Harsher Discipline for Union Stewards than Rank-and-File for Participation in Illegal Strike Activity

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HARSHER DISCIPLINE FOR UNION STEWARDS THAN RANK-AND-FILE FOR PARTICIPATION IN ILLEGAL STRIKE ACTIVITY

Indiana & Michigan Electric Co. v. NLRB
599 F.2d 227 (7th Cir. 1979)

In Indiana & Michigan Electric Co. v. NLRB, the United States Court of Appeals for the Seventh Circuit decided that discriminatory discipline of union stewards for participating in an unlawful strike was proper employer conduct. This decision denied enforcement of an order issued by the National Labor Relations Board which had held that such conduct was an unfair labor practice. In an era of increasing employee unrest, the Indiana decision has important implications for management and labor alike. From a management standpoint, it may provide an effective deterrent against unlawful strike activity. From a labor standpoint, it may create an obstacle in finding people willing to undertake the position of union steward. Despite the fact that this decision may have such far-reaching impact, the Seventh Circuit failed to consider fully the legal and policy considerations underlying its conclusion. This case comment will examine those considerations and conclude that the Indiana result was a desirable one, but that the Seventh Circuit diluted the strength of its decision by relying too heavily upon its own incorrect view of Board policy.

HISTORICAL BACKGROUND

Section 8(a)(1) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer to interfere with the right of employees to engage in union activities. Section 8(a)(3) further provides that it shall be an unfair labor practice for an employer to discriminate against employees in a manner that would either encourage or discourage membership in any labor organization. A violation of section 8(a)(3) constitutes a derivative violation of section 8(a)(1).

1. 599 F.2d 227 (7th Cir. 1979).
8(a)(1) when the employer's acts serve to discourage union membership or activities.6 The central purpose of these provisions is to protect employee self-organization and the process of collective bargaining from disruptive interference from employers.7

The National Labor Relations Board was created to implement these provisions and to remedy any violations thereof.8 To accomplish these objectives, the Board is authorized to promulgate rules of general or particular applicability which also have future effect.9 A decision of the Board may be appealed to the circuit courts to determine whether it was supported by substantial evidence on the record as a whole, or as in the instant case, whether it was a proper application of the law.10

Historically, the tension between the Board and the circuit courts has been acute because the Board's power of enforcement depends upon enforcement decrees issued by the federal circuit courts of appeals.11 This tension is evident in the different interpretations the Board and the circuits have placed upon the discrimination guidelines established by the United States Supreme Court in *NLRB v. Great Dane Trailers, Inc.*12 In *Great Dane*, the employer had refused to give accrued vacation pay to striking employees but announced its intention to pay such benefits to strikers' replacements, returning strikers, and employees who had not struck. The Board felt that such discriminatory conduct was violative of sections 8(a)(1) and 8(a)(3).13 The Fifth Circuit did not find a violation.14 The Supreme Court reversed and held that the action was an unfair labor practice primarily grounded in section 8(a)(3), which specifically requires that in order to find a violation the Board must find discrimination and a resulting discouragement of

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6. Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 486 F.2d 837, 845 (8th Cir. 1973), cert. denied, 416 U.S. 938 (1974). In Indiana & Michigan Elec. Co. v. NLRB, 599 F.2d 227, 227 n.2 (7th Cir. 1979), the court stated that the opinion of the administrative law judge in the original hearing of the same case did not reflect a determination that there was an independent violation of section 8(a)(1), and that the Board did not contend that the court should treat the two separately. Therefore, the same proof was required to show a violation of either section.


9. 5 U.S.C. § 551(4) (1976). This section defines "rule," in part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ."


14. 363 F.2d 130 (5th Cir. 1966).
union membership.\textsuperscript{15}

The \textit{Great Dane} Court further held that, where unfair labor practices are at issue, the finding of a violation depends upon whether the discriminatory conduct was motivated by anti-union animus. The Court established a two-tier test to determine if such improper purpose was present. The first tier of that test provided that, in situations where the employer's conduct was inherently destructive of important rights, no proof of anti-union animus would be required. Where the existence of such conduct is established, the Board can find an unfair labor practice even if the employer introduces evidence that its conduct was actually motivated by business considerations. The second tier of that test provided that, in situations where the adverse effect of the employer's discriminatory conduct was relatively slight and the employer came forward with evidence of legitimate and substantial business justifications for its actions, anti-union animus must be proven before the Board can find an unfair labor practice.\textsuperscript{16} The Court found that the employer's conduct in \textit{Great Dane} was inherently destructive of important employee rights and, hence, constituted an unfair labor practice.

\textit{The Inherently Destructive Test}

Since the formulation of the two-pronged \textit{Great Dane} test, there has been considerable confusion in its application. In applying the first tier of this test, the courts have found that the phrase "inherently destructive" is not easily defined, and cases finding violations under this standard are relatively rare.\textsuperscript{17} It is generally acknowledged, however, that actions creating visible and continuing obstacles to the future exercise of employee rights are inherently destructive.\textsuperscript{18} In addition to the \textit{Great Dane} fact situation,\textsuperscript{19} there are several other employer activities which have been found to be inherently destructive. Among them are the permanent discharge of employees for participation in protected union activities;\textsuperscript{20} the guarantee of superseniority to strikebreakers;\textsuperscript{21} the refusal to bargain with a duly-elected union, coupled with the em-

