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Union Officers and Wildcat Strikes: Freedom From Discriminatory Discipline

Steven Rummage†

Since 1949 the National Labor Relations Board has hammered out a doctrine which prevents the discriminatory discipline of union officers following wildcat strikes. The Board has held that, absent an express provision in the contract, no-strike clauses do not imply an affirmative duty owed the employer by union officers to prevent and/or quell unauthorized job actions. Similarly, union officers do not have an "implied higher duty of loyalty" to the contract than do other employees. However, the Board has recognized that because of their status in the shop, union officers, by their actions, can more easily give legitimacy to a wildcat strike. Under these circumstances officers, in effect, become leaders of the strike and can be disciplined, just as any other employee who led a strike. Strong criticism from a Board minority and the courts has failed to grasp the distinctions between these different approaches to discipline of union officers. Nevertheless, the Board doctrine comports with traditional agency law and with the realities of industrial relations.

I
INTRODUCTION

One of an employer's most effective deterrents to a wildcat strike1 is the ability to discharge or discipline participating employees. Since participating in a wildcat constitutes just cause for discipline, an employer may discharge or suspend all striking employees. In practice, though, wholesale reprisals only further dislocate the employer's business. As a result, the National Labor Relations Board (the Board) has consistently held that an employer may discharge or otherwise discipline only a few of the participating workers as examples to the rest.2 Not surprisingly, leaders of a wildcat are more likely candidates for discipline than are mere participants.

1. Throughout this article, the term "wildcat" is used to describe a strike that both violates the contract and is unauthorized by the union.
Where a wildcat results from group planning or spontaneous action, however, the employer may be unable to identify leaders. In such a case, union officers become logical targets for discipline. Because holding union office is protected concerted activity under the National Labor Relations Act (the Act), selective discipline of union officers following a wildcat strike raises serious questions of possible violations of section 8(a)(3) of the Act.

In unfair labor practice proceedings brought under that section, employers have offered three conceptually distinct justifications for such selective discipline. First, they have contended that their collective bargaining agreements impose upon union officers an affirmative duty to prevent and/or quell work stoppages in violation of the contract. At various times, employers have claimed that the duty is implicit in any collective bargaining agreement and/or that the duty arises whenever a union pledges its best efforts to thwart unauthorized stoppages. Either form of the argument depends on contractual interpretation. Because employers interpret contracts as imposing duties upon stewards in their capacity as employees, they argue that the contracts have waived the stewards' right to protection from discipline based on union activity.

The second justification derives not from the terms of the contract, but rather from a "greater duty of loyalty" to the contract owed by employees who happen to be union officers. Because officers participating in a wildcat breach a "greater duty," employers reason, the punishment for their participation may be accordingly more severe.

These first two rationales therefore justify selective discipline of union officers by reference to different standards of conduct for officers than for rank and file employees. The third justification focuses not on different standards, but rather on the effect officers' status have on the nature of their conduct. This approach recognizes that actions by

4. 29 U.S.C. § 158(a)(3) (1976) states that: It shall be an unfair labor practice for an employer—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.
6. It would appear questions of contract interpretation should be decided by an impartial arbitrator rather than by the Board. Recent Board policy, however, has been to refuse to defer to arbitrators in cases arising under section 8(a)(3) of the NLRA. See General Am. Transp. Corp., 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977) (suggesting that this has been a long-standing Board policy). Accordingly, the Board has frequently engaged in contract interpretation in discriminatory discipline cases.
union officers during a wildcat may have greater impact than similar actions by rank and file employees. Accordingly, conduct by union officers during a wildcat may rise to the level of leadership where similar conduct by a rank and file employee would not.\textsuperscript{8}

The three justifications have received mixed reactions before the Board and in the courts. In \textit{Precision Castings Co.},\textsuperscript{9} a three-member Board panel found that a union's contractual undertaking to "take all reasonable steps to restore normal operations"\textsuperscript{10} in the event of a wildcat did not impose affirmative duties on union officers in their capacity as employees. Thus, a steward's failure to take preventive action could not serve as a basis for discipline. The Board found disparate discipline of the steward to be without contractual justification and impermissibly based solely on the stewards' union status. In so holding, however, the Board carefully preserved the employer's ability to selectively discipline participants in a wildcat, provided "the criteria employed were not union related."\textsuperscript{11}

Less than a year later the full Board decided \textit{Gould Corp.}\textsuperscript{12} Basing its argument on a contract clause by which the union pledged that its officers would "use every reasonable effort to terminate . . . unauthorized action,"\textsuperscript{13} the employer claimed a right to discipline a union steward for failing to make a bona fide effort to prevent a wildcat. The same three members who had decided \textit{Precision Castings} comprised the majority in \textit{Gould}.\textsuperscript{14} Following their earlier decision, they found that the contract did not impose distinct duties on the steward in his capacity as an employee. Since the steward suffered discipline "not because of his actions as an employee, but because of his lack of actions as a steward,"\textsuperscript{15} the steward's discharge violated section 8(a)(3) of the Act.\textsuperscript{16}

