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## New Proscriptions Against Selective Discipline of Union Officials: Metropolitan Edison Co. v. NLRB {103 S. Ct. 1467}

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## NEW PROSCRIPTIONS AGAINST SELECTIVE DISCIPLINE OF UNION OFFICIALS: *METROPOLITAN EDISON CO. v. NLRB*

The National Labor Relations Act<sup>1</sup> prohibits employer interference with their employees' rights to engage in collective bargaining activity.<sup>2</sup> Employer conduct that discriminates against, discourages, or encourages union membership violates sections 8(a)(1) and 8(a)(3) of the Act.<sup>3</sup> The United States Supreme Court recently interpreted these sections to prohibit selective employer discipline of employees

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1. 29 U.S.C. §§ 151-169 (1982) [hereinafter cited as the Act].

2. Section 7 of the Act reads, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1982). The definition of "concerted activities" spawned much litigation since Congress enacted the statute in 1935. The concept originated in the Norris-LaGuardia Act of 1932, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C §§ 101-115 (1982)), which prohibited federal courts from issuing injunctions based on allegations that persons were engaging in a "concert of acts." 29 U.S.C. § 105 (1982). The Act does not protect all concerted activities. The activity must further the employees' mutual aid or protection. Contemporary courts tend to require the concerted activity to further some group interest through either a work-related complaint or a grievance that seeks a specific remedy. *See Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1209 (9th Cir. 1974). The Act protects a single employee acting alone if that employee's actions are done pursuant to a union contract. *NLRB v. City Disposal Systems, Inc.*, 104 S. Ct. 1505 (1984). Activities not protected by the Act include a work slow-down, sit-down strike, wildcat strike, or any action accompanied by violence to the plant or machinery. *Boeing Aircraft Co. v. NLRB*, 238 F.2d 188 (9th Cir. 1956). *See generally* R. GORMAN, *BASIC TEXT ON LABOR LAW* 296-325 (1976).

3. Sections 8(a)(1) and 8(a)(3) read:

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 157 of this title;

3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. §§ 158(a)(1), (a)(3) (1982).

A violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1) when the employer's action tends to discourage union membership or activities. *Inter-Collegiate*

based on their status as union officials. In *Metropolitan Edison Co. v. NLRB*,<sup>4</sup> the Court held that in the absence of explicit contractual duties or a clear and unmistakable waiver by a union, such selective discipline impermissibly discriminates and contravenes the Act's purposes.<sup>5</sup>

Metropolitan Edison Company disciplined local officials of the Electrical Workers Union on four occasions because of their participation in unlawful<sup>6</sup> work stoppages.<sup>7</sup> The union twice filed grievances, and arbitrators ruled the discipline acceptable because of a union official's "affirmative duty"<sup>8</sup> to uphold no-strike provisions in

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Press, Graphic Arts Div. v. NLRB, 486 F.2d 837, 845 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

Section 8(a)(3) originated as part of the Taft-Hartley Act, 61 Stat. 136, in 1947, and amended in 1951, 65 Stat. 601, and was derived from § 8(3) of the 1935 Wagner Act, 49 Stat. 452, 29 U.S.C. § 158(3) (1982). Under the original version the provision read:

That nothing in sections 151-166 of this title . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in said sections as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such an agreement when made.

29 U.S.C. § 158(3) (1946).

Subsequent legislative history indicates that Congress intended to prevent employer and union discrimination for purposes other than legitimate concerns such as non-payment of union dues. *See* *Radio Officers Union v. NLRB*, 347 U.S. 17, 41 (1954). Senator Taft, the co-sponsor of the 1947 bill, stated, "It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation." 93 CONG. REC. 4191 (1947). A House Conference report defined the boundaries of the new section when it stated that § 8(a)(3) "prohibits an employer from discriminating against an employee . . . except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract." H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 44 (1947).

4. 460 U.S. 693 (1983).

5. *Id.* at 703.

6. Work stoppages that are not authorized by the union (the so-called "wildcat" strikes) and those in violation of no-strike clauses, form the two major classes of strikes left unprotected by section 7 of the Act. *See* *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). *See also* *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). For the scope of § 7 rights, see *supra* note 2.

7. 460 U.S. at 695.