\textsuperscript{15} 388 U.S. at 32.
\textsuperscript{16} \textit{Id}. at 33.
\textsuperscript{17} Loomis Courier Serv. Inc. v. NLRB, 595 F.2d 491, 495 (9th Cir. 1979).
\textsuperscript{18} \textit{Id}. \textit{See also} Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1333-34 (9th Cir. 1976).
\textsuperscript{19} The United States Court of Appeals for the Seventh Circuit found inherently destructive employer action under the same factual circumstances as those in \textit{Great Dane} in \textit{System Council T-4} v. NLRB, 446 F.2d 815 (7th Cir. 1971), \textit{cert. denied}, 404 U.S. 1059 (1972).
\textsuperscript{20} Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).
ployer's coercive activities to prevent formation of that union;22 the employer's policy of assigning returned strikers to the least desirable shifts on a non-rotating basis;23 and the discharge of a large number of employees, including some union leaders, during a union organizing campaign.24 In each of these cases, the reviewing courts found that the employer actions in question were discriminatory on their face and that the employer must be held to have intended the foreseeable result—the discouragement of union membership.25

On the other hand, there are several types of actions which have been found not to be inherently destructive of employee rights. In Waterbury Community Antenna, Inc. v. NLRB,26 for example, the United States Court of Appeals for the Second Circuit held that the discharge of a temporary employee upon completion of the job for which he had been hired was not inherently destructive. While on its face such a termination might not be suspect, the employee in Waterbury had been an active union organizer during his temporary tenure. When the Board reviewed the case, it found that the employer's actions had discouraged other employees from joining the union, and the Board found a violation.27 Upon appeal to the Second Circuit, this finding of employee discouragement was not contested.28 Therefore, the Waterbury court focused its attention on the Board's proof of discrimination.

The Waterbury court recognized that, although the general rule is that the burden of proof of discriminatory intent rests with the Board, there are some instances where no proof is required. When the conduct of the employer is of such a nature that it carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent," the court held that it would assume that the "real motive" of the employer was anti-union animus and that his conduct was of an inherently destructive nature.29 However, the court held that there was nothing inherently destructive about the discharge of a single employee for cause, even if that employee was a union activist. Since it was clear that the employee in question would have been fired regardless of his union status,

22. NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970).
26. 587 F.2d 90 (2d Cir. 1978).
28. 587 F.2d at 96.
29. Id. at 98.
the court held that there had been no violation. The court stated that it is well-established that employees who are active in union affairs do not thereby obtain a special immunity from ordinary employment decisions.\textsuperscript{30}

However, in describing the inherently destructive tier of the *Great Dane* test, the Second Circuit misinterpreted what should be the result when an employer claimed a business justification for his conduct. The *Waterbury* court stated that, where the employer asserts such justification for layoffs, some basis for concluding that they were motivated by anti-union animus must be shown.\textsuperscript{31} The *Waterbury* court seemed to be shifting the burden of proof back to the Board once the employer has asserted a business justification for his conduct. However, the Supreme Court clearly stated in *Great Dane* that, where the employer's conduct falls within the inherently destructive category, there is no additional proof required of the Board.\textsuperscript{32} Even if the employer comes forward with a valid business justification, the Board is still free to draw the inference of improper motive from the inherently destructive conduct itself.\textsuperscript{33}

In *Portland Willamette Co. v. NLRB*,\textsuperscript{34} the Ninth Circuit held that the employer's refusal to give retroactive pay raises to strikers who had not returned to work by a specified date was not inherently destructive of protected employee rights. In *Portland*, the employees had gone on strike over the issue of retroactive pay raises. Although this issue was never formally resolved, most of the strikers returned to work with the permission of their union. The employer proceeded to give retroactive pay raises to those employees who had returned to work by a specified date. Those employees who had returned after that date were reinstated with all seniority rights, but did not receive the retroactive raises. The Board found that limiting the retroactive raises to those on the payroll as of a specified date was inherently destructive of the employees' right to strike.\textsuperscript{35} The Board made this finding even though it also found that the employer neither foresaw nor intended anti-union consequences.\textsuperscript{36}

On appellate review, the Ninth Circuit observed that the cases in which the employer's conduct had been found to be inherently destruc-

\textsuperscript{30} Id. at 97.
\textsuperscript{31} Id.
\textsuperscript{32} 388 U.S. at 33.
\textsuperscript{33} Id. at 33-34.
\textsuperscript{34} 534 F.2d 1331 (9th Cir. 1976).
\textsuperscript{35} Id. at 1333-34.
\textsuperscript{36} Id. at 1334.
tive involved conduct with far-reaching effects tending to hinder future bargaining or which discriminated solely upon the basis of participation in strikes or union activity. The court held that in the Portland case the effect of the conduct complained of—granting retroactive raises to workers who had returned to work by a specific date—was limited to a particular instance and was not comparable to the continuing consequences of such actions as granting superseniority to strike-breakers. The Portland court further found that, since the employer clearly did not intend its action to serve as a cut-off date for the strike, there was no basis upon which the Board could find that the employer's action bore its own indicia of illegal intent.

This last conclusion of the Portland court is a further confusion of the standards set forth in Great Dane. The Portland court applied a subjective standard to determine the intent of the employer. However, the Great Dane standard for finding intent is an objective one. The inference of intent under Great Dane is drawn from the nature of the employer's questioned conduct rather than from what he was feeling at the time the conduct occurred. In sum, the Great Dane focus is on the conduct which bears the indicia of intent, not on the employer's subjective intention.