Board members Pennello and Truesdale vigorously dissented in \textit{Gould}. They argued that the contract created additional duties owed

\begin{itemize}
\item \textsuperscript{8} See, e.g., Midwest Precision Castings Co., 244 N.L.R.B. No. 63, 102 L.R.R.M. 1074 (Aug. 24, 1979).
\item \textsuperscript{9} 233 N.L.R.B. 183, 96 L.R.R.M. 1540.
\item \textsuperscript{10} Id. at 183, 96 L.R.R.M. at 1542.
\item \textsuperscript{11} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} The majority was comprised of Chairman Fanning and members Jenkins and Murphy. Member Truesdale dissented from the majority's finding of an 8(a)(3) violation but concurred with the majority's finding of an 8(a)(4) violation. See note 16 \textit{infra}.
\item \textsuperscript{15} 237 N.L.R.B. at 881, 99 L.R.R.M. at 1059.
\item \textsuperscript{16} Four members of the Board (Chairman Fanning and members Murphy, Jenkins and Truesdale) found that the discharge violated section 8(a)(4) of the NLRA, because it was partly based on the ground that the employee had filed charges with the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission and the NLRB without first using procedures required under the contract. Id. For a detailed discussion of this question, see the dissenting opinion of member Penello, \textit{id.} at 883, 99 L.R.R.M. at 1064.
\end{itemize}
by those employees who happened to be stewards.\textsuperscript{17} Member Penello also claimed that all collective bargaining agreements implicitly impose higher duties of loyalty on union officers.\textsuperscript{18} He asserted that the majority's position ignored a long line of Board precedent holding that union officers have a greater duty to uphold the provisions of a contract.\textsuperscript{19} Penello further contended that the "new" Board doctrine denying the existence of such contractual duties would undermine union no-strike commitments.\textsuperscript{20} Finally, both dissents argued that \textit{Gould} placed union stewards in the enviable position of having more privileges than their rank and file counterparts without concomitant responsibilities.\textsuperscript{21}

Nine months after \textit{Gould}, the Seventh Circuit in \textit{Indiana & Michigan Electric Co. v. NLRB} held that union officials "are subject to 'an even greater duty than the rank-and-file employees to uphold [the contract] provisions.'"\textsuperscript{22} The court explicitly rejected the Board's holding in \textit{Gould}. Soon thereafter, the Third Circuit refused enforcement of \textit{Gould},\textsuperscript{23} holding that the contract imposed both an implied duty of greater loyalty and a specific affirmative duty.

Despite these reversals, the Board majority still considers its decisions in \textit{Gould} and \textit{Precision Castings} to be sound.\textsuperscript{24} Much of the criticism articulated by the Board minority and the circuit courts stems from fundamental misconceptions of the majority's doctrine and the rights it seeks to protect.

As employees, union officers have the right to be free from discriminatory discipline based on their union status. That right is clearly violated if different standards of conduct or discipline are applied to officers than to other employees, unless those standards derive from clear and explicit contractual waivers of the officers' statutory rights. Union pledges that officers will use "best efforts" to avert unauthorized

\textsuperscript{17} \textit{Id.} at 882, 886, 99 L.R.R.M. at 1060-61, 1064.
\textsuperscript{18} \textit{Id.} at 885-86, 99 L.R.R.M. at 1063.
\textsuperscript{20} 237 N.L.R.B. at 883, 99 L.R.R.M. at 1061.
\textsuperscript{21} \textit{Id.} at 882, 884, 99 L.R.R.M. at 1060, 1062.
\textsuperscript{22} 599 F.2d 227, 231 (7th Cir. 1979), \textit{quoting} Stockham Pipe Fittings Co., 84 N.L.R.B. at 629, 24 L.R.R.M. at 1334 (brackets in original).
\textsuperscript{23} \textit{Gould}, Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979).
\textsuperscript{24} \textit{E.g.}, South Cent. Bell Tel. Co., 254 N.L.R.B. No. 32, 106 L.R.R.M. 1164 (Jan. 14, 1981); Miller Brewing Co., 254 N.L.R.B. No. 24, 106 L.R.R.M. 1153 (Jan. 14, 1981); Metropolitan Edison Co., 252 N.L.R.B. No. 147, 105 L.R.R.M. 1487 (Sept. 30, 1980); Rogate Indus., Inc., 246 N.L.R.B. No. 143, 103 L.R.R.M. 1085 (Dec. 11, 1979). \textit{See also} Babcock & Wilcox Co., 249 N.L.R.B. No. 99, slip op. at 4-5, 104 L.R.R.M. 1199, 1200 (May 23, 1980). Since these decisions were announced, the Eight Circuit has also apparently recognized a higher duty for union officers. NLRB v. Armour-Dial, Inc., 638 F.2d 51, 106 L.R.R.M. 2265 (8th Cir. 1981). Whether the Board will now reconsider its positions remains to be seen. \textit{See also} Section IV infra.
work stoppages cannot suffice to waive the right. Such a pledge places the union under a duty to the employer to quell wildcats. As the union's agents in the shop, union officers owe a duty to the union to assist it in fulfilling its pledge. The failure of union officers to meet their obligations to the union might, of course, result in the union's liability to the employer for breach of contract. But, unless the duty to prevent stoppages is phrased as a rule of employee conduct, the union's commitment gives rise to no special duty owed by the officers as employees to their employer.

The Board majority acknowledges, however, that while union officers' status alone cannot justify a different standard of discipline or conduct, that status inevitably colors their actions. Thus, the Board has recognized that in some circumstances conduct which would be innocent on the part of a rank and file employee rises to the level of leadership of wildcat action when committed by a union officer. In so delineating the permissible limits of discipline of union officers, the Board majority has recognized the realities of union officers' roles in the workplace. Contrary to the assertions of Board members Penello and Truesdale, this recognition did not burst forth unexpectedly in Gould. Rather, Gould is the culmination of a long developing Board doctrine.

