Indiana & Michigan Electric Company *and* Local Union No. 1392, International Brotherhood Of Electrical Workers, AFL–CIO. Case 25–CA–10346

23 January 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 17 December 1979 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The stipulated facts in brief are as follows. The Union and the Respondent have a collective-bargaining agreement which covers, inter alia, the line department of the Respondent's Marion-Muncie Division. This agreement contains an article entitled "Mutual Responsibilities," to wit:

MUTUAL RESPONSIBILITIES

Section 1. It is the mutual desire of both parties hereto to provide for uninterrupted and continuous service; therefore,

a. The Company agrees that while this Contract is in effect, there shall be no lockout of the Employees of the Company.
b. The Union agrees that while this Contract is in effect none of its members will cause, directly or indirectly or participate in any strike, or stoppage of work of the Company.

Section 2. The Union agrees that, in the event of a violation (other than lockout) of the provisions of the foregoing paragraph, it will in good faith and without delay publicly disavow such violation, exert itself to bring about a quick termination of such violation and insist that the employee or employees involved cease such violation. To that end the Union will promptly take whatever affirmative action is necessary. If the Union has not authorized, participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation.

On 21 August 1978 about 15 employees in the line department engaged in an unauthorized work stoppage in violation of the collective-bargaining agreement. The Union's highest official at the division, Unit Chairman Baldridge, along with two stewards, Maxwell and Ridley, participated in the work stoppage. Baldridge and Maxwell ceased work shortly after the walkout began. Ridley failed to report to work after discovering that the line department employees had left the premises. None of the union officials instigated the work stoppage.

On 25 August 16 line employees received suspension notices and/or warning slips from the Respondent. Baldridge received only a written warning for failing to report to his supervisor before leaving, but was not suspended because the Respondent's investigation revealed that his failure to report to work on 21 August was for the purpose of attempting to get the striking employees to return to work. Two employees received 5-day suspensions because they induced other employees to participate in the work stoppage. The remaining employees, except for Maxwell and Ridley, received 3-day suspensions essentially for participating in the work stoppage. Maxwell and Ridley received 5-day suspensions for participating in the stoppage in "total disregard of your obligation as a Union Steward."

The judge in effect concluded that by holding the union stewards to a higher standard of conduct than other rank-and-file employees the Respondent violated Section 8(a)(3) and (1) of the Act. We disagree.

The issue was considered recently by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In *Metropolitan Edison*, the Court held that an employer may impose greater discipline on union officials only when the collective-bargaining agreement and circumstances surrounding the collective-bargaining relationship indicate the union has waived its officials' Section 7 rights to the extent that the officials have an affirmative duty to prevent illegal work stoppages.[1] There the parties' collective-bargaining agreement contained a general no-strike/no-lockout clause. Two earlier arbitration awards had interpreted a similar clause as imposing a higher duty on union officials to enforce the no-strike obligation. These arbitration awards, however, were rendered under prior contracts, and the agreement in force at the time of the alleged unfair labor practice contained a provision stating that "[a] decision [by an arbitrator] shall be binding . . . for the term of *this* agreement" (emphasis added). 460 U.S. at 709. In this context the Court held that the union had not clearly and explicitly waived the Section 7 rights

[1] *Metropolitan Edison*, 460 U S at 698

of its employee officials. Therefore, the employer violated Section 8(a)(3) by disciplining the employee officials for failing or refusing to take affirmative steps to end the unlawful work stoppage.

While finding that the union had not bound the union officials to enforce the no-strike clause, the Court concluded that since "[n]o-strike provisions, central to national labor policy, often have proven difficult to enforce"[2] a "union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages."[3] Indeed, the Court found that a union lawfully may bargain away the statutory protection accorded union officials in order to secure gains it considers of more value to its members, and that such contractual obligations promote labor peace and clearly fall within the range of reasonableness accorded bargaining representatives.

