalty . . . .

Id. (emphasis in original). The court held, quite simply, that it was not bound by previous arbitrator interpretations. *Id.*

115. *Id.* at 478, 482 n.1.

116. *See supra* text accompanying notes 72–94.

117. 658 F.2d 1242 (7th Cir. 1981).

118. *Id.* at 1248.

119. *Id.* at 1245.

strike; (4) union officers with incumbent responsibilities to avert or discourage wildcat activities." [120]

Contrary to its decision in *Heist*, the Seventh Circuit in *Caterpillar* seemed to indicate that higher responsibilities may be imposed on union officials even in the absence of clear contract language providing such duties. [121] Even though there was no contract provision specifically imposing upon union officials the duty to "avert or discourage wildcat activities," the court refused to enforce that portion of the Board order [122] which held that the company had violated sections 8(a)(1) and 8(a)(3) by discharging the officials for failure to fulfill their higher incumbent responsibilities. [123] Although the court mentioned that four criteria were utilized in discharging the employees, [124] it quoted with approval that portion of the *Indiana* opinion indicating that an employer is entitled to take into account a union official's greater responsibility and greater fault. [125] Therefore, it appeared that the Seventh Circuit revived *Indiana* in *Caterpillar* as quickly as it departed from it in *Heist*.

At least one other circuit has relied on *Indiana* to uphold harsher discipline of union officials for participating in an illegal work stoppage because of responsibilities attaching to their union office. In *NLRB v. Armour-Dial, Inc.* [126] the Eighth Circuit upheld suspensions of union executive committee members "not because of their status as union officers but because of their acts and omissions to act while holding union office." [127] The union president had threatened a work stoppage and was suspended after a forklift operator and three members of the executive committee refused to unload an Iowa Beef Products (IBP) truck because employees of the IBP plant were on strike. [128] The president was suspended for ninety days; executive committee members received nine-day suspensions. [129] One rank-and-file employee who refused to operate the forklift was also suspended. [130]

The president's suspension was not contested at the appellate court level. The court relied on *Indiana* and *Gould* to uphold the suspensions of the executive committee members, [131] rejecting the Board's argument that the

120. *Id.*

121. *See supra* text accompanying note 90.

122. 250 N.L.R.B. 527 (1980).

123. 658 F.2d 1242, 1249 (7th Cir. 1981).

124. *Id.* at 1248. *See also supra* text accompanying note 120.

125. 658 F.2d 1242, 1249 (7th Cir. 1981) (quoting Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 232 (7th Cir. 1979)). *See supra* text accompanying note 64. When citing *Indiana*, the *Caterpillar* court noted that "this court upheld the discharging of certain employees who had engaged in an illegal strike, when the sole criterion was their union status." 658 F.2d 1242, 1249 (7th Cir. 1981). In *Indiana*, however, the court upheld a less serious suspension of the union officials, not their discharge. The Seventh Circuit specifically pointed to this fact in a footnote in *Heist*. 657 F.2d 178, 182 n.3 (7th Cir. 1981).

126. 638 F.2d 51 (8th Cir. 1981).

127. *Id.* at 55.

128. *Id.* at 54.

129. *Id.*

130. *Id.*

131. The court quoted significant portions of the *Indiana* decision, including the following: "As the Board said in [its prior] cases, union officials are subject to 'an even greater duty than the rank-and-file employees to uphold [the contract] provisions.'" *Id.* at 55.

case at bar should be distinguished since none of the officials had participated in or induced the work stoppages.[132] The *Armour* court found that the committee members' presence at the meetings between the union and the company, in addition to their acquiescence in the position espoused by the president, amounted to "participation in and inducement of the work stoppage that followed."[133] The court continued: "The role the committee played in inducing the work stoppage will not be overlooked even though the committee members chose to communicate their support in a non-verbal manner."[134] It is apparent that the *Armour* court looked hard to find "participation in and inducement of" the work stoppage. Although this case ultimately may be distinguished from *Indiana*, in which mere participation justified greater discipline, it is clear that the *Armour* court did not rely on a specific contract provision to impose greater responsibilities on union officials.[135]

IV. GREATER RESPONSIBILITIES ABSENT SPECIFIC CONTRACT PROVISIONS

The NLRB majority appears committed to the rule of *Precision Castings Co.*[136] that a union steward who participates in an unauthorized work stoppage may not be disciplined more severely than a rank-and-file employee for participating in the same activity.[137] That principle, however, is not unchallenged. Not only did the Seventh Circuit implicitly, if not explicitly, overrule that Board decision in *Indiana*,[138] but former NLRB member Penello,[139] in a series of dissents, attacked vigorously the majority's reliance on *Precision Castings*.