II
DEVELOPMENT OF THE DOCTRINE: EARLY BOARD DECISIONS

The Board decision in Stockham Pipe Fittings Co. is the likely source for all three employer justifications. In that case, the Board stated:

Furthermore, we are convinced on this record that Falkner, as the admitted leader of the local, and as one of the negotiators and signatories to a valid no-strike agreement between the Union and Respondent, had an even greater duty than the rank and file employees to uphold its provisions.

From this statement one could easily conclude, as did member Penello in his Gould dissent, that the Board had held union officers to contactually implied greater duties of loyalty to collective bargaining agreements. One commentator has even argued that under Stockham Pipe Fittings "union leaders bear a greater responsibility to remedy breach of a no-strike clause," thus suggesting an implied affirmative duty owed by the employer to the union officer.

26. Id. at 629, 24 L.R.R.M. at 1334.
Close scrutiny of the Board's decision, however, demonstrates that the Board actually judged the officer's conduct by the same standard as in fact would be applied to other employees. The Board did permit the status of the union officer to enter into the evaluation of the seriousness of his conduct. This is consistent with the third employer justification which argues that a union officer's status may be considered in determining the nature of his conduct on other employees.

The Trial Examiner in *Stockham Pipe Fittings* found that the union financial secretary called a special meeting of the union officers to garner support for a walkout, knew that a strike had been approved at the meeting (although he was not present when the vote was taken), and participated in the walkout the next morning. The Board, confirming the Trial Examiner's findings, stated that these circumstances, coupled with the officer's admitted leadership of the local, belied his contention that he played no role in planning or advocating the walkout.

In reality, then, the decision in *Stockham Pipe Fittings* did not rely on the imposition of additional duties or higher standards of conduct. Rather, the Board examined the activities of the financial secretary in light of his leadership role and concluded that the officer was more than "an uninformed and innocent bystander." The Board determined that the officer was among the leaders of the wildcat. He had thus committed a breach of his duty as an employee which was sufficiently serious to justify discharge of any employee. The discipline did not result from a higher standard of conduct stemming from his union officer status.

The Board next addressed the union officer's role in unauthorized work stoppages in *University Overland Express, Inc.* In that case, the company had had a policy of calling drivers at a specified hour to make route assignments. A newly negotiated contract provided that employees who lived outside the local dialing area would be called collect. In discussing the new provision, a union steward told a group of drivers that if he were not within the local dialing area he would not accept the calls. That evening, a number of drivers refused the toll calls. Only one driver appeared at the truck terminal to accept his assignment. None of the scheduled trucks left the terminal until the union ordered the drivers back to work some ten hours later.

A grievance panel held the steward responsible for the wildcat, and he was dismissed. The Trial Examiner agreed, pointing to the

29. 84 N.L.R.B. at 643-44, 24 L.R.R.M. at 1333.
30. Id. at 629, 24 L.R.R.M. at 1334.
31. Id.
33. Id. at 87-88.
steward's influence in the shop and the apparent provocative force of his comments.\textsuperscript{34} Citing \textit{Stockham Pipe Fittings}, the Trial Examiner added that, as a union steward, the dismissed employee "had an even greater duty than [other employees]" to honor the contract, and in particular, the no-strike clause.\textsuperscript{35}

Notwithstanding the reference to the steward's unique obligations, the decision in \textit{University Overland Express} rests only on the proposition that the status of union officers may be relevant in assessing the nature of their conduct. The steward's announcement, that if necessary, he would violate the contract, was more influential than would have been a similar remark by a rank and file employee. The nature of the steward's conduct—due to its \textit{inducement effect}—rather than any special obligation he owed the employer under the contract justified the discharge in \textit{University Overland Express}.

Thus, while both \textit{Stockham Pipe Fittings} and \textit{University Overland Express} referred to special duties owed by union officers, in neither case was the inference of such duties essential to the decision. In \textit{Pontiac Motors Division},\textsuperscript{36} however, the Board was confronted with discipline which could have been justified only on a theory of breached special obligations. Rejecting the notion that such obligations could be implied without specific contractual justification, the Board ordered the employer to lift the disciplinary suspension imposed on the union committeeman in that case.\textsuperscript{37}

The committeeman had refused to persuade recalcitrant employees to work their scheduled overtime. Though he did not participate in their refusal to work, he was disciplined for failing "to fulfill his obligations as a union committeeman."\textsuperscript{38} The employer argued that a broad no-strike clause\textsuperscript{39} justified the discipline. The Board disagreed, finding that a general no-strike clause could not provide a basis for discipline of the committeeman absent participatory conduct on his part.\textsuperscript{40} The Board declined to decide whether a \textit{specific} contractual provision could

\textsuperscript{34} The Trial Examiner commented: "I find it inconceivable under all the circumstances that [the steward] was an uninformed and innocent bystander to all the events leading up to the unauthorized strike and work stoppage." \textit{Id.} at 92.

\textsuperscript{35} \textit{Id.} See text accompanying notes 25-31, supra. It was undoubtedly this single reference to \textit{Stockham Pipe Fittings} which prompted member Penello to cite the case in his \textit{Gould} dissent, 237 N.L.R.B. at 886 n.17, 99 L.R.R.M. at 1063 n.17, and led the Seventh Circuit to reply on it in \textit{Indiana & Mich. Elec. Co.}, 599 F.2d at 231.


\textsuperscript{37} \textit{Id.} at 416, 48 L.R.R.M. at 1369.

\textsuperscript{38} \textit{Id.} at 414, 48 L.R.R.M. at 1368.