8. 252 N.L.R.B. 1030, 1034 (1980). *See also infra* notes 40-48 and accompanying text discussing the treatment of the "affirmative duty" theory by both the Board and the federal courts of appeal.

bargaining agreements.<sup>9</sup> In a subsequent dispute, union members and officials refused to cross a picket line established by an unrelated union.<sup>10</sup> At the conclusion of the strike, Metropolitan Edison suspended the employees who refused to cross and gave longer suspensions to two union officials who participated in the strike.<sup>11</sup> The union filed an unfair labor practice charge with the National Labor Relations Board, which issued a complaint against the company based on its selective discipline.<sup>12</sup> The Administrative Law Judge

9. The agreement read, in part:

The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

460 U.S. at 695 (quoting petition for cert. app. 32).

10. 460 U.S. at 696.

11. *Id.* President Lang and Vice President Light each received 25 day suspensions while the rank-and-file received five-to-ten day suspensions. *Id.* at 697. Metropolitan Edison claimed that the two men violated their "affirmative duty" as officials to "make every bona fide effort to prevent the unlawful work stoppage" and to uphold the "sanctity of the agreement." Metropolitan Edison Co., 252 N.L.R.B. at 1033. The company argued that the officials became the "active leaders" of the strike because they attempted to secure the removal of the picket line instead of setting an example to the other employees by crossing the line. *Id.* at 1034. See also Brief for Petitioner App. at 92, Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 698 (1983) ("The reason we got disciplined was that we were union officers and we should have asked people to come into work and that is basically it.").

12. 252 N.L.R.B. at 1030. Congress created the NLRB in 1935 to investigate and remedy unfair labor practices within the scope of Title 29. 29 U.S.C. §§ 153, 160 (1982). The NLRB rules on unfair labor practice allegations and investigates and adjudicates representation questions raised in the context of collective bargaining and union elections. 29 U.S.C. §§ 159-160 (1982). After the regional director of the NLRB decides to issue an unfair labor practice charge against an employer the matter goes before an Administrative Law Judge (ALJ). *Id.* § 160(b). The NLRB may endorse the ALJ's finding with or without oral argument. *Id.* § 160(c). The NLRB will dismiss the charge unless the NLRB's General Counsel proves by a preponderance of the evidence that an employer or union committed an unfair labor practice. *Id.* If an unfair labor practice is proven, an order will be issued for the employer to correct the unfair practice. Some of the remedial measures at the NLRB's disposal include the issuance of cease and desist orders to the offending parties, the reinstatement of employees to their work positions, and the reimbursement of back pay. *Id.* See also Radio Officers Union v. NLRB, 347 U.S. 17 (1954). See generally R. GORMAN, *supra* note 2, at 287.

The NLRB may petition a United States court of appeals to enforce its orders. 29 U.S.C. § 160(e) (1982). The NLRB's findings of fact will stand "if supported by substantial evidence on the record considered as a whole. . . ." *Id.* See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). As issues move from questions of fact

held that union acquiescence to prior arbitration decisions does not create an implied duty on the part of union leaders to prevent similar work stoppages at later dates.<sup>13</sup> The NLRB agreed with the Administrative Law Judge's conclusions,<sup>14</sup> and on appeal, the Third Circuit Court of Appeals enforced the Board's order.<sup>15</sup> The United States Supreme Court unanimously affirmed the decisions of the lower adjudicatory bodies.<sup>16</sup>

The right to strike is a protected activity under section 7 of the National Labor Relations Act.<sup>17</sup> Consequently, employers may not punish employees for taking part in lawful strikes.<sup>18</sup> Employers may, however, discipline employees who strike in violation of a no-strike clause.<sup>19</sup> Prior to the Supreme Court's decision in *Metropolitan Edison*, it was unclear whether an employer may impose harsher sanctions on employees who are union officials participating in the unprotected activity. Unions have challenged this discriminatory disciplinary action as contrary to section 8(a)(3) of the Act.<sup>20</sup> These challenges compelled the NLRB and the courts to formulate appro-

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to questions of law, courts become reluctant to defer entirely to the NLRB's findings. *See, e.g.,* NLRB v. Marcus Trucking Co., 286 F.2d 583, 590-92 (2d Cir. 1961). *See generally* R. GORMAN, *supra* note 2, at 10-12.

13. 252 N.L.R.B. at 1035.

14. *Id.*

15. *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 484 (3d Cir. 1981). A later decision, *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), posing similar facts and questions, reached a result contrary to the Third Circuit's holding. There, the court held that parties to a collective bargaining agreement may impose on union officials a special duty to comply with a no-strike pledge. For breach of that duty an official may be selectively disciplined. *Id.* at 336.

16. 460 U.S. 693 (1983).

17. 29 U.S.C. § 158(a)(1) (1982). Congress intended to include this right to strike within the meaning of the phrase "concerted activity," protecting the activity from employer interference by § 8(a)(1). *Id.* *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 26 (1947), *cited with approval in* NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1963).