In Loomis Courier Service, Inc. v. NLRB, the United States Court of Appeals for the Ninth Circuit held that it was not inherently destructive of employee rights for a financially troubled employer to move one of its offices outside the geographical boundaries of the local union. The Loomis court overruled the Board on the grounds that the Board's factual finding that the employer's actions were coercive was not substantially supported by the record. In support of this conclusion, the Ninth Circuit stated that the facts presented were equally susceptible to a contrary interpretation. Moreover, the court concluded that the employer had reasonably accounted for each circumstance at issue. There are two problems with this decision. The first is that where the facts are equally susceptible to two reasonable views, the circuit court is bound to adhere to the Board view, even though it might have decided the case differently in an independent proceeding. The second problem is that the Great Dane Court explicitly stated that the

37. Id.
38. Id.
39. Id.
40. Id.
41. 595 F.2d 491 (9th Cir. 1979).
42. Id. at 499.
43. See NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970).
Board need not accept employer justification where inherently destructive behavior has been found. Thus, the Ninth Circuit should have upheld the Board's findings.

Similarly, in *NLRB v. Moore Business Forms*, the Fifth Circuit found inherently destructive behavior but only in the absence of a showing of an "overriding business purpose justifying the invasion of union rights." And, in *System Council T-4 v. NLRB*, the Seventh Circuit stated that withholding accrued benefits from strikers was inherently destructive unless the employer could prove a legitimate purpose.

Thus, the number of cases purporting to apply the first tier of the *Great Dane* test is both small and generally confused. While the Supreme Court has stated that inherently destructive behavior may be violative of the Act despite a showing of legitimate business purpose, the circuit courts have tended to be more lenient by allowing employers' business justifications to overcome the "indicia of intent" associated with their actions.

**The Anti-Union Animus Test**

The second tier of the *Great Dane* test involves situations where the adverse effect of an employer's discriminatory conduct is comparatively slight. In such cases, if the employer comes forward with evidence of legitimate and substantial business justification for the challenged conduct, actual anti-union animus must be proven. This part of the test has caused the sharpest split between the circuit courts and the Board, as well as among the circuits themselves.

When the employer has asserted a legitimate business reason for its actions, the Board's position has been that any anti-union motivation, regardless of its relative insignificance, is sufficient for a finding of a violation of the Act. Thus, whenever legal and illegal motives exist concurrently, the Board finds a violation. The Board recognizes that the First and Ninth Circuits refuse to accept this view, but perceives at least a majority of the remaining circuits to be in accord with its position.

The position adopted by the United States Court of Appeals for

44. 574 F.2d 835 (5th Cir. 1978).
45. 446 F.2d 815, 819 (7th Cir. 1971), cert. denied, 404 U.S. 1059 (1972).
48. Id.
49. Id.
the First Circuit regarding the second tier of the Great Dane test is illustrated by its holding in NLRB v. Wells Fargo Armored Service Corp. In Wells Fargo, the First Circuit stated that "the Board must find that anti-union animus was the dominant motive for the [employer's conduct] and that it would not have taken place 'but for' such animus." In Liberty Mutual Insurance Co. v. NLRB, the First Circuit chastised the Board for repeatedly refusing to follow the dominant motivation test established by that court. By failing to do so, the Board caused needless litigation because the court would routinely deny enforcement of any Board order which was based upon a partial motivation test.

The Ninth Circuit takes the same position as the First Circuit. In Western Exterminator Co. v. NLRB, the court stated that where a discharge was motivated by multiple factors, the central issue is: "How significant of a role must the anti-union animus play . . . in order to constitute a violation of section 8(a)(3)?" The court answered this question by holding that anti-union animus must be the predominant motive involved in the employer's actions. In so holding, the Western Exterminator court overruled a Board order. The Board and the court had analyzed the facts in identical fashion, but they had drawn disparate conclusions. The Board had found a violation because illegal motivation was "at least part" of the basis for the employer's conduct. This test was not acceptable to the court, which maintained that the illegal motivation must be the predominant one in order for a violation of section 8(a)(3) to be found.

While the remaining circuits do not take as strong a position against the Board's partial motivation analysis, it is clear that the circuit courts are not as likely as the Board to find a violation when the employer's anti-union motivation is relatively insignificant. In NLRB v. Computed Time Corp., the Fifth Circuit discussed the two major considerations to be followed in determining violations of the Act where there has been no inherently discriminatory behavior. The first was that management is the complete master of its own business affairs

50. 597 F.2d 7 (1st Cir. 1979).
51. Id. at 10.
52. 592 F.2d 595 (1st Cir. 1979).
53. Id. at 606 (Aldrich, J., concurring).
54. 565 F.2d 1114 (9th Cir. 1977).
55. Id. at 1117.
56. Id. at 1118.
57. Id. at 1119.
58. 587 F.2d 790 (5th Cir. 1979).
and has total freedom to make business decisions with one exception: it may not act when the real motivating purpose is to do something which the Act forbids.\textsuperscript{59} The second consideration was that the burden of proof is upon the Board to present evidence that the employer's conduct was the result of improper motives.\textsuperscript{60} By speaking of the purpose, rather than a purpose, the court suggested that the illegal motivation must be more than merely a contributing factor to the employer's disputed actions. Furthermore, the court did not state that a violation would be found where improper motive exists regardless of its insignificance, but rather that the conduct in question must be the result of improper motives. This suggests a much more stringent test than that employed by the Board.

The Fourth Circuit, in \textit{American Manufacturing Associates, Inc. v. NLRB},\textsuperscript{61} took exception to a Board finding that an employer's reasons for discharging his employees were "pretextual." The court held that "[w]hen an employer has, as did the employer in this case, a perfectly valid reason to discharge or discipline an employee, . . . the Board [must find] an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one."\textsuperscript{62} By emphasizing the choice of one reason over the other, the court indicated that, in order to find a violation of the Act, the good reason must have been subordinated to the bad one.