In his dissent to *Gould Corp.*[140] Penello pointed out that the steward's duties to take affirmative action to end an unauthorized strike were contractually imposed in that case[141] and also distinguished discipline based on union status from discipline based on a failure to fulfill responsibilities that accompany union status.[142] In making this distinction, Penello drew an analogy to benefits received by a steward by virtue of his union position,[143] indicating

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132. *Id.*

133. *Id.* at 56.

134. *Id.*

135. The court looked to the employment contract only to describe the unauthorized activity of the disciplined employees. The no-strike clause is as follows: "[S]hould trouble of any kind arise in the plant, there shall be no strike stoppage, slowdown, suspension of work or boycott on the part of the Union or its members or the employees . . . ." *Id.* at 53.

136. 233 N.L.R.B. 183 (1977).

137. *See supra* text accompanying notes 30–51.

138. 599 F.2d 227, 230 (7th Cir. 1979).

139. *See supra* note 30.

140. 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

141. 237 N.L.R.B. 881, 884 (1978). *See also supra* note 69.

142. 237 N.L.R.B. 881, 883–84 (1978).

143. *Id.* at 884. Penello argued this position as follows:

> According to the majority's analysis, an employee who becomes a union steward acquires a battery of *benefits* and *protections* without an iota of *burdens or responsibilities* in return. For I am certain that my colleagues would not question the accepted principle that union stewards who are engaged in the processing of grievances may engage in conduct which otherwise would be unprotected by the Act.

that those benefits that are granted "*solely* because of the employee's position in the union"[144] do not give rise to an unfair labor practice. Penello also looked to the sanctity of the grievance-arbitration, no-strike tradeoff, as mandated by Congress in the National Labor Relations Act, to support the notion of an affirmative duty of union stewards.[145] Finally, Penello argued that a long line of arbitrator's decisions has established the duty of the union steward to prevent or terminate illegal work stoppages[146] and cited cases relied on by the *Indiana* court to support the position that union stewards have a greater duty than rank-and-file employees to uphold the provisions of a collective-bargaining agreement, particularly the no-strike clause of the agreement.[147]

Penello expanded his analysis of a steward's inherently imposed duties in his concurring opinion in *Midwest Precision Castings Co.*[148] and his dissent to *Metropolitan Edison Co.*[149] In *Midwest* Penello looked to the steward as an authority figure, a leader on any issue that arises in the plant on a daily basis.[150] Because the steward holds this position of authority, by his mere participation in an unauthorized work stoppage he "should be viewed as the

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> Nor would they dispute the principle that the maintenance and enforcement of a clause in a collective-bargaining agreement granting union stewards superseniority for the purposes of layoff and recall over the rest of the employees in the bargaining unit is lawful. Such benefits or protections are granted *solely* because of the employee's position in the union and for the purpose of properly administering the collective-bargaining agreement. However, when a union steward is disciplined because he has improperly administered the collective-bargaining agreement by failing to fulfill a *duty* inherent in his position and which would not exist *but for* his union position my colleagues are quick to find a violation on the part of the employer.

Id. (emphasis in original).

144. *Id.*

145. *Id.* at 884–85. Penello indicated that "the fundamental importance of the grievance arbitration system and its companion no-strike agreement to the peaceful settlement of labor-management disputes, as mandated by Congress, applied by the courts and the Board, and consistently interpreted by a long line of arbitral authority, will be seriously undermined" by the majority's decision. *Id.* at 883.

146. *Id.* at 885–86, 885 n.15.

147. *Id.* at 886. *See supra* note 63.

148. 244 N.L.R.B. 597 (1979).

149. 252 N.L.R.B. 1030 (1980), *enforced*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).