\textsuperscript{39} The provision read: "The Union will not cause or permit its members to cause nor will any member of the Union take part in any strike or stoppage. . . . The Corporation reserves the right to discipline any employee taking part in any violation of this section." 132 N.L.R.B. at 414, 48 L.R.R.M. at 1368.

\textsuperscript{40} \textit{Id.} at 415, 48 L.R.R.M. at 1368.
subject union officers "to employer discipline arising solely out of their union stewardship as distinguished from their conduct as employees." It ruled simply that a general no-strike clause could not abridge any employee's statutory right to be "free from employer discipline . . . [for] union activity." This clear language foreshadows the Precision Castings doctrine, and casts doubt upon the dicta in Stockham Pipe Fittings and University Overland Express by recognizing the distinction between discipline for conduct as an employee and discipline for conduct as a union officer.

The Board returned to murkier factual waters in Russell Packing Co., but again rejected an opportunity to adopt a theory of implied contractual duties for union officers. In Russell Packing, the chief steward was discharged for helping an assistant handle a grievance during working hours. Because of the continuous nature of production in the pork packing firm, company policy forbade the processing of grievances during work hours as a way to forestall food spoilage caused by delays. Nevertheless, the assistant steward left his station to handle a grievance and the shop shut down. Although the chief steward allegedly, and unsuccessfully, instructed the conveyor belt employees to resume their work, he too joined efforts to resolve the grievance at once. A four-hour work stoppage resulted. The Board, citing Stockham Pipe Fittings and University Overland Express, found the chief steward's discharge to be lawful, concluding that he had "participated and acquiesced in the assistant steward's unprotected conduct and ratified it as his own."

The Board once again flirted with language supportive of an implied contractual duty to prevent unauthorized work stoppages. Ultimately, however, it applied the familiar behavioral standard developed in Stockham Pipe Fittings. First, the Board examined the actions of the chief steward as an employee who, unlike rank and file employees, left the work room to consult with the instigator of the stoppage to participate in the settlement of the grievance. Second, in light of the chief steward's status as "the Union's chief spokesman in the affected area," he was aware that the agreement was being violated by the unauthorized work stoppage. The Board also noted that the chief steward had failed to disavow his assistant's actions, even though "as the union's chief spokesman in the affected area, he was aware that the agreement was being violated by the unauthorized work stoppage."

41. Id.
42. Id., 48 L.R.R.M. at 1369.
43. See text accompanying notes 9-11 supra.
45. Id. at 197, 48 L.R.R.M. at 1610.
46. The Board condemned the chief steward for failing to warn his assistant "of his violation of the no-strike agreement," and neglecting "to induce [the assistant] . . . the obvious instigator of the stoppage, to return to work." The Board also noted that the chief steward had failed to disavow his assistant's actions, even though "as the union's chief spokesman in the affected area, he was aware that the agreement was being violated by the unauthorized work stoppage." Id.
47. See text accompanying notes 25-31 supra.
area," the Board concluded that his actions rendered him an ally of the instigator of the stoppage. Finding that the employer had discharged the chief steward "because of his active participation in an unauthorized work stoppage . . . ", the Board implied that any employee who had engaged in similar conduct would have been justifiably discharged. No special standard was applied to the chief steward.

The Board's analysis could be characterized as based upon the *inducement effect* of the chief steward's actions. In the eyes of rank and file employees, the chief steward's refusal to work during the settlement of the grievance was certainly more influential than would have been similar action by other employees. In contrast, the rank and file were passive participants. They simply ceased work until the grievance was settled. Under these circumstances, the chief steward's active involvement in the unprotected activity causing the stoppage rose to the level of leadership.

In *Super Valu Xenia*, the Board found that the employer lawfully dismissed two union officers who called in sick the morning of a wildcat. Although the stewards did not lead the wildcat, the bargaining agreement targeted them for special discipline for participation in unauthorized stoppages, unlike the agreements previously considered. The contract protected rank and file employees from discharge during the first 24 hours of a wildcat. Stewards were denied similar immunity by an express contractual provision which subjected a steward to "discipline, including discharge in the event the steward has taken unauthorized strike action . . . " The contract thus provided a distinctly different standard of discipline for stewards.

Notwithstanding the express contractual provision, the General Counsel argued that the employer's criterion for discharge—failure to perform duties as union officers—violated the *Pontiac Motors* rule that stewards may be disciplined only for their acts as employees. Without explanatory comment, the Administrative Law Judge (ALJ) rejected the *Pontiac Motors* argument. He upheld the dismissal, finding that the stewards had violated certain "obligations" by their partici-

48. 133 N.L.R.B. at 197.
49. *Id.*, 48 L.R.R.M. at 1610 (emphasis added).
50. *See also* text following note 35 *supra*.
52. *Id.* at 1255, 95 L.R.R.M. at 1445.
53. *Id.* at 1259.
54. *Id.* (emphasis added).
55. *See* text accompanying notes 36-42 *supra*.
56. The ALJ quoted a portion of *Pontiac Motors* stating that the contract in that case could not be construed to permit discipline of a steward for acts arising out of his stewardship; the ALJ then asserted that *Pontiac Motors* was "not controlling on this issue." 228 N.L.R.B. at 1259.
57. *Id.*
pation in the stoppage. But the ALJ specified neither the nature nor the source, contractual or implied, of these obligations.58

The ALJ’s cryptic opinion, coupled with the Board’s silent affirmation, frustrates attempts to discern the Board’s intentions in *Super Valu Xenia*. However, given the specific contractual provision singling out stewards for discipline, the case is not authority for the proposition that every contract, by implication, imposes greater duties and responsibilities on union officers.59 Instead, it must be read as simply enforcing the express contractual waiver of the stewards’ right to freedom from discipline based on their union status.60

The final case leading to *Precision Castings* is *Chrysler Corp.*,61 in which the Board upheld the discharge of a steward for his leadership of and participation in a walkout. The ALJ’s opinion, adopted by the Board, applied the *Stockham Pipe Fittings* analysis, examining the steward’s conduct, while keeping in mind the inducement effect his status lent to his actions.62 Once again, the Board concentrated on the nature of the steward’s conduct and failed to endorse a theory of implied contractual duties.