Similarly, in \textit{Edgewood Nursing Center, Inc. v. NLRB},\textsuperscript{63} the Third Circuit stated that an employer violates the Act if anti-union animus was the "real motive" for his actions. The burden is on the Board to prove that the employer's asserted business justifications for his actions were pretextual. Again, this language denotes a more stringent test than that applied by the Board.

Even though the remaining circuits purportedly apply a "partial motivation" analysis,\textsuperscript{64} it is recognized that determining whether anti-union animus was at least part of the motivation behind an employer's actions can be very difficult.\textsuperscript{65} A burden of proof is imposed upon the Board to demonstrate explicitly that an improper motive contributed to

\textsuperscript{59} Id. at 795.
\textsuperscript{60} Id.
\textsuperscript{61} 594 F.2d 30 (4th Cir. 1979).
\textsuperscript{62} Id. at 36.
\textsuperscript{63} 581 F.2d 363 (3d Cir. 1978).
\textsuperscript{64} See Head Division, AMF, Inc. v. NLRB, 593 F.2d 972 (10th Cir. 1979); NLRB v. Gogin, 575 F.2d 596 (7th Cir. 1978); Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977); NLRB v. Broyhill Co., 514 F.2d 655 (8th Cir. 1975); NLRB v. Advanced Business Forms Corp., 474 F.2d 457 (2d Cir. 1973); Metropolitan Life Ins. Co. v. NLRB, 330 F.2d 62 (6th Cir. 1964).
\textsuperscript{65} Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977).
the employer's action. Thus, even in circuits where partial anti-union motivation is sufficient for finding a violation, the courts do not apply this test mechanically. The courts are much more likely than the Board to take legitimate business interests into consideration and give them added weight in making their determinations.

**INDIANA & MICHIGAN ELECTRIC CO. v. NLRB**

**Facts of the Case**

*Indiana & Michigan Electric Co. v. NLRB* involved a work stoppage engaged in by fifty members of the International Brotherhood of Electrical Workers in violation of a no-strike clause in the union's contract with the employer electric company. Five union stewards falsely informed their supervisors that they were ill and left with the other strikers. That afternoon three of the stewards returned to work in an effort to end the strike, but the two other stewards did not. All of the strikers returned to work the next morning. The company took the following disciplinary action: the rank-and-file participants received a written warning; the three stewards who belatedly aided the effort to end the strike each received a one-day suspension; and the two stewards who did not try to end the strike each received a three-day suspension.

The union filed charges with the Board alleging that the disciplinary action against the five union officers constituted a violation of sections 8(a)(1) and 8(a)(3) of the Act, and the Board issued a complaint. The administrative law judge held that the company's actions discriminated against the five union officers solely upon the basis of their position with the union and issued an order accordingly. The Board affirmed. On appeal, the United States Court of Appeals for the Seventh Circuit refused enforcement.

68. Id. at 736.
69. 599 F.2d 227 (7th Cir. 1979).
70. Although the Seventh Circuit referred to four stewards and one union officer, the record of the proceedings before the administrative law judge shows that all five suspended employees were stewards. *Indiana & Michigan Elec. Co.*, 237 N.L.R.B. 226 (1978).
71. 599 F.2d at 229.
72. Id.
74. 599 F.2d at 228.
The Seventh Circuit's Holding

The court’s denial was based upon two lines of reasoning: first, that the Board had not met the standard espoused by the Supreme Court in *Great Dane*; and second, that the Board’s decision was a departure from its own precedent and erroneous.

The *Indiana* court stated that the unfair labor practice in the instant case was grounded primarily upon section 8(a)(3). The court assumed that disciplining union stewards or officers more severely than rank-and-file members for participating in an illegal strike constituted discriminatory conduct for purposes of the *Great Dane* test. The court found that the Board has relied solely upon the “inherently destructive” nature of the employer’s actions and accordingly determined that “the narrow issue before us is whether the employer’s conduct was inherently destructive of important employee rights.”

The Seventh Circuit held that the employer’s actions were not inherently destructive of employee rights. The court reasoned that the more severe punishment was not based solely upon the union officials’ status but upon their breach of the higher responsibility that accompanies that status. The court further stated that until recently the Board had been in agreement with the proposition that the higher responsibilities of union officials justified disciplining them more severely for participating in unprotected activity. The *Indiana* court held that recent Board decisions to the contrary represented a departure from that view and were erroneous. The court further held that the employer action in the instant case at most deterred union officials from deliberately engaging in clearly unlawful conduct and, therefore, the employer’s action was not violative of the Act.

ANALYSIS

In *Indiana & Michigan Electric Co.*, the Board issued a summary judgment based upon its view that its decision in *Precision Casting*...
Co.\textsuperscript{82} was controlling. In \textit{Precision}, five shop stewards were suspended for three days as a result of their participation in an unlawful strike. None of the rank-and-file members were disciplined in any way. The Board held that the employer's freedom to discipline remained unfettered so long as the criteria involved were not union-related. The employer admitted that the basis for selecting these particular employees for discipline was their position as shop stewards but contended that, under the terms of the contract, they could be held to a greater degree of accountability for participating in the strike. The Board held that discrimination directed against an employee on the basis of his or her holding union office was contrary to the plain meaning of section 8(a)(3) and would frustrate the policy of the Act if allowed to stand. Thus, in \textit{Precision Casting}, the Board had articulated a rule that prevents employers from disciplining union officials more harshly than rank-and-file members, even for unlawful strike activity, when that discipline is based upon the employee's union status.