18. 29 U.S.C. § 157 (1982).

19. Strikes in violation of a no-strike clause are unprotected activities because no-strike clauses constitute permissible union waivers of employees' right to strike under the Act. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-80 (1956). Where the strike activity is unprotected, employers may discipline in the same manner as for any other unprotected act. *See* NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939). *See generally* Note, *Considerations in Disciplining Employees for Participation in Violation of the No-Strike Clause*, 106 U. PA. L. REV. 999 (1958).

20. *See infra* notes 33-54 and accompanying text.

appropriate standards for determining the limits of permissible employer conduct towards union members and officers.<sup>21</sup>

Section 8(a)(3) of the Act states that it is an unfair labor practice if an employer discriminates against, discourages, or encourages union activity through the hire or tenure of employment, or any term or condition of employment.<sup>22</sup> Congress, in promulgating the Act, failed to define "discrimination," rendering its meaning unclear.<sup>23</sup> This ambiguity prompted the Supreme Court to develop a test for determining when a section 8(a)(3) violation results from an employer's discriminatory conduct. In *Radio Officers Union v. NLRB*,<sup>24</sup> the Court suggested that the NLRB may presume an illicit intent to discriminate when the employer's behavior "inherently" encourages or discourages union membership, and such an effect is the "natural consequence" of his actions.<sup>25</sup>

The Court incorporated this dictum into its holding in *NLRB v. Erie Resistor Corp.*<sup>26</sup> The employer offered and granted super-senior-

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21. See *infra* notes 25-54 and accompanying text (discussing development of the balance to be struck between appropriate employer conduct and vital employee interests).

22. See *supra* note 3. See generally J. ATLESON, P. RABIN, G. SCHATZKI, H. SHERMAN & E. SILVERSTEIN, *LABOR RELATIONS AND SOCIAL PROBLEMS* 290-91 (2d ed. 1978).

23. Neither the Senate nor the House Reports dealing with this provision give any indication as to what Congress intended by "discrimination." See S. REP. NO. 573, 74th Cong., 1st Sess. 11 (1934); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 19 (1934). In *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), the Supreme Court ruled that there was no "discrimination" by an employer in hiring permanent replacements for strikers, but if the employer chooses to rehire he must do so without considering the degree of participation of the strikers in the work stoppage. In a later decision the Court seemed to shift its emphasis from discriminatory action by an employer to discriminatory impact upon a union. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the Court ruled that an employer violated § 8(a)(3) when he discharged employees for violating a broad no-solicitation rule. *Id.* at 805. This action "clearly" violated § 8(a)(3) because it "discourages membership in a labor organization." *Id.* Because "discouragement" of union membership discriminates per se, the question of what, if any, anti-union motivation must exist in a less clear-cut case remained unanswered. See generally Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965).

24. 347 U.S. 17 (1954).

25. *Id.* at 45. "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." *Id.* Thus, an employer may not discriminate against an employee at a union's request for failure to pay union dues. *Id.* at 61.

26. 373 U.S. 221 (1963).

ity status<sup>27</sup> to returning strikers and replacements to ensure a supply of labor sufficient to overcome the severe financial difficulty caused by a prolonged strike.<sup>28</sup> The Court, examining the employer's actions in terms of its impact on the strike activity, concluded that the employer's conduct discouraged employees from exercising their section 7 right to strike.<sup>29</sup> Conduct which, on its face, appeared to promote justifiable business ends may be "impeached" by a showing that the employer intended to encroach upon protected rights.<sup>30</sup> The Court asserted that the employer "intends" what "foreseeably and inescapably" flows from his actions.<sup>31</sup> A series of Supreme Court rulings<sup>32</sup> further analyzed employer conduct in this area, culminating in *NLRB v. Great Dane Trailers*.<sup>33</sup>

In *Great Dane Trailers*, an employer granted vacation benefits to non-strikers while simultaneously refusing to grant the same privilege to striking employees.<sup>34</sup> The Court reaffirmed *Erie Resistor* when it stated that if the discriminatory conduct was "inherently destructive" of employee rights, no proof of subjective anti-union motivation is needed. This proof is unnecessary even if the employer offers evidence that the conduct was motivated by legitimate business considerations.<sup>35</sup> In a significant elucidation of this test, however, the Court declared that the NLRB must prove that an anti-union motive exists

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27. The replacements and strikers received an additional 20 years seniority with the company upon their return to work. *Id.* at 223.