With regard to the specificity required for a finding that a union has waived union officials' rights, the Court found on the record before it that there was no showing that the parties intended to incorporate the two prior arbitration decisions into the subsequent agreement, particularly in light of the provision restricting the binding effect of arbitration decisions to the term of the agreement. Accordingly, the Court considered that the general no-strike clause alone was insufficiently clear to constitute a waiver. Nevertheless, the Court stated that arbitration decisions may be relevant to establishing waiver of the statutory right in question either when an arbitrator has stated that the bargaining agreement clearly and unmistakably imposes an explicit duty or when there is a clear and consistent pattern of arbitration decisions which may be said to have been incorporated in subsequent agreements.[4] The Court thus held that a waiver may be established by circumstances surrounding the collective-bargaining relationship as well as by the language of the agreement itself. "Assessing the clarity with which a party's duties have been defined . . . will require consideration of the specific circumstances of each case."[5]

Turning to the instant case, we find a contract clause which unequivocally requires the Union to disavow publicly an unlawful strike and take whatever affirmative action is necessary to bring about a quick termination of such a strike. To find that this clause imposes no greater duty on union officials than they would have without it would be to misconstrue both the scope and intent of the Supreme Court's opinion in *Metropolitan Edison*. Nothing in the Supreme Court's opinion in *Metropolitan Edison* or the Third Circuit decision which it affirmed indicates that the courts intended to require specificity with regard to the naming of union officials as opposed to specificity regarding what affirmative action can be expected of the union by and through its officials in the event of an unlawful strike. Indeed, all indications are to the contrary.

The Supreme Court defined the question before it as follows: "[W]hether an employer unilaterally may define the *actions* a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply."[6] (Emphasis added.) One need only look at the facts in *Metropolitan Edison* to interpret this statement. There, unlike here, the no-strike clause was merely a general clause which imposed *no* affirmative obligation on the union. Moreover, the union officials who were disparately disciplined, unlike those in the instant case, *did* take conscientious affirmative steps to bring the walkout to an end—though not the steps the employer deemed necessary. In particular, the courts focused on the employer's decision that the union officials must cross the picket line, a requirement the courts regarded as especially problematical for union officials and possibly counterproductive in terms of ending the walkout. Nowhere is there any indication that the courts were concerned with an employer unilaterally determining which officials, if any, should represent the union. That the courts did not express such a concern is not surprising—it has long been well established that a union, like an employer, acts through its agents.[7] Indeed, it would be a radical departure from longstanding precedent to hold that contractual or other obligations imposed on unions or employers must be explicitly designated as the responsibility of specified officials or agents. Nor is it surprising that the courts consistently used the term "union officials" instead of "union" when describing the specificity necessary for a waiver of Section 7 rights. The union cannot act *but* through its agents.[8]

[2] Id at 707
[3] Id at 707
[4] Id at 709 fn 13
[5] Id at 709

[6] Id at 700

[7] Indeed, since the 1947 amendments to the Act, Sec 2(2) has defined the term "employer" as including "any person acting as an agent," and Sec 8(b) has applied to acts committed by "a labor organization or its agents." As Senator Taft stated, "What is a labor organization? It is an organization with officers, exactly like a corporation." 93 Cong Rec 4142 (1947), reprinted in 2 Leg Hist 1026 (LMRA 1948)

[8] Although the Board specifies that a union's "officers, agents, and representatives" are responsible for effectuating the Board's order, this fact is of little relevance since the Board inserts a similar provision referring to "officers, agents, successors, and assigns" in its orders against employers. And, no one would question seriously the responsibility of an employer's officials for carrying out the employer's obligations, contractual or otherwise. See *Riley Aeronautics Corp*, 178 NLRB 495, 501 (1969)

Thus, we conclude that the Supreme Court in *Metropolitan Edison* found that affirmative action cannot be required of the union and its officials unless such a requirement is bargained for. Nevertheless, in our view the Court clearly left open the question of what contractual language would suffice to constitute such a waiver. The Court merely held that the general "no-strike" language in that case was not enough. Here, the contract unequivocally imposed an affirmative duty to take steps to terminate the unlawful walkout. Since Union Stewards Maxwell and Ridley here not only took no action to halt the work stoppage but actually participated in it, we need not speculate as to what particular language would be necessary to require those union officials to take particular actions. Clearly, Maxwell and Ridley have not fulfilled their contractual obligations even under the most narrow construction of this contract.