It has been well-established by both the Board and the courts that an employer may lawfully discharge an employee for engaging in a strike which is forbidden by the provisions of a no-strike agreement because such activity is not protected by the Act.\textsuperscript{83} The issue here is whether the extent of such discipline may be based upon union status.

The \textit{Indiana} court held that the employer's action in the instant case was not inherently destructive of important employee rights. The court did recognize, however, that employer action that would discourage union members from holding union office would have an inherently adverse effect upon employee rights.\textsuperscript{84} An argument can be made that such discouragement might be the result of the employer action in the instant case. If union stewards are to be more harshly disciplined for mere participation in, as opposed to leadership of, illegal strike activity, discouragement may well result. And, if such discouragement was the result of the employer's actions, definite and continuing obstacles to the employees' rights of self-organization and collective bargaining would arise. Those rights would be difficult to assert when union members are reluctant to assume leadership roles.

However, given the precedent in the area, the better view is that

\textsuperscript{82} 233 N.L.R.B. 183 (1977).
\textsuperscript{84} 599 F.2d at 230.
the employer's action in the instant case was not inherently destructive. Employer actions which have been found to be inherently destructive are those which prevent union formation or penalize employees solely because they are union members.\textsuperscript{85} As the Indiana court reasoned, the effect of this employer's conduct would be to deter further illegal activity by those charged with upholding the no-strike agreement. The Seventh Circuit stated that the discipline in the instant case was not based upon union status, but rather upon the responsibility that is attached to the position of union steward. Such action is not equivalent to those actions which would prevent union formation or penalize employees solely because of union status.

The Indiana court did not consider the second tier of the Great Dane test because the Board did not contend that the employer was motivated by anti-union animus.\textsuperscript{86} The legitimacy and substantiality of the employer's actions—assuring uninterrupted electrical service to the community—was uncontested.\textsuperscript{87} Thus, there was no basis, under either the first or second tier of the Great Dane test, upon which to find a violation of the Act.

While the first part of the Indiana decision rests upon strong ground, the second part of the decision is based upon much weaker ground. The second part of the decision deals with Board precedent and is misleading and superfluous to the decision rendered.

Basic to the Board's recent decisions concerning discriminatory discipline is its overriding policy to insulate employees' employment status from their union activities.\textsuperscript{88} That is, in cases where the Board has found that discipline was based upon an individual's union office rather than upon his conduct as an employee, the Board has found that the employer committed an unfair labor practice violative of the Act.\textsuperscript{89} The Board's position has been that the employer is free to choose whom he will hire and fire, so long as the selection is not discriminatory.\textsuperscript{90} The Indiana court interpreted the Board's decisions prior to Precision Casting Co.\textsuperscript{91} as supporting the position that disci-

\textsuperscript{85} See notes 17-25 supra and accompanying text.
\textsuperscript{86} See notes 46-49 supra and accompanying text.
\textsuperscript{87} 599 F.2d at 230 n.4.
\textsuperscript{88} NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976). The court stated: "The Act's provisions were designed to permit workers to exercise freely the right to join unions, to be active or passive members, or to abstain from joining any union at all without imperiling their right to a livelihood." Id. at 1163.
\textsuperscript{90} American Beef Packers, Inc., 196 N.L.R.B. 875 (1972).
\textsuperscript{91} 233 N.L.R.B. 183 (1977). See notes 92-106 infra and accompanying text.
pline could be based upon union office when unlawful strike activity was involved. The court therefore held that the Precision Casting decision, upon which the Board based its Indiana decision, was erroneous and reversible. However, such an interpretation does not hold up under a careful examination of the cases.

In determining that the Board's order in Indiana was a departure from its own precedent, the Seventh Circuit began with the Board-articulated proposition that an employer having a reasonable basis for making such a distinction may discipline fewer than all unlawful strikers. The court went on to state that the higher responsibility of union officials had been considered to be such justification in cases prior to Precision Casting Co. However, it should be noted that, in all but one of the cases cited by the court of appeals as being contrary to the Board's ruling in the instant case, factors of leadership and contractual obligations played an important role not present in the instant case.

The Indiana court relied heavily upon the Board's decision in Chrysler Corp. v. Dodge Truck Plant to buttress its holding that the decision in Indiana & Michigan Electric Co. represented a departure from prior law. In Chrysler, the Board upheld the discharge of a chief steward for unlawful strike activity. In the instant case, counsel for the Board attempted to distinguish Chrysler on the basis that the chief steward of the Dodge plant had played a leadership role in that walkout, while the electric company stewards had played no active leadership role. The Indiana court dismissed that argument, citing the administrative law judge's finding, affirmed by the Board, that the Dodge steward's leadership role had been established not by any assertive actions in leading the strike but rather by his "presence during illegal strike activities." But a reading of the Board decision reveals that the discharged Dodge employee had arranged an alternate location for the strike meeting when the original site became unavailable, encouraged rank-and-file to attend the meeting, participated in that

92. The court cited J.P. Wetherby Construction Corp., 182 N.L.R.B. 690, 697 n.31 (1970), as the source for this proposition. It should be noted that in that case the disciplined steward had led the unlawful activity. This is a factor which will be seen in most of the labor cases cited by the Indiana court. Both the court and the Board cited NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 259 (1939), in support of this point. However, in that case, discrimination based upon union status was not at issue. There, all striking employees were offered reinstatement if they reapplied within a certain time period. All those who reapplied were rehired with the exception of two employees, neither of whom were union officers. The Supreme Court merely upheld an employer's normal right to select its employees.
93. 599 F.2d at 230.
95. 599 F.2d at 230.
96. 232 N.L.R.B. at 475.
meeting, and played an active leadership role.\textsuperscript{97} In fact, the Board stated: "It is clear that if the factional activity was not completely under his [the chief steward’s] control at the beginning, it was certainly his show by the end of the evening."\textsuperscript{98} The steward also was given a warning prior to the walkout concerning the consequences should he participate. In its findings, the Board stated that the severity of this discipline in comparison to that received by other members was easily explained by his active leadership role.