28. 373 U.S. at 224. For an excerpt of § 7, see *supra* note 2 and accompanying text.

29. *Id.* at 231.

30. *Id.* at 228.

31. *Id.*

32. *See American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (for a lock-out inherently prejudicial to union interests or without viable business justification, no anti-union animus is required); *NLRB v. Brown*, 380 U.S. 278 (1965) (temporary replacement of locked-out economic strikers held to have only a "comparatively slight" impact on union membership); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (management inherently possesses the prerogative to permanently shut down a plant, so anti-union intent must be established before a § 8(a)(3) violation is found); *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21 (1964) (intent unimportant when employer acting in good faith fines union employee for a non-union-related act).

33. 388 U.S. 26 (1967).

34. *Id.* at 27. The management claimed that these benefits reflected a "new policy" which it had adopted unilaterally. *Id.* at 29.

35. *Id.* at 33.

when the effect on employee rights is "comparatively slight," and when the employer raises a legitimate and substantial business justification.<sup>36</sup> Because the company offered no justification for withholding the vacation benefits, it failed to meet the burden of proof required by the second prong of this test.<sup>37</sup> As a result, the Court demanded no proof of the company's anti-union motivation.<sup>38</sup>

The NLRB, when considering a selective discipline claim, previously focused on the duties, if any, that are concomitant with holding union office. In *Stockham Pipe Fittings*,<sup>39</sup> the NLRB first introduced the theory of a union officer's affirmative duty to comply with a no-strike clause. The NLRB determined that a union official, by his deliberate failure to attempt to avert an impending strike, breached a "greater duty" to uphold the contractual provision that prohibited such a union action.<sup>40</sup> The duty flowing from the status of a union steward provided a legitimate foundation upon which an employer could base his decision to discipline.<sup>41</sup>

The NLRB gradually retreated from this status-based rationale.<sup>42</sup>

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36. *Id.* at 34.

37. *Id.* Later that same year the Court again found it unnecessary to prove intent in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967). In *Fleetwood Trailer*, the employer violated § 8(a)(3) because he offered no justification for hiring non-union employees following a crippling strike. *Id.*

38. In his dissent, Justice Harlan regarded the decision as a retreat from traditional pronouncements that "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an anti-union animus." 388 U.S. at 39 (Harlan, J., dissenting) (quoting *NLRB v. Brown*, 380 U.S. at 288).

Congress never intended courts to use deduction and inference as the basis for limited court review of the provisions of the Act. To remedy the "shocking injustices" resulting from limited review, the 1947 House drafters stated that "requiring the Board to rest its rulings upon facts not interferences [sic], conjectures, background imponderables and presumed expertness will correct the abuses under the Act." H.R. REP. NO. 245, 80th Cong., 1st Sess. 41, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 332 (1948). See generally Note, *Harsher Discipline for Union Stewards than Rank-And-File for Participation in Illegal Strike Activity*, 56 CHL.-KENT L. REV. 1175 (1980).

39. 84 N.L.R.B. 629 (1949).

40. *Id.* The official stated to a company vice-president that, although he knew a strike might occur in the near future, he would nevertheless take no action to avert it. *Id.*

41. *Id.* at 631. Eleven years later the Board ruled that by actively inciting rank-and-file to follow his own actions, a union steward had violated his higher duty. *University Overland Express Co.*, 129 N.L.R.B. 82 (1960).

42. Two cases illustrate this trend. In *Chrysler Corp.*, 228 N.L.R.B. 486 (1977), a



In *Precision Castings Co.*,<sup>43</sup> the NLRB ultimately rejected the *Stockham* doctrine and replaced it with a rule that requires the presence of explicit contractual duties to justify selective discipline. The bargaining agreement in *Precision Castings* lacked a clause conferring extra duties upon union officials to prevent unlawful work stoppages. In addition, the employer intimated his dislike of the union when he told his employees that without a union they would have “more overtime that [they] could work.”<sup>44</sup> These anti-union statements and the absence of contractual duties led to the NLRB’s holding that the employer’s selective discipline of union officials for strike participation discriminated against employees holding union office. The employer’s conduct, therefore, contravened the plain meaning of section 8(a)(3).<sup>45</sup> The NLRB concluded that an employer cannot hold a union official, who participates in an unlawful work stoppage, to greater accountability for participating in the action if the bargaining agreement<sup>46</sup> does not require such accountability. With this decision,