In view of the foregoing, we find that the Union has clearly assumed the duty to attempt to prevent unlawful strikes and has thereby waived its employee officers' Section 7 protection from the Employer's disparate discipline for failing to do so. Accordingly, we find that the Respondent has not violated Section 8(a)(3) and (1) by disparately disciplining Stewards Maxwell and Ridley, and we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Fort Wayne, Indiana, on August 27, 1979, based on an unfair labor practice charge filed on November 13, 1978, by Local Union No 1392, International Brotherhood of Electrical Workers, AFL-CIO (the Union), and a complaint issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on December 20, 1978 [1]

The complaint alleges that Indiana & Michigan Electric Company (Respondent) violated Section 8(a)(1) and (3) of the Act by discriminatorily disciplining union stewards for their participation in an unprotected work stoppage. Respondent, by its timely filed answer, denies the substantive allegations of the complaint.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

On the entire record, including the stipulations entered into by the parties, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is an Indiana corporation engaged at Fort Wayne, Indiana, and other locations within the States of Indiana and Michigan in the production, sale, and transmission of electrical energy as a public utility. Jurisdiction is not in issue. The complaint alleges, Respondent has admitted, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent has admitted, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

The Union represents certain employees of Respondent in four separate units, each having its own collective-bargaining agreement. The events involved in this case occurred in Muncie, Indiana, at Respondent's Marion-Muncie Division.

The collective-bargaining agreement for Marion-Muncie in effect at the time involved herein provided at article III as follows:

> MUTUAL RESPONSIBILITIES
>
> Section 1. It is the mutual desire of both parties hereto to provide for uninterrupted and continuous service, therefore,
>
> a. The Company agrees that while this Contract is in effect, there shall be no lockout of the Employees of the Company.
> b The Union agrees that while this Contract is in effect none of its members will cause, directly or indirectly or participate in any strike, or stoppage of work of the Company.
>
> Section 2. The Union agrees that, in the event of any violation (other than lockout) of the provisions of the foregoing paragraph, it will in good faith and without delay publicly disavow such violation, exert itself to bring about a quick termination of such violation and insist that the employee or employees involved cease such violation. To that end the Union will promptly take whatever affirmative action is necessary. If the Union has not authorized,

[1] Pursuant to an Order dated August 3, 1979, this case was consolidated for hearing with Case 25-CA-8593 involving the same parties but distinct issues, and the two cases were presented seriatim However, as resolution of the issues involved in Case 25-CA-8593 may potentially be affected by, and must therefore await, disposition of the Employer's petition to the Supreme Court for a writ of certiorari in the substantially similar case of *Indiana & Michigan Electric Co*, 229 NLRB 576 (1977), Supplemental Decision and Order at 235 NLRB 1128 (1978), enfd 599 F 2d 185 (7th Cir 1979), and as the issues of this case arise under Sec 8(a)(3) and (1) of the Act, affect individual employees, and are subject to immediate resolution, I have determined, sua sponte, to sever the two cases for decisional purposes in order to avoid unnecessary delay

participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation

The Union's highest official at the Marion-Muncie Division was its unit chairman Phillip Baldridge. Six employees served as union stewards. Baldridge and two of the stewards, Robert Maxwell and Keith Ridley, worked in the line department, the department involved in the instant dispute

On August 21, 1978,[2] about 15 employees in the line department engaged in an unauthorized work stoppage in violation of the collective-bargaining agreement. The work stoppage lasted from 8 a.m. until 7:30 the following morning.

Baldridge and Maxwell participated in the work stoppage to the extent that both ceased work and left Respondent's premises shortly after the walkout began. Ridley participated to the extent that he failed to report to work at his scheduled starting time on that day after discovering, on his arrival, that the line department employees had left the premises. The work stoppage was not instigated by either Baldridge, Maxwell, or Ridley.

On August 25, Respondent issued disciplinary suspension notices and/or warning slips to 16 line department employees (a 17th discipline was issued in error and was subsequently rescinded). Of these, Unit Chairman Baldridge received merely a written warning for failing to report to his supervisor before leaving the premises, but no suspension because the Company's investigation revealed that his failure to work on August 21 was for the purpose of attempting to secure the return to work of the striking employees Two employees, not union officers or stewards, received 5-day suspensions because the Employer believed that they had induced other employees to participate in the work stoppage. The remaining employees, except for Ridley and Maxwell, received 3-day suspensions for "Participating in a stoppage of work on August 21, 1978, in direct violation of Article III of the Agreement and the Company's Rules of Conduct" Union Stewards Ridley and Maxwell received 5-day suspension notices stating:

> Participating in a stoppage of work on August 21, 1978 in direct violation of Article III of the Agreement and the Company's Rules of Conduct. Your participation indicated a total disregard of your obligation as a Union Steward, to uphold the provisions of the Agreement to which the Union is a party and to refrain from condoning, by your own actions, the violation of that Agreement.