Thus, it appears that the Indiana court’s dismissal of this distinction was not justified. For while it is clear that, when a union leader instigates or incites a work stoppage, he will be subject to greater discipline than will mere participants, it is also clear that any non-officer instigators also will be subject to greater discipline.\textsuperscript{99} It does not necessarily follow that a steward or union officer who played no active leadership role in a work stoppage should be subject to greater discipline. By dismissing this leadership distinction, the Seventh Circuit denied the clear thrust of the Board’s holding in \textit{Chrysler Corp. v. Dodge Truck Plant}\textsuperscript{100} that the difference in discipline was based upon the steward’s leadership activity during the unlawful strike, not his union status.

In closing its discussion of the \textit{Chrysler} case, the Indiana court referred to the related case of \textit{Super Value Xenia}\textsuperscript{101} to further support its opinion. In that case, the chief steward was discharged, while all other strikers were reinstated after participating in an unlawful work stoppage. In upholding that discharge, the Board did not even address whether there was an unfair labor practice involved. Rather, the Board found that the steward was discharged as a consequence of participating in an unauthorized work stoppage contrary to the provision of that union’s collective bargaining agreement. In that agreement, there was a specific clause which provided that "the employer had authority to impose proper discipline, including discharge, in the event the steward has taken unauthorized strike action. . . ."\textsuperscript{102} Where the union leader has greater responsibility to the employer by contract provision, the issue of whether he is subject to greater discipline is foreclosed by those

\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Michigan Lumber Fabricators, Inc., 111 N.L.R.B. 579 (1955); See Note, \textit{Considerations in Disciplining Employees for Participation in Violations of the No-Strike Clause}, 106 U. Pa. L. Rev. 999, 1017 (1958) [hereinafter referred to as \textit{Considerations in Disciplining Employees}].
\textsuperscript{100} 232 N.L.R.B. 466 (1977).
\textsuperscript{101} 228 N.L.R.B. 1254 (1977).
\textsuperscript{102} Id.
provisions. However, this is distinguishable from the facts of the instant case because the contract between the union and the employer had no provisions addressing the responsibilities or discipline of union stewards.

The Board decision cited by the Indiana court which most directly supports its position is Russell Packing Co. In that case, an assistant steward instigated a work stoppage by leaving his place at a conveyor belt in order to submit a grievance. Such grievances were supposed to be submitted in writing so that work would not be disrupted. The chief steward, whose discharge was in question, also left the belt to aide his assistant. There followed a brief walkout by the remaining employees working on the conveyor belt. After a short time, the chief steward returned to the work room and attempted to persuade the other workers to return to the conveyor belt. Both the assistant and chief stewards were discharged as a result of their actions. The discharge of the assistant steward was not questioned by the union because he had been the leader of the walkout. The Board upheld the discharge of the chief steward because he was the union's spokesman in the affected area and was aware that the agreement was being violated. By joining the assistant steward in seeking an immediate settlement of the grievance, he had participated and acquiesced in unprotected conduct. Thus, the Russell decision supported the Seventh Circuit's holding in Indiana that a steward may be discriminatorily disciplined for mere participation in, as opposed to leadership of, the unauthorized action.

Three more Board decisions were cited by the Indiana court in support of its decision to deny enforcement of the Board's order in the instant case. In University Overland Express, Inc., the Board upheld the discharge of a steward whom the employer had reasonable cause to believe was responsible for a work stoppage. Again, in Stockham Pipe Fittings Co., the Board recognized the leadership role of the steward, as well as the contract provisions relating thereto, as valid reasons for imposing greater discipline upon the steward. While the Indiana court recognized the Board's consideration of those employees' leadership
roles in reaching its decisions, it chose to dismiss that factor as a distinguishable consideration in reaching its own decision.\textsuperscript{110}

Finally, the Indiana court referred to \textit{Riviera Manufacturing Co.}\textsuperscript{111} as a related case which supported its position. However, in that case, the discharged steward had a history of insubordination and was ultimately fired for failing to follow management orders. His discharge was totally unrelated to his position as steward. Thus, it can be seen that, of all the Board decisions cited by the Indiana court, only \textit{Russell} supported the court's position that the Board's decision in the instant case was a clear departure from prior law.