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union employee actively fought, along with his co-workers, to get more heat to their particular work section. Subsequently, this same employee ran for union office, and wrote “Vote for Pat” in poured concrete with an automatic push rod. The employee received a thirty-day disciplinary layoff for “defacing company property” (the concrete) and the “throwing away of other company property” (the push rod). *Id.* at 487-89. The company contended before the NLRB that the employee-official was disciplined for taking part in a “disruptive and disorderly” demonstration and for “failing to follow the grievance procedure.” *Id.* at 490. The NLRB thought otherwise. Though the employee did deface and dispose of company property, his action in protesting the cold working conditions was “consistent with his duties and responsibilities as chief steward.” *Id.* Consequently, § 7 of the Act protected his actions. *Id.*

The Board’s growing insistence on either affirmative action by a union official or the presence of an express contractual provision to justify selective discipline continued in *Super Valu Xenia*, 228 N.L.R.B. 1254 (1977). There the NLRB stated that an express provision in a contract providing that the company could discharge any union member participating in a non-authorized strike justified the selective discharge of two union officials. *Id.* at 1258-61.

43. 233 N.L.R.B. 183 (1977).

44. *Id.* at 184.

45. *Id.*

46. *Id.* One author argues that this position is similar to the earlier Board decisions beginning with *Stockham Pipe Fitting* because those cases studied only the *degree* of participation of the union officials in the unlawful work stoppages. He claims that the early inquiries determined an official’s higher duty only if his action, or the bargaining agreement, warranted that finding. Though conduct formed one factor in determining a “higher duty,” the author argues it was not dispositive. Rummage, *Union Officers and Wildcat Strikes: Freedom from Discriminatory Discipline*, 4 INDUS. REL. L.J. 258, 261-68 (1981).

the NLRB removed status as a justification for unilateral discipline of union officials.

Despite subsequent NLRB decisions faithful to this rule,<sup>47</sup> the proposition that discriminatory discipline of union officials is impermissible absent explicit contractual duties did not enjoy uniform acceptance by the federal courts.<sup>48</sup> Courts in the Seventh,<sup>49</sup> Eighth,<sup>50</sup>

47. See, e.g., *McGuire and Hester*, 268 N.L.R.B. 37 (1983); *Brunswick Corp.*, 267 N.L.R.B. 68 (1983); *Consolidation Coal Co.*, 263 N.L.R.B. 1306 (1982); *Metropolitan Edison Co.*, 252 N.L.R.B. 1030 (1980), *enforced*, *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *aff'd*, 460 U.S. 693 (1983); *Rogate Industries*, 246 N.L.R.B. 898 (1979); *Midwest Precision Castings Co.*, 244 N.L.R.B. 597 (1979); *Gould, Inc.*, 237 N.L.R.B. 881 (1978), *enf. denied*, *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1981).

In both *Gould* and *Metropolitan Edison* Board Member Penello voiced vigorous dissents to the majority position. "As I emphasized in my dissenting opinion in *Gould*," Penello wrote, ". . . my view is that a union official who acquires a battery of benefits and protections because of his position with the union must be held accountable to fulfill certain duties and responsibilities inherent in that position of authority. . . ." *Metropolitan Edison Co.*, 252 N.L.R.B. at 1031 (1980) (Member Penello, dissenting). These duties do not necessarily derive from the official's status alone; rather, how that official behaves in spite of that status determines the possible existence of a duty. *Id.* at 1031. Status, Penello believes, creates two distinct duties:

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 action may be explicitly stated, as it was in *Gould*, or may merely be implicit in the no-strike provisions of the contract, as is the case here. . . . 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.

*Id.*

But see *Chrysler Corp.*, 232 N.L.R.B. at 475 n.20 (rejecting the negative leadership concept). This position by Penello does not advocate selective discipline based solely on status, but rather permits such disciplines where status is combined with action (negative or affirmative). The practical result differs little from the restrictive results of *Stockham*.

48. As one Board Member notes, "[I]t is fair to say that the Board's holding in [*Precision Castings*] met, at the outset, with something less than enthusiastic approval from the Courts of Appeal. . . ." Zimmerman, *The NLRB and the Courts: Mutual Respect is Overdue*, 1982 LAB. L. DEVS. 53. This Board Member further concluded:

When two similarly situated employees participate in the same conduct and the one who is a union officer is disciplined while the other is not, it seems clear that the employer has discriminated between them based on the fact of one being a union officer. Thus, some courts incorrectly focused on the employer's justification for disciplining the stewards, rather than on whether it had a lawful basis for

and District of Columbia<sup>51</sup> Circuits held such discipline to be proper given the inherent duties of union officers to act in accordance with no-strike agreements. This rationale did not convince the Courts of Appeal in the Third<sup>52</sup> and Fifth<sup>53</sup> Circuits which held that the existence of specific contractual provisions were determinative in establishing higher duties upon union officials to uphold the bargaining agreements. This dichotomy among the circuits on the issue of the applicability of the *Precision Castings* proscriptions established an issue ripe for Supreme Court review.