During the investigative interviews conducted with Ridley and Maxwell, Respondent informed them that, as stewards, they had a greater responsibility than the rank-and-file employees to stop an unauthorized work stoppage in violation of the collective-bargaining agreement and to secure the return of the striking employees. Based on those interviews, it was stipulated, Respondent had reason to believe that neither Ridley nor Maxwell took any action to secure the return to work of the striking employees.[3]

The employees served the suspensions assessed against them.

B. *The Prior Case*

The parties stipulated that *Indiana & Michigan Electric Co.*, 237 NLRB 226 (1978), enf denied 599 F.2d 227 (7th Cir 1979), involved the same parties and the same issue, arising from an earlier unauthorized work stoppage in violation of the collective-agreement at a different location and in a different bargaining unit.[4] In that earlier case, the Board, adopting the administrative law judge's decision, rejected Respondent's contention that "stewards and the union officials have a greater responsibility to the Employer than do ordinary rank-and-file members to uphold the collective-bargaining agreement particularly Article III, and that Article III should be construed as to set forth that union officials are to be subject to a more severe punishment for breach of same" It refused to require, as urged by Respondent, that the contract should be read so as to require stewards to take positive action to halt unauthorized work stoppages. The Board decision was based on its earlier holding in *Precision Castings Co*, 233 NLRB 183 (1977). Therein, the Board had stated, at 183–184, as follows:

> The fact that the disciplined employees participated in an unauthorized strike in breach of a valid contract provision does not legitimatize Respondent's action in this situation Respondent's freedom to discipline anyone remained unfettered so long as the criteria employed were not union-related. In the case before us, however, Respondent admits that the reason for selecting these five employees for discipline was that each held the position of shop steward and, therefore, under the terms of the contract, could assertedly be held to a greater degree of accountability for participating in the strike. However, discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand.

[2] All dates hereinafter are 1978 unless otherwise specified

[3] In a similar unauthorized work stoppage in violation of the contract occurring on April 24, among other employees of the Marion-Muncie Division, all participating employees, including stewards, received warning notices The steward of that department, who participated in the work stoppage, received no greater discipline than the other employees "since the Respondent has reason to believe that the steward took efforts to secure the return to work of striking employees"

[4] The only distinguishing factor between that case and the instant case was that in the "Mutual Responsibilities" article of the contract involved in the earlier case there was no language requiring the Union to "promptly take whatever affirmative action is necessary to "bring about a quick termination of" a work stoppage in violation of the agreement The article involved in the earlier case provided that the Union agreed "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 position held by them with the Company"

As noted, the Court of Appeals for the Seventh Circuit denied enforcement to the Board's Order in the *Indiana & Michigan Electric* case The court stated (599 F.2d at 232):

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe 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 destructive of important employee rights

The Board did not seek certiorari review in the Supreme Court.

C. *Analysis and Conclusions*

The Board has repeatedly stated, "Under [our] consistent policy it is the Administrative Law Judge's duty to apply established Board precedent which the Board or the Supreme Court has not reversed." *Club Cal-Neva*, 231 NLRB 22, 23 fn. 5 (1977), and cases cited therein. See also *Ford Motor Co.*, 230 NLRB 716 (1977),[5] where the Board, at 718 fn. 12, stated:

> By relying on U.S. court of appeals' decisions which are contrary to applicable Board precedent, the Administrative Law Judge in this case has committed an error. It is not for an Administrative Law Judge to speculate as to what course the Board should or would follow where a circuit court has expressed disagreement with the Board's views. That is the province of the Board alone. It remains the Administrative Law Judge's duty to apply established Board precedent which the Supreme Court or the Board has not reversed

I am therefore bound to follow the relevant Board precedent on the issues raised herein.