If the Board's decision in \textit{Precision Casting Co.}\textsuperscript{112} represented a departure from Board precedent, it was in the area of disciplining union officials based upon their contractual obligation.\textsuperscript{113} As previously discussed, where a union-management contract stated specifically that union officials were responsible for averting unauthorized activity, those officials could be disciplined for their failure to do so. In \textit{Precision}, it was held that despite contract provisions stating that the union shall use every reasonable effort to terminate the unauthorized action, the employer could not hold union officials more responsible than rank-and-file. Although the Indiana court stated that union officials generally had a higher responsibility that accompanied their status, it did not base this assumption upon contractual considerations. The court did not address the contractual issue which would have been a much stronger argument in support of its position that the Board's decision was a departure from precedent and erroneous.\textsuperscript{114}

Even if the Board decision in Indiana was a departure from its own precedent, the United States Supreme Court has held that earlier precedents do not prevent the Board from adopting a different ruling in a subsequent case.\textsuperscript{115} The Court has stated that "to hold that the

\textsuperscript{110} 599 F.2d at 230-31.
\textsuperscript{111} 167 N.L.R.B. 772 (1967).
\textsuperscript{112} 233 N.L.R.B. 183 (1977).
\textsuperscript{113} The Indiana court also referred to the Board's decision in Gould Corp., 237 N.L.R.B. 881 (1978), along with the \textit{Precision Casting} decision, as representing a departure from precedent. In Gould, the Board also held that harsher discipline of union stewards for participating in illegal strike activity was an unfair labor practice. The Third Circuit recently overruled that decision in Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979). The Gould court based its decision upon the fact that the stewards were contractually obligated to enforce the no-strike clause provision of their agreement. The Gould court relied upon the Indiana decision to support its holding.
\textsuperscript{114} Although there apparently was no such provision in the Indiana contract, this is the area in which the Precision and Gould holdings represent a glaring departure from prior law. See note 106 \textit{supra} and accompanying text.
\textsuperscript{115} NLRB v. Weingarten Inc., 420 U.S. 251 (1975). In that case, the Board had held that the denial of an employee's request to have his union representative present during talks with the
Board's earlier decisions froze the development of a national labor law would misconceive the nature of administrative decision making.\textsuperscript{116} The Court further stated that "cumulative experience begets understanding and insight by which judgments are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."\textsuperscript{117}

The circuit courts have held that the Board is not bound by a rule if it subsequently determines that the reason for the rule failed and it does not act arbitrarily, unreasonably, or in violation of the Act.\textsuperscript{118} The Indiana court did not discuss whether the Board's decision fell into any of those categories. Rather, it labeled the decision a departure from precedent and seemingly equated that with error.\textsuperscript{119} However, that is not necessarily the case. Often where the Board fails to provide a rationale for its adoption of a position, or for its decision in a case, the proper course for a reviewing court is to remand the matter to the Board for explanation of its reason.\textsuperscript{120} However, a remand would be improper where the reviewing court determined that the rule or decision did not further the Act's policy.\textsuperscript{121} In the instant case, while it is clear that the court did not like the Board's decision, the court did not make clear how the decision would negatively affect the furtherance of the Act's policy. In fact, the court did not fully discuss the policy considerations involved in the discriminatory discipline of union officials. The court, however, did briefly touch upon the areas of superseniority and employer remedies. These policy considerations merit examination.

\textsuperscript{116} 420 U.S. at 265-66. While the Court upheld the Board's departure, the dissenting opinion by Chief Justice Burger stated that the case should be remanded by the court of appeals to the Board for an explanation of its change in policy. In either case, the Court did not view the departure as reversible error. \textit{Id.} at 269.
\textsuperscript{117} \textit{Id.} at 266.
\textsuperscript{118} \textit{See Metropolitan Life Ins. Co. v. NLRB}, 330 F.2d 62 (6th Cir. 1964).
\textsuperscript{119} 599 F.2d at 231.
\textsuperscript{120} \textit{See Pacific Southwest Airlines v. NLRB}, 587 F.2d 1032 (9th Cir. 1978).
\textsuperscript{121} \textit{Id.}
NOTES AND COMMENTS

POLICY CONSIDERATIONS CONCERNING DISCRIMINATORY DISCIPLINE OF UNION OFFICIALS

In a footnote in its opinion, the Indiana court cited several cases where the Board recognized that the special responsibilities of union officials justified the employer in treating them more favorably than the rank-and-file when doing so facilitated the discharge of those responsibilities. The court reasoned that, if union officers receive special consideration for performing their duties, they should also receive special discipline for not performing them.

Over forty percent of all labor contracts contain special provisions granting stewards preference in seniority rights. This special preference manifests itself in the form of "superseniority." It has been stated that the true rationale for allowing superseniority provisions is found in the important function served by the union official. Superseniority provides continuity of representation in carrying out the objectives of a collective bargaining agreement. The issue raised here is whether the harsher disciplining of union stewards, absent any leadership role or special contractual provisions, is consistent with this goal.

Strictly speaking, a shop steward is not an officer of the local. However, he is the union representative who comes in closest contact with the members. His major functions are to handle grievances which members have against their employer and to advise the rank-and-file concerning the terms of their employment contract. For these reasons, the steward experiences the full impact of potential conflict and tension in the work area. Thus, the position can be a burdensome one if taken seriously since any problem within the department becomes a problem for the steward. Aside from super-

122. 599 F.2d at 231 n.10.
123. BNA, BASIC PATTERNS IN UNION CONTRACTS 77 (9th ed. 1979).
124. See Note, Union Steward Superseniority, 6 N.Y.U. L. & Soc. Ch. 1 (1976-77). Superseniority may be granted to union stewards for purposes of lay-offs and recalls. This enables the steward to remain at work and available for contract administration and grievance processing. If the steward were laid off like an ordinary employee, the remaining bargaining unit employees would be left without a representative.
126. Id.
127. F. Peterson, AMERICAN LABOR UNIONS (1963) [hereinafter referred to as Peterson].
129. J. Barbarsh, AMERICAN UNION S' STRUCTURE, GOVERNMENT AND POLITICS 48-52 (1967) [hereinafter referred to as Barbarsh].
130. Id.
131. Seidman supra note 128.
seniority,\textsuperscript{132} stewards may receive other benefits in the form of dues remission or nominal fees.\textsuperscript{133}

From a labor viewpoint, if the employer is able to discipline a steward more harshly than the rank-and-file for mere participation in unauthorized strike activity, a burdensome position becomes even more unappealing; and the goal of continuous representation in the grievance process becomes more difficult. The argument also has been advanced by the Board that a steward's extra duties are owed to the union, not to the employer.\textsuperscript{134} Therefore, when a steward is derelict in his duty to forestall an illegal strike, the union is the aggrieved party, not to the employer.\textsuperscript{135} Discipline of the steward should be a function of the union rather than the employer.