In *Chrysler Corp.*, a number of employees gathered at a bar to discuss grievances before the beginning of their afternoon shift. Upon the steward’s arrival at the bar, several employees informed him of their intent to refuse to report to work. After the time for reporting had passed, the steward arranged for a meeting place for the strikers at a nearby bar. He led the strikers to that bar, where he chaired a formal meeting concerning the grievances which precipitated the strike. This led the ALJ to comment that “if the [wildcat] was not completely under his control at the beginning, it was certainly his show by the end of the meeting.”63 The ALJ concluded:

The steward not only was engaged in an illegal walkout but . . . his presence provided this action with his active approval and encourage-

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58. The ALJ also cited, without comment, *Russell Packing*, a factually inapposite case. *Id.*
59. Nevertheless, the case was so interpreted by the Seventh Circuit in *Indiana & Mich. Elec. Co.*, 599 F.2d at 231.
60. Member Fanning apparently rejected this interpretation, concurring solely on the ground that, pursuant to the contract, the employer’s right to discharge was unreviewable after the stoppage had extended beyond twenty-four hours. *Super Valu Xenia*, 228 N.L.R.B. at 1254, 95 L.R.R.M. at 1445. In a later dissent, Fanning and Jenkins questioned whether even an express provision in a contract can waive an officer’s right to freedom from discriminatory discipline. Rogate Indus., 246 N.L.R.B. No. 143, slip op. at 9, 103 L.R.R.M. at 1087 (Fanning and Jenkins, dissenting).
62. *Id.* at 474-75.
63. *Id.* at 475.
ment, not merely negative leadership, and... Respondent had ample basis for concluding that the steward exercised a leadership role in the walkout...64

In distinguishing the steward's active participation in and leadership of the stoppage from "merely negative leadership," i.e., the failure to urge strikers to return to work, the ALJ suggested that inaction would not support discharge.65 This constituted implicit disapproval of attempts to imply affirmative contractual duties owed by union officers in their capacity as employees.66

The ALJ's analysis in Chrysler Corp. reiterated the Board's historic position on the eve of Precision Castings. In the nearly thirty years between Stockham Pipe Fittings and Chrysler Corp., the Board never explicitly sanctioned discipline of union officers based on implied contractual duties. The Board consistently held that absent expressly imposed contractual duties, union officers' susceptibility to discipline during unauthorized work stoppages arises from their conduct colored by their status, and not from their status alone.

III

Completion of the Doctrine: Precision Castings and Gould

Precision Castings differed from Chrysler in one critical respect. As the Board noted, "the suspended stewards had not been active in either calling or conducting the strike, and concededly were disciplined solely because they failed to urge the strikers to return."67 Because the Board found that the stewards were passive participants in the strike,68 the factual issues of the case lay somewhere between Pontiac Motors (discipline of a nonparticipating steward) and Chrysler (discipline of a highly active steward for leading the strike). The employer in Precision Castings endeavored to justify discipline by looking to the union's contractual agreement to "take all reasonable steps to restore normal operations" in the event of a wildcat.69 The employer claimed that this clause created a duty owed the employer by union officers thereby waiving their right to be free from discipline based on their union of-

64. Id. (emphasis added).
65. Id.
66. See text accompanying notes 38-40 supra.
67. 233 N.L.R.B. at 184 n.3, 96 L.R.R.M. at 1542 n.3.
68. The Board's factual finding seems somewhat at odds with the ALJ's finding that the suspended stewards were only those who appeared on the picket line. Id. at 197. That the Board chose to ignore this finding may reflect either the employer's insistence that discipline could be based on an affirmative duty of stewards to prevent wildcats, or simply the Board's desire to decide the question for once in an unambiguous factual context.
69. Id. at 183, 96 L.R.R.M. at 1542.
Consequently, union officers breaching the duty were properly the subject of discipline solely because of their inaction.

Citing Pontiac Motors, the Board panel rejected the employer’s argument. Implicit in the holding was a repudiation of the notion that the contract provision in question waived the union officer’s statutory right to freedom from discriminatory discipline. Absent an explicit waiver, the Board stated that a union officer could not “be held to a greater degree of accountability for participating in the strike.” The Board rejected the theory that officers owed implied duties of loyalty to the contract, as well as the theory that this particular contract created explicit affirmative duties owed to the employer. Nevertheless, the holding in Precision Castings would not preclude an employer from considering the union stewards’ status when assessing their conduct as employees to determine whether leadership was exercised.

The Gould decision was similarly narrow. Like the employer in Precision Castings, the employer in Gould rested its defense on a contractual provision in which the union pledged that its officers would “use every reasonable effort to terminate” a wildcat strike. Although the Board members disagreed on the extent of the steward’s participation in the work stoppage in Gould, the employer apparently did not argue that the steward had been a leader of the strike. The Board again faced only the question of whether the contract before it created greater obligations for union officers in their capacity as employees.