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singling them out for discipline as against rank-and-file employees who participated in the same job action. . . . Despite the unfriendly reception . . . the Board has persevered in its position.

*Id.* at 54-55.

49. See *Indiana & Mich. Elec. Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1978) (employer may consider employees' union status in deciding the discipline to be administered; selective discipline was not inherently destructive because it kept union officials from deliberately engaging in clearly unlawful conduct). But see *C.H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981) (imposition of selective discipline on official who tried to avert a strike although contract imposed no specific duties held "inherently destructive" of employee rights); cf. *Caterpillar Tractor Co. v. NLRB*, 658 F.2d 1242 (7th Cir. 1981) (employer may impose greater discipline on union official if the official's status is one of several factors in reaching that decision).

50. See *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981) (court cites *Indiana & Michigan Electric* in overruling Board and permitting discipline for acts committed while employee held union office). See generally Comment, *Selective Discipline of Union Officials: NLRB v. Armour-Dial, Inc.*, 23 B.C.L. REV. 155 (1981) (court correct in deciding that where there is no duty to act differently, no selective punishment is proper).

51. See *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1981) (court reverses Board's decision and upholds selective discipline of a union committeeman who failed to take affirmative steps to end a wildcat strike). But see *Szewczuga v. NLRB*, 686 F.2d 962 (D.C. Cir. 1982) (union official must lead a strike in violation of explicit contractual provision to warrant harsher discipline by employer).

52. Compare *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *aff'd*, 460 U.S. 693 (1983) and *Hammerhill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981) (no selective discipline permitted where contract imposes no extra duties and union officials took reasonable steps to prevent work stoppages) with *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U.S. 890 (1981) (selective discipline of union officials allowed where contract specifically details the duties of union officials). See generally Note, *The Dismissal of a Union Official for Participation in an Unauthorized Work Stoppage is Not Inherently Destructive of Important Employee Rights and, Consequently, Do Not Violate Section 8(a)(3) of the National Labor Relations Act*, 49 GEO. WASH. L. REV. 411 (1981) (*Gould* court erred by not considering employer's intent as well as the effect of his conduct).

53. See *NLRB v. South Cent. Bell*, 688 F.2d 345 (5th Cir. 1982) (when no-strike clause imposes no special duties upon union stewards, employer may not discipline them more harshly than rank-and-file).

The incorporation of the *Precision Castings* “contractual”<sup>54</sup> doctrine into the federal framework came in the Supreme Court’s decision in *Metropolitan Edison Co. v. NLRB*.<sup>55</sup> Justice Powell, writing for an unanimous Court, held that absent an explicit contractual duty on the part of union officials to prevent unlawful work stoppages or a “clear and unmistakable” waiver by the union, an employer may not unilaterally impose harsher discipline on union officials than that imposed on rank-and-file employees.<sup>56</sup> To reach this holding the Court applied the balancing test articulated in *Great Dane Trailers*<sup>57</sup> and concluded that an invasion of an employee’s section 7 rights outweighs the justification that the company had a right to freedom from unauthorized strikes and that union officials had a duty to actively pursue that end.<sup>58</sup> The Court merged the *Precision Castings* rule into this balancing test by asserting that the imposition of such an implied duty would place the official in an untenable dilemma, forcing him to weigh his own job security as an employee against the respect that his union status demands from his subordinates in the union.<sup>59</sup> As a result, the Court labeled Metropolitan Edison’s conduct “inherently destructive” of protected employee rights because it discouraged

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54. See *supra* notes 44-47 and accompanying text.

55. 460 U.S. 693 (1983).

56. *Id.* at 703. In addition, the Court dismissed the company’s contention that the union’s acquiescence to prior arbitral decisions created a union waiver of its right to assert no greater duty for its officials. *Id.* at 706 (citing *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974)). Although a union may make a “clear and unmistakable” waiver through acquiescence, the employer must show a clear line of decisions to which the union acquiesced. *Id.* at 709 n.13 (citing *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 221-22 (1979)). The Court determined that two prior decisions fail to create a binding waiver. 460 U.S. at 710. This position comports with the *Precision Castings* requirement that no higher duty exists absent explicit union acceptance of such a limitation. *Id.* at 702.