From a management viewpoint, the primary benefit derived from a collective bargaining agreement is the promise of labor peace for the term of that agreement.\textsuperscript{136} To further effectuate the agreement, the employer may grant seniority preference to stewards to facilitate maintenance of labor peace.\textsuperscript{137} When the no-strike clause of the agreement is violated, the employer loses the essential fruits of his bargain; he is denied the only consideration which he obtained from the union in exchange for his numerous commitments.\textsuperscript{138} It can also be stated that, when a steward participates in unlawful activity, the employer loses the added assurance which he bargained for by granting steward seniority preference. In essence, the employer has granted benefits for which he has received no return. Without the ability to impose stricter discipline on union stewards, the employer is left without the assurance of tranquility for which he bargained and has no weapons to use as a deterrent against further illegal action.\textsuperscript{139} This is particularly true since the union steward is the person in the work area charged with maintaining the terms of the no-strike agreement.\textsuperscript{140}

\textsuperscript{132} This right has generally been limited to layoff and recall. Special on-the-job preferences cannot be granted to stewards because this would encourage union membership which is an unfair labor practice. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976).
\textsuperscript{133} \textit{Barbash supra} note 129.
\textsuperscript{134} See Gould Corp., 237 N.L.R.B. 226 (1978). See also Considerations in Disciplining Employees \textit{supra} note 99.
\textsuperscript{135} \textit{Id.}
\textsuperscript{137} NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976).
\textsuperscript{138} Bartlett, \textit{supra} note 136, at 118.
\textsuperscript{139} The Indiana court stated that the purpose of the employer's action was to deter stewards from further illegal acts. 599 F.2d at 230.
\textsuperscript{140} \textit{Barbash supra} note 129.
The Indiana court also stated that, absent the ability to more harshly discipline union officers for unauthorized activity, the employer is left without a remedy. However, it has been suggested by the Board and stated by several courts that the union entity itself may be liable for damages to the employer for violation of a no-strike clause by its members. Whether such potential liability existed in the instant case would depend upon a variety of factors. While this issue was never raised at any of the hearings, the possibility of union liability does suggest that there may be a remedy available to the employer other than harsher discipline of individual union officers.

**CONCLUSION**

The application of the two-tiered *Great Dane* test has been somewhat inconsistent and has created a sharp conflict between the circuit courts and the Board. Both of these factors were present in the Indiana decision. While the court expressed an obvious dislike for the Board's decision, it failed to definitively state what type of behavior would constitute inherently destructive conduct by an employer. The court's decision gave the impression that the behavior involved was not inherently destructive because the court said that it was not. The United States Court of Appeals for the Seventh Circuit had an opportunity in the instant case to pull together some of the threads that run through the "inherently destructive" body of case law but instead chose to dismiss briefly the Board's decision. This was unfortunate given the confusion surrounding this area of the law.

The Indiana court also made much of the fact that the Board's decision was a departure from its own case law and erroneous. However, there is no rule which prevents the Board from departing from its previous decisions. Furthermore, the court misconstrued some of the

141. 599 F.2d at 230 n.4. The court noted that the absence of any damage remedy against the strikers for breach of the no-strike clause made the possibility of disciplinary action the only effective deterrent to violation of that clause.


143. United States Steel Corp. v. United Mine Workers, 519 F.2d 1249 (5th Cir. 1975). This case gives a good overview of the applicable law. See also Blue Diamond Coal Co. v. UMWA, 436 F.2d 551 (6th Cir. 1970), cert. denied, 402 U.S. 920 (1971); United Constr. Workers v. Haislip Bakery Co., 223 F.2d 872 (4th Cir. 1955), cert. denied, 356 U.S. 847 (1956). Generally, for liability to be imposed upon the union, it must be shown that the union was a party to the strike.

144. Some of these factors are whether the union sanctioned, approved, or incited the strike, Penn Packing Co. v. Amalgamated Meat Cutters, 497 F.2d 888 (3d Cir. 1974); whether union agents engaged in the unlawful strike were acting within the scope of their authority, United Constr. Workers v. Haislip Bakery Co., 233 F.2d 872 (4th Cir. 1955), cert. denied, 350 U.S. 847 (1956); and the history of unlawful strikes by that union, U.S. Steel Corp. v. United Mine Workers, 519 F.2d 1249 (5th Cir. 1975).
earlier Board decisions in buttressing its conclusions that the Board was in error.

The Indiana court should have based its decision solely upon the Great Dane line of cases and dispensed with the relatively lengthy discussion of Board decisions. Given the legal precedent in this area, the Indiana decision was probably the correct one. Employer actions which have been found to be violations under the inherently destructive standard generally have been those which work to prevent union formation or to penalize employees for union activity. As the Indiana court stated, the employer's actions in the instant case served to deter further illegal acts by union stewards. However, the court diluted the strength of its decision by its ill-considered discussion of Board precedent. The Indiana decision is based more upon contempt for the Board's decision in the instant case than upon careful legal reasoning.

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