While, as noted, the Board in the earlier case herein found *Precision Castings* controlling and determinative of an 8(a)(3) and (1) violation, Respondent contends that the Board's most recent decision on this question, *Midwest Precision Castings Co.*, 244 NLRB 597 (1979), evidences a modification of the Board view. Respondent argues, based on that latter case, that "all members of the Board now appear to recognize that a union steward may, under appropriate circumstances, be held to 'a higher standard of conduct than rank-and-file employees.'" I cannot agree that this is the import of *Midwest Precision Castings*. The Board expressly distinguished the steward's conduct in that case from the conduct of the union officers in both *Precision Castings* and *Gould Co.*, 237 NLRB 881 (1978). In *Midwest Precision Castings* the Board specifically found that the steward "urged support of and sought to induce employee participation in an unauthorized, illegal work slowdown" and held that the employer did not violate Section 8(a)(1) or (3) of the Act by disciplining the steward for engaging in such conduct. No such involvement existed in the original *Precision Castings* case or in the *Gould* case and none exists herein. I must therefore conclude that this case is governed by the Board decisions and rationale in *Precision Castings* and *Gould.*

In the instant case, unlike the situation in the prior *Indiana & Michigan* case, the contract provided that "the Union will promptly take whatever affirmative action is necessary" to bring about a quick termination of any violation of the no-strike, no-work-stoppage clause. That language is similar to the contract language involved in *Precision Castings*, supra, which required the union to "take all reasonable steps to restore normal operations" in the event of a work stoppage. It is less precise than the language contained in the *Gould* contract, which specifically provided that the union, its officers, and representatives should immediately order employees participating in an unlawful work stoppage to return to work. The Board in both *Precision Castings* and *Gould* held that the greater discipline assessed upon the union officers was not validated by such contractual provisions. In *Gould* it stated:

> The contract is binding between the Employer and the Union, but does not grant the Employer the power to enforce it by discharging union officials. The Employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances.

That rationale is specifically supported by the contract language involved herein, which provides: "If the Union has not authorized, participated in or condoned such violation and fulfills its obligations under this paragraph with respect to any such violation, the Company agrees that it will not sue the Union for any damages resulting from such violation." It is implicit from such contract language that the contemplated recourse available to the Employer for breach of the Union's no-strike obligations is through the courts in an action against the Union, as an entity, and not in such self-help measures as Employer-imposed discipline on union officers and stewards.

It is axiomatic that organizations, such as labor unions, must have officers in order to function. Individuals assume the responsibilities of organizational office expecting to shoulder certain burdens and to derive certain tangible and intangible benefits *from the organization.* In so doing, they subject themselves to the discipline *of the organization.* They should not have to fear that those with whom they must deal as representatives of their organization will similarly have the power to unilaterally

[5] Both *Club Cal-Neva* and *Ford Motor* involved decisions of the circuit courts of appeals for the circuits in which the employers' facilities were located

impose discipline. The Board has recognized this, stating (in the context of grievance processing) that the master-servant relationship does not carry over to the dealings between the employer and the employee when the employee is acting as a union representative; at such times, there are only company representatives on the one side and union representatives on the other. See *Crown Central Petroleum Corp.*, 177 NLRB 322, 323 fn. 4 (1969). The possibility that an employee might suffer a penalty exacted out of his or her job tenure for what an employer perceives to be a misuse of union office or a breach of its contract *with the union* would, I am convinced, act as a powerful deterrent to an employee's willingness to assume or actively pursue a leadership role in a union.

Accordingly, I find that by holding union officers and stewards to a higher standard of conduct than other, rank-and-file, employees, and by disciplining Maxwell and Ridley more severely than it disciplined rank-and-file employees who engaged in identical improper conduct, Respondent has discriminated against them because of their roles in the Union and has necessarily discouraged employees from holding union office. Such conduct is inherently discriminatory and destructive of important Section 7 rights and, even absent any showing of specific union animus, violates Section 8(a)(3) and (1) of the Act. See *NLRB v. Great Dane Trailer*, 388 U.S. 26 (1967), and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). See also *Crown Central Petroleum Corp.*, supra.

CONCLUSIONS OF LAW

1. By giving more severe discipline to Robert Maxwell and Keith Ridley than was given to other employees who participated in the August 21, 1978 violation of the contractual no-strike provision, because said Robert Maxwell and Keith Ridley were stewards for Local Union No. 1392, International Brotherhood of Electrical Workers, AFL–CIO, Respondent has violated Section 8(a)(3) and (1) of the Act.

2. The unfair labor practice enumerated above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily assigned greater discipline to Robert Maxwell and Keith Ridley by suspending them for longer periods of time than other employees who participated in the work stoppage of August 21, 1978, Respondent shall be required to make them whole for any loss of pay they suffered by reason of this discrimination. Any backpay found to be due shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[6]

[Recommended Order omitted from publication.]

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).