Relying on Precision Castings, the majority emphatically rejected the notion of implied affirmative duties. Such unwritten rules of conduct would permit discharge of union officers “not because of . . . actions as an employee, but because of . . . lack of actions as a steward.” Furthermore, the Board dismissed the employer’s contention that the union commitment to restrain wildcatters explicitly created such duties:

The contract is binding between the Employer and the union, but does not grant the employer the power to enforce it by discharging union officers.

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70. Id. at 184, 96 L.R.R.M. at 1542.
72. The majority admitted that the steward participated, but denied that he instigated or led the work stoppage. Id. Member Truesdale found that the steward “actively encouraged [the] continuation” of the strike, with which member Penello seemed to agree. Id. at 882, 884, 99 L.R.R.M. at 1060, 1062.
73. In support of his discharge, an internal company memorandum was produced. It cited the steward’s “particular obligation to observe the [contract]” and his failure to fulfill that obligation. Id. at 881, 99 L.R.R.M. at 1059.
74. As member Penello later observed, the “sole issue” in Gould was the question of “whether a union steward could be singled out for discipline for failing to abide by his contractual responsibilities.” Midwest Precision Castings Co., 244 N.L.R.B. No. 63, slip op. at 16, 102 L.R.R.M. 1074, 1078 (1979).
officials. The employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office.76

The Board thus recognized the "dual aspect" of the no-strike provision of a collective bargaining agreement: "it is both a rule governing employee conduct and a commitment by the union."77 The Board's reasoning demanded that the two aspects of the agreement be kept distinct. The majority held that an employee could not be disciplined for violating the union's commitment, any more than the union could be held liable for the action of a lone employee,78 though an employee could, of course, be disciplined for breaching that aspect of the rule governing employee conduct. And Gould did not preclude discipline of officers for breach of their duties where the contract specifically provided for such duties.

Because they did not accept this bifurcated view of the no-strike clause, the dissents of Penello and Truesdale naturally found that the contract imposed additional duties on union officers. Truesdale, for example, worried that refusal to impose an affirmative contractual duty on stewards to prevent or quell unauthorized job actions "would render meaningless" the union's commitment to stop wildcats. But that argument would make sense only if one assumed that union commitments gave rise to duties owed by union officers as employees. If Truesdale's theory is stripped of this assumption, he is in effect approving employer "self-help against individual union officials for a union breach of contract."80 Moreover, his dissent never responded to the majority's argument that the actions of union officers in their official capacity must be separated from acts performed in their capacity as employees. Truesdale thus assumed the most important fact in issue and proceeded to justify his position by claiming that the assumed fact was supported by a long line of Board precedent. That assertion cannot withstand a close analysis of Board cases from Stockham Pipe Fittings to Chrysler.

Member Penello's dissent attacked the majority's viewpoint as simplistic and fallacious.81 He argued that the majority failed to realize that union officers were disciplined in such cases not solely because of their union status, but because of a failure to "fulfill the duties required

76. Id.
78. The "actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question." United States v. White, 322 U.S. 694, 702 (1944).
80. Id. at 881, 99 L.R.R.M. at 1059.
81. Id. at 883, 99 L.R.R.M. at 1062.
of a union steward under the collective bargaining agreement. . . ."82 This argument, however, suffers from the same flaw as Truesdale’s dissent, as closer study of the majority opinion reveals.

While the majority admitted that the contract prescribed the “duties of union officers while acting as union officers,”83 the provision did “not grant the employer the power to enforce it by discharging union officials.”84 The majority clearly implied that the union officer, acting in an official capacity, owed no duty to the employer. Instead, the union officials owed duties only to their principal. Since the union’s commitment to “use every reasonable effort” to end wildcats did not create additional duties for the steward-as-employee, the majority reasoned that the employer should have disciplined the steward according to the same standard of conduct applicable to every other employee.

Penello’s argument that the steward was not discriminatorily disciplined since he had failed to fulfill his contractual obligations thus clearly “begs the question.”85 For one of the major issues confronting the Board was whether the contract did in fact impose such duties.

In addition, Penello’s dissent suggests deep inconsistencies in his own position with respect to the implied duties issue. For example, he cited approvingly the decision in Pontiac Motors,86 where the Board struck down the discipline of nonparticipating stewards following a wildcat. Yet if, as member Penello contends, an officer may be disciplined solely for the failure to carry out an implied duty under the contract to prevent or restrain wildcats, there is no persuasive reason to distinguish between participating and nonparticipating officers.

More importantly, Penello made no attempt to explain how the union’s contractual undertaking could subject an employee to discipline absent an express provision like that in Super Valu Xenia.87 This failure is critical, for much of Penello’s dissent rested on the premise that the union commitment to prevent wildcats did indeed create additional duties owed to employers by union officers. For example, Penello argued that no unfair labor practice had been proven because the charging party failed to demonstrate antiunion animus on the employer’s part.88 He did not address the possibility that additional duties for a union officer might be inherently destructive of employee rights, a finding which would justify an unfair labor practice charge even with-

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82. Id.
83. Id. at 881, 99 L.R.R.M. at 1059.
84. Id. (emphasis added).
85. Id.
86. Id. at 886 n.20, 99 L.R.R.M. at 1064 n.20.
87. See text accompanying notes 51-54 supra.
out a showing of antiunion animus. Certainly the application of different disciplinary criteria to those engaging in the protected activity of holding union office appears inherently destructive of the right to engage in that activity. But Penello, while not denying protected status to holding union office, sidestepped the argument. He called the employer's actions in Gould merely an attempt "to enforce a valid collective-bargaining agreement by disciplining those employees who had violated specific provisions of such agreement." To avoid dealing with the arguably destructive nature of implied additional duties, the dissent simply presumed they had been bargained into existence. Given that presumption, the company's acts appear justifiable.