The Court’s underlying theory provides that waiver of statutorily protected rights is permissible if the waiver does not subvert the premise of “fair representation.” *Id.* at 706. Selective discipline as a means to enforce the no-strike provision is “ancillary” to the union’s promise not to strike. *Id.* A union may waive the right to be free from such employer actions in the same manner as it may waive the right to strike. *Id.* See Note, *Selective Discipline of Union Officials After Metropolitan Edison Co. v. NLRB*, 63 B.U.L. REV. 473 (1983) (discussing origins of Court’s waiver analysis).

57. See *supra* notes 33-37 and accompanying text.

58. 460 U.S. at 701.

59. *Id.* Practice manuals advising a management readership recognize this problem. See, e.g., S. CABOT, LABOR MANAGEMENT RELATIONS ACT MANUAL § 16.02 (1978) (the union steward “must advocate the employees’ point of view, which places him in constant conflict with supervisors and other management representatives”).

qualified employees from holding union office. The unfair leverage given to the employer thus violates section 8(a)(3).<sup>60</sup>

It is not surprising that the Court adhered to the guidelines set forth in *Great Dane Trailers* when confronted with discriminatory discipline of union officials. The unanimity of the Justices reflects a judicial satisfaction with the balance struck by the *Great Dane Trailers* Court and exposes a confidence that such a balance is the appropriate method to apply to employer discrimination cases. After *Metropolitan Edison*, a mere no-strike clause clearly fails to impose higher duties upon union officials. Furthermore, inactivity by an official in the face of a contractual violation forms an insufficient basis for harsher discipline. While the Board resolved this issue in *Precision Castings*,<sup>61</sup> it was not received enthusiastically around the circuits.<sup>62</sup> Because of the Supreme Court's resolution of this conflict, employers in the future may bargain for the inclusion of affirmative duties clauses in collective bargaining agreements.<sup>63</sup>

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60. 460 U.S. at 704-05. See also Brief for Respondent 27, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). See generally Note, *supra* note 19 (if extra duty imposed by employer is unreasonable, it might deter workers from seeking union positions because of the risk of greater penalties if a work stoppage occurs).

61. See *supra* notes 43-47 and accompanying text.

62. See *supra* notes 49-53 and accompanying text. See generally 18B T. KHEEL, *LABOR LAW* § 12.04 (1972 & Supp.) and cases cited therein.

63. See Yaffe, *The Protected Right of the Union Steward*, 23 *IND. & LAB. REL. REV.* 483 (1970). The Supreme Court's decision shows under what circumstances past arbitration decisions may determine whether or not a union waiver exists. The Court stated that the arbitrator's decision may be binding if the arbitrator finds that the contract clearly and unmistakably imposes affirmative duties on union officials. 460 U.S. at 709 n.13. Even absent this specific arbitral finding, "where there is a clear and consistent pattern of arbitration decisions the parties . . . may be said to have incorporated the decisions into their subsequent bargaining agreements." *Id.* As a result, employers will negotiate for an explicit union waiver in a collective bargaining contract. Unions, on the other hand, will contest each unsuccessful round of arbitration lest their silence be interpreted as acquiescence to the rulings given by the arbitrators. Because the court does not say how many arbitration decisions suffice to impose a "binding waiver," unions will contest each to insure that their silence does not work against them at a later date. This prediction is bolstered given the tendency among arbitrators to find that union officials have special responsibilities to employers by virtue of their official status. One Board Member commented before the Twenty-Ninth Annual Institute on Labor Law:

Simply put, the preeminent national labor policy favors peaceful resolution of labor disputes through mutually agreed upon means. One of these means is mandatory arbitration, the quid pro quo for which is a no-strike obligation. . . . Reflecting the key role played by union officials in effectuating the no-strike obligation by both direction and example, arbitrators have almost universally ac-

Despite this decision, union leaders may not ignore completely the terms of collective bargaining agreements. The Court appears to equivocate when it notes that a remark made by a union official may carry greater significance than if uttered by a rank-and-file employee.<sup>64</sup> This suggests that in at least one situation a union official's status may constitute a factor, though not the sole factor, in the employer's decision to discipline.