150. 244 N.L.R.B. 597, 600 (1979). Penello argued the following:

> By the very nature of his position with the union a steward occupies a position of some authority *vis-a-vis* his fellow employees, and those employees will of necessity look towards the steward for guidance and leadership on any issue which arises on a daily basis in the plant. For example, if an employee is called by his employer to attend an investigatory interview which the employee reasonably believes may result in disciplinary action the employee has a federally protected right to request the presence of his union steward at such an interview. Or if an employee has a grievance regarding some action taken by management against him the collective-bargaining agreement will, in most cases, require him to seek out his union steward for advice and assistance in processing the grievance. And if an employee merely has a question concerning the interpretation of the collective-bargaining agreement he will naturally seek the assistance of his union steward. In the same manner, if employees are contemplating the withholding of their services from their employer by engaging in a work stoppage or work slowdown they perforce will seek the advice of and guidance of their union steward on a matter of such crucial importance to their employment. If under such circumstances a union steward joins his fellow employees in an illegal, unauthorized work stoppage logic dictates that the steward should be viewed as the "leader" of such a work stoppage.

Id. at 600–01.

'leader' of such a work stoppage."[151] Penello concluded that "the effect caused by a union steward who fails to urge employees who are engaged in an illegal, unauthorized work stoppage to return to work is no different from the effect caused by a union steward who affirmatively instigates or leads an illegal, unauthorized work stoppage."[152]

It is apparent that Penello would not require a union steward to exercise any active leadership in an unauthorized work stoppage in order to justify his more severe punishment. Furthermore, in *Metropolitan Edison* he made clear that some affirmative action to end an unlawful strike does not fulfill the steward's duty to enforce the no-strike clause of the bargaining agreement by crossing the picket line.[153] Finally, Penello would hold that higher responsibilities of union officials need not be spelled out under the contract and that implicit in any no-strike clause is a negative duty not to participate in any unlawful work stoppage and an affirmative duty to take action to bring any strike in violation of the no-strike clause to an end.[154]

Penello's series of dissents outlines his position that union officials have more rigorous responsibilities to uphold the provisions of a bargaining agreement. Clearly, in his view, a union steward has a greater responsibility to uphold the no-strike clause of an employment contract than do rank-and-file employees. The greater responsibilities need not be specified explicitly in the contract; rather, they are inherent in the union official's position. Because of the implicit duties arising from the no-strike clause not to participate in an unauthorized work stoppage and to take affirmative steps to end an unauthorized strike, a striking steward has not fulfilled his duties when he takes some affirmative steps to end the unauthorized strike. Therefore, mere participation by a union steward in an unauthorized strike justifies imposing greater discipline on him than on rank-and-file employees.

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151. *Id.* at 601.

152. *Id.* at 602.

153. 252 N.L.R.B. 1030, 1031 (1980).

154. *Id.* Penello described these duties as follows:

> Furthermore, I note that in cases like this union officials typically have two different duties under the contract. The first is a negative duty, which is usually explicitly stated in the contract but is implicit in any no-strike clause, that the union will refrain from breaching its no-strike agreement. Mere participation by a union official in a strike in violation of a no-strike clause would breach this negative duty. The second duty is an affirmative duty that the union, through its officials, will take affirmative action to bring any strike in violation of the no-strike clause to an end. This affirmative duty may be explicitly stated in the contract, as it was in *Gould*, or may merely be implicit in the no-strike provisions of the contract, as in the case here. As this case illustrates, it is possible for a union official to comply with one duty without necessarily fulfilling his obligations under the other duty. Logically, the negative duty should take precedence. Thus, I would find that, regardless of what other actions are taken by a union official, he has responsibility to refrain from participating in a strike in violation of the no-strike clause. Of course, even if a union official does not participate in the unlawful strike, he may still fail to fulfill his responsibilities if he does not take steps to end the strike, in cases where the contract imposes such a duty either explicitly or implicitly. However, I would find that, at the very least, any no-strike agreement imposes upon union officials a negative duty to refrain from participating in an unlawful strike.

Id.

The *Indiana* court adopted the general reasoning that a union steward could be punished more severely than rank-and-file employees because of his greater responsibilities,[155] but the majority of courts in the disparate-treatment cases have not been willing to distinguish between punishment based on higher responsibilities and punishment because of union status.[156] Furthermore, when a greater responsibility of union officials has been recognized, it is only when it has been imposed specifically by the contract, and some affirmative acts on the part of the official have served to fulfill those responsibilities.[157] Whether the courts will go as far in finding a greater responsibility of union stewards as Penello would have them go remains to be seen.

V. CONCLUSION

In determining whether disparate treatment of a union official for participation in an unauthorized strike amounts to an unfair labor practice, the courts have been inconsistent in their application of the principle that the higher responsibilities of union stewards justify their greater punishment.