Penello's next argument relied on the same faulty presumption. In his view, the majority's position permitted the union steward to acquire "benefits and protections" under the Act without assuming corresponding responsibilities. Two cases Penello cited in support of this proposition had held unlawful the discipline of union officers for the use of derogatory language at grievance meetings. These decisions rested on the notion that grievance committeemen should not suffer discipline as employees for acts performed in their official union capacity. The two roles should have been kept separate. While acting as union officers, the committeemen owed no duty to their employer to refrain from the use of such language.

A similar view underlies the majority opinion in Gould: a union officer should not be disciplined for acts or omissions in the performance of duties as a union officer. Indeed, such a result is compelled by the very cases Penello cited. To argue, in effect, that Gould should be decided differently because the derogatory remark cases already sufficiently protect union officers is, at best, perplexing. The dissent's argument might make sense if one assumed that, by failing to urge the return of the strikers, the union official in Gould breached a duty owed to the employer. But in so assuming, Penello begged the very question presented.

As further support for the argument that stewards should have responsibilities commensurate with their privileges, Penello cited two cases in which the Board approved contracts granting stewards superseniority in layoff and recall. Since these benefits were conferred

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89. See NLRB v. Great Dane Trailers, Inc., 383 U.S. 26, 32 (1967) and text accompanying notes 128-132 infra.
91. Id.
solely because of the union officer's status, Penello argued that responsibilities should also flow from that status. The opinion did not address the fact that the superseniority provisions were not implied in the contract, but had been freely negotiated by the parties with specific reference to the stewards' rights as employees. Despite the absence of specific provisions providing duties for stewards in the Gould contract, Penello once again merely assumed the contract, in fact, imposed those additional duties. Once he assumed away the central issue, his dissent argued plausibly that if the Board permitted parties to bargain for superseniority, it should also permit them to bargain for peculiar obligations for stewards in their capacity as employees. But, as pointed out earlier, the Board majority in Gould did not preclude free negotiation of such a provision. It merely held that the Gould contract contained no such provision, and that absent an express provision, the employer could not use different disciplinary criteria for union officers.

Penello's final argument sought to justify without explaining his assumptions. For example, he argued that without an affirmative duty on union officers to prevent wildcat strikes, an employer would have no effective remedy in the event of an unauthorized work stoppage. Without a remedy, Penello contended, an employer would have little reason to agree to a no-strike clause as a quid pro quo for grievance arbitration machinery. This argument explicitly rested on the premise that the union could not be sued because it had "done everything in its power to end the work stoppage." The premise lacks merit, for no one in Gould denied that the steward had failed to take all reasonable steps to end the wildcat. As the majority pointed out, this failure by the union's agent clearly gave rise to a remedy against the union.

Moreover, Penello did not explain why the search for an employer remedy should be permitted to impinge upon protected employee rights. And, in any event, examined in light of the weapons presently available to employers faced with wildcats, Penello's argument that employers will be without a remedy is weak indeed. First, employers may discipline any employee who leads an unauthorized job action. Second and more importantly, some courts have recently upheld damage suits against unions on more expansive theories of liability than were formerly accepted. Third, with the expansion of section 301 remedies against unions has come an increased, though by no means

95. Id. at 885, 99 L.R.R.M. at 1063.
96. Id. at 881, 99 L.R.R.M. at 1059.
uniform, willingness among courts to allow damage suits against individual employees who lead wildcat strikes.98

Finally, Penello justified his argument by pointing to "a long line of arbitration decisions" and "Board cases going back as far as 1949"99 which had accepted implied duties for stewards. Previous Board treatment of the issue though, as discussed above, comported with the decision in Gould. Penello's reference to arbitration decisions merits closer review. As should now be apparent, the imposition of affirmative duties on union officers depends largely upon contract interpretation. If arbitrators have routinely and uniformly held union officers to affirmative duties to enforce no-strike clauses or to greater duties of loyalty to the contract, that would provide strong support for Penello's position.

Reported arbitration decisions on this issue have frequently used language which would support Penello's view. However, as in the early Board decisions on the matter, the language used by the arbitrators is often broader than the actual holdings. While some cases undeniably hold that union officers owe implied duties under collective bargaining agreements,100 others are not nearly so clear. Despite using language supportive of Penello's position, many arbitration awards have relied instead on the inducement effect of actions taken by union officers.101 For example, on facts not unlike Chrysler Corp.,102 arbitrator Harry Platt recited various affirmative duties owed by union officers. Ultimately, though, he found that the officer's actions, as well as his inaction, gave "validity and leadership to the illegal strike and encouraged employees to continue it."103

The distinguished arbitrator Saul Wallen has stated that "union leadership has an especial responsibility to honor the pledge word of a union."104 But he also made it clear that that responsibility arises only when the steward commits affirmative acts having an inducement effect: "We do not mean to imply that an official, who, having refrained from encouraging a walkout, thereafter respects the picket line while refraining from actions designed to keep others out, falls in a different category from the rank and file participant."105 His view of the stew-

105. Id. at 1244.
ard's responsibility, like the Board's, focused on the different quality of the steward's actions, not on a higher standard of conduct. Finally, at least one arbitrator, Whitley McCoy, has adamantly refused to imply special duties which union officers owe to employers.106

Penello's characterization of arbitration decisions, then, is at best superficial. The cases show wide variation in the treatment of implied contractual duties. This divergence in views is especially significant when one considers the difference in perspectives brought to a contract by an arbitrator and the Board. The arbitrator may look only to the words of the agreement and the law of the shop. The Board must view the contract with an eye toward the rights protected by the Act. Because holding union office is protected activity, the Board must begin an inquiry with the presumption that the right to freedom from discipline based on union status has not been waived. This presumption comports with the traditional requirement that a waiver of rights under the Act be "clear and unmistakable."107 It is noteworthy, then, that even without benefit of this presumption against waiver, some arbitrators have rejected implied contractual duties. Given the presumption of non-waiver, those arbitration decisions which have found implied duties are unpersuasive authority for rejection of the Board doctrine.