Furthermore, the *Metropolitan Edison* decision leaves untouched the basic remedies available to employers hurt by unlawful union conduct. The union as a whole risks liability for damages resulting from an unlawful work stoppage.<sup>65</sup> An employer also may punish union members and officials as employees for breaching the contract by going out on strike, as long as the punishment is uniform.<sup>66</sup> This proposition, mandated by the *Metropolitan Edison* Court, apparently allows an employer to discipline the offending work group as a whole more harshly in response to inactivity of union officials in effecting a resolution of the dispute. Finally, the Court does not rule whether

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knowledge over the years that these officials have a higher duty to abide by and enforce a no-strike obligation. In other words, arbitrators recognize the great practical deterrent value of the employer's ability to discipline union officials and its necessity in minimizing disruption. By the way, the arbitrators generally do not look to specific contractual language spelling out a higher duty for union officials but derive it from the no-strike obligation and what is sometimes referred to as "industrial common law."

Hunter, *Recent Developments before the NLRB*, 1983 LAB. L. DEVS. 167, 202 (1983) (footnotes omitted). See generally Leahy, *Arbitration, Union Stewards and Wildcat Strikes*, 24 ARB. J. 50, 53 (1969).

64. 460 U.S. at 699 n.6 (citing *Midwest Precision Castings Co.*, 244 N.L.R.B. 597, 598 (1979)).

65. A union is liable for damages only if it authorized or ratified the strike. 29 U.S.C. § 185(b) (1982). The Act authorizes union-imposed sanctions against union members. *Id.* § 158(b)(1)(A). See, e.g., *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (Court upholds union fines of members crossing picket line); see generally Fishman & Brown, *Union Responsibility for Wildcat Strikes*, 21 WAYNE L. REV. 1017 (1975) (encouraging application of the *Allis-Chalmers* rationale to union discipline of members engaged in wildcat strikes). The *Metropolitan Edison* decision may promote self-imposed union discipline of its members who violate union rules concerning wildcat strikes. Unions have at their disposal a wider range of disciplinary measures than employers, including the ability to fine members. A bargaining agreement that provides for union handling of employee dereliction in certain matters would enhance a union's reputation for integrity and reduce labor-management friction, for employees will more likely respect the edicts of their union than the proscriptions of employers. After all, "[i]t is the union, and not the employer, which is directly injured when the leader is derelict in his duty. . . ." Note, *supra* note 19, at 1020.

66. See *supra* note 20 and accompanying text.

selective discipline is appropriate for a union officer who promotes or takes an active role in the unlawful activity.<sup>67</sup> Recognition of this narrow breadth, coupled with the Court's assertion that a union may bargain away the rights of union officials in collective bargaining,<sup>68</sup> means that an employer may obtain realistic means to secure compliance with the general terms of the contract.<sup>69</sup>

At the heart of the Court's rationale rests the desire to maintain equality between the parties in the bargaining process.<sup>70</sup> Pursuant to *Great Dane Trailers*,<sup>71</sup> the Court seeks to regulate employer conduct and, if necessary, purge that conduct of all vestiges of anti-union sentiment. The Court's desire to promote the adversarial system of employer-employee relations through collective bargaining agreements formed a premier policy consideration in the *Metropolitan Edison* decision.<sup>72</sup>

To withstand future scrutiny by the NLRB and the courts, an employer must selectively discipline only in accordance with a bilateral agreement that explicitly permits selective discipline of union officials. This will intensify the bargaining process as both employers and unions seek to delineate the duties of union officials and the proper scope of employer responses to the officials' actions. The parties' actions, measured against the agreement, will become determinative in employer discrimination cases. With this in mind, *Metropolitan Edison Co. v. NLRB* provides a framework under which

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67. See Yaffe, *supra* note 63, at 487. See, e.g., *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981); *University Overland Express, Inc.*, 129 N.L.R.B. 82, 92 (1960) (officials disciplined because of their active participation in bringing about a strike).

68. 460 U.S. at 707.

69. *Id.* See also Note, *Discriminatory Discipline of Union Representatives for Breach of their "Higher Duty" in Illegal Strikes*, 1982 DUKE L.J. 900, 935.

70. 460 U.S. at 708. See also Brief for Respondent at 22, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). As with all bargaining agreements, self-interest motivates the parties. This interest is a fundamental tenet of employer-employee relations. See A. SMITH, *WEALTH OF NATIONS* 66 (Mod. Lib. ed. 1965) ("The Workmen desire to get as much, the Masters to give as little as possible, the former are disposed to combine in order to raise, the latter to lower the wages of labour."). See also Skelton, *Economic Analysis of the Costs and Benefits of Employer Unfair Labor Practices*, 59 N.C.L. REV. 167 (1980).

71. 388 U.S. 26 (1967). See *supra* notes 35-39 and accompanying text.

72. 460 U.S. at 708.

each side can monitor the other within effective and discernable boundaries.

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