Indiana imposes a greater duty on union officials than on rank-and-file employees to uphold the provisions of the contract.[158] Because of the higher responsibilities that accompany union status, a union steward who participates in a work stoppage that is in violation of a no-strike clause in the bargaining agreement may be disciplined more severely than a rank-and-file employee. The Seventh Circuit did not require instigation or leadership by the steward, nor did it require explicit contract provisions imposing a duty on the official; rather, harsher treatment was justified for mere participation in unprotected activity because of greater fault on the part of the union steward.[159]

This broad rule was narrowed considerably after *C.H. Heist Corp. v. NLRB*,[160] in which the Seventh Circuit looked solely to the employment contract to define higher responsibilities of union officials.[161] Absent a specific contract provision to the contrary, higher responsibilities do not require a steward to cross a picket line, but may be fulfilled by some attempts to induce employees to return to work. A steward's mere participation in the unlawful activity is not sufficient to justify harsher punishment.

After *Heist* it appeared that the Seventh Circuit would determine higher responsibilities of union officials only by construing the employment contract, but then the court upheld the discharge of union officials in *Caterpillar Tractor Co. v. NLRB*[162] by relying on its analysis in *Indiana*.[163] In light of the

155. *See supra* text accompanying notes 52–65.

156. *See, e.g.*, Metropolitan Edison Co. v. NLRB, 663 F.2d 478 (3d Cir. 1981); Hammermill Paper Co. v. NLRB, 658 F.2d 155 (3d Cir. 1981).

157. *See, e.g.*, C.H. Heist Corp. v. NLRB, 657 F.2d 178 (7th Cir. 1981).

158. *See supra* text accompanying notes 52–65.

159. *Id.*

160. 657 F.2d 178 (7th Cir. 1981).

161. *See supra* text accompanying notes 72–94.

162. 658 F.2d 1242 (7th Cir. 1981).

163. *See supra* text accompanying notes 116–25.

Heist decision, however, it would appear unwise for an employer to rely on *Indiana* in discharging a union official for his greater fault in participating in a wildcat strike, especially if the steward had made some attempts to induce striking employees to return to work and there was no contract provision imposing explicit duties on a steward.[164]

From its initial decision in *Gould Inc. v. NLRB*[165] the Third Circuit has looked to the employment contract to determine greater responsibilities of union officials, even though the *Gould* court relied on *Indiana* to reach its holding.[166] In *Hammermill Paper Co. v. NLRB*[167] the discharge of a union official on the ground that he had failed to take affirmative action as a union representative in the face of concerted action in violation of the bargaining agreement was a violation of section 8(a)(3) when the contract imposed no greater duties on the union steward.[168] Again, in *Metropolitan Edison Co. v. NLRB*[169] the court would not sustain a discharge of union officials when higher responsibilities had not been imposed explicitly on the officials by the contract.[170]

The Third Circuit, then, has been more consistent than the Seventh Circuit in its determination of a union official's higher responsibilities. Clearly, that circuit will oppose greater discipline of union officials who participate in unprotected activity to the same degree as rank-and-file employees, unless a contract provision specifically imposes greater duties on the officials. After *Heist* it is not clear to what extent the Seventh Circuit will look beyond the employment contract in defining higher responsibilities of union officials, but it appears that some affirmative acts on the part of union officials will fulfill any greater obligations they may have under the contract.

Therefore, it is apparent that some courts have followed the Board's lead and have been unwilling to differentiate between discipline based on higher responsibilities and discipline based on union status, simply calling any disparate treatment of union stewards a section 8(a)(3) violation except when duties are explicit in the employment contract. Even when such a distinction is made, the extent to which a union official may have greater responsibilities by virtue of his union position, outside those explicitly imposed by the employment contract, is unclear. Former NLRB member Penello argued vigorously that a union official's position bestows greater responsibilities upon him.[171] To achieve some consistency in the disparate-treatment cases in which no contractual duties are explicitly imposed, the courts must first decide

164. *See supra* text accompanying notes 72–94.
165. 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).
166. *See supra* text accompanying notes 66–72.
167. 658 F.2d 155 (3d Cir. 1981).
168. *Id.* at 163.
169. 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 2926 (1982).
170. *Id.* at 482.
171. *See supra* text accompanying notes 137–57.

whether discipline based on union status may be distinguished from discipline based on higher responsibilities accompanying union status. Second, the courts must recognize how these higher responsibilities may be defined—whether they may only be imposed specifically, or whether, as member Penello suggested, higher duties are implicit in a no-strike clause.

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