In conclusion, neither a claimed lack of remedies nor past arbitration decisions justify Penello's belief that a union's agreement to halt wildcats requires officers, as part of their duties as employees, to exert pressure on fellow employees. In fact, most of his dissent follows logically only once one assumes his premise. Unfortunately, though, Penello has never offered a persuasive reason why that premise should be accepted in the first instance.

Thus, the majority properly rejected Penello's position. Gould was not a case in which the contract imposed a separate and distinct duty upon the officer as in Super Valu Xenia. Rather, in Gould the no-strike clause established "a rule governing employee conduct and a commitment by the union,"108 not a rule governing a union officer's conduct as an employee. The majority's holding that the provision did not create new obligations owed by the officer to the employer seems logically unassailable.

108. Feller, supra note 77 at 797 (emphasis added).
IV

Refining the Doctrine: Midwest Precision Castings and Armour-Dial

Gould and Precision Castings decided only two things: (1) the contracts in those cases did not impose affirmative duties on union officers; and (2) such duties could not be inferred from contracts which did not specifically provide for them. The narrowness of those holdings has been emphasized by two subsequent Board decisions. In Midwest Precision Castings, the disciplined steward had told a rank and file employee to slow down production. Although evidence showed that the steward intended her statement to be a joke, the Board upheld the disciplinary action against her. The majority opinion distinguished the case from Precision Castings and Gould by looking to “the nature of the conduct” of the steward. Since she had suggested that employees engage in unprotected conduct, she could be regarded as a leader in the slowdown, and thus well within reach of disciplinary measures. In so holding, the Board explicitly sanctioned the action of the employer in “singling out [the steward] for disparate treatment by holding her to a higher standard of conduct than other employees.”

At first glance, the decision appears to retreat from the Gould doctrine. Board members Penello seized upon this language and argued that the majority was supporting “a legal standard which, had it been applied in Gould, would have led to a different result in Gould.” He claimed, in a concurring opinion, that because “employees will of necessity look towards the steward for guidance and leadership on any issue,” actions by a steward participating in an unauthorized stoppage must be regarded more seriously than acts by the rank and file. “That,” Penello argued, “was precisely the assertion I made in Gould.”

In fact, the view taken by Penello in Midwest Precision Castings differed from his position in Gould. Recognizing the leadership role of the union officer, he concentrated on the conduct of the officer as an employee, judging her activity by the same standard as was applied to

110. Id., slip op. at 5, 102 L.R.R.M. at 1075.
111. Id., slip op. at 7, 102 L.R.R.M. at 1076. Explaining its opinion in a footnote, the Board used somewhat troubling language. It distinguished another case involving discriminatory discipline in the following manner: “Thus, unlike the instant case where [the steward’s] activity went to the spirit and letter of observance of the contractual no-strike clause, the activity engaged in by the union steward in Owens-Corning was totally unrelated to his duties as a union steward in administering the collective bargaining agreement in the plant.” Id., slip op. at 7 n.11, 102 L.R.R.M. at 1076 n.11.
112. Id., slip op. at 15 n.21, 102 L.R.R.M. at 1078 n.21.
113. Id., slip op. at 14, 102 L.R.R.M. at 1077.
114. Id.
other employees. By contrast, his dissent in Gould relied on express and implied contractual duties which, if breached, would justify discipline of stewards, but not of rank and file employees. In a concurring opinion, member Fanning clearly recognized the distinction between the arguments advanced by Penello. Applying that distinction, Fanning carefully pointed out that the steward in Midwest Precision Castings was not discharged for failing to fulfill some affirmative duty, but rather because of her action as an employee. The steward’s status entered into the determination of her discipline, but “only to the extent that status colors the impact of her action.” The steward’s status so altered the nature of her actions as to distinguish them from similar activity by rank and file employees.

In response, Penello characterized Fanning’s reasoning as circuitous: allowing the steward’s status to color her action meant that union status was the cause of the discharge. That, he asserted, was precisely what Gould found impermissible. However, Penello misconstrued the extent of the ruling in Gould. The employer there violated the Act not because it took into account the union status of the steward, but because it relied on wholly different responsibilities allegedly owed by union officers. By relying on duties which lacked contractual support, the employer in Gould applied a “legally impermissible criterion under the Act.” In Midwest Precision Castings, however, the employer disciplined the steward not because she was a steward, but because as a steward her acts could more easily be found to be leadership. And leadership of wildcats, under Board doctrine, is a permissible criterion for discipline of any employee.

Fanning’s argument also makes good practical sense. By refusing to permit application of different disciplinary criteria for a steward unless the contract expressly provides for such criteria, the Board has recognized that the steward’s relationship to the employer, as an employee, should generally be no different from that of other employees. Nevertheless, by allowing steward status to enter into an evaluation of conduct, one acknowledges that, to the rank and file, the officer’s leadership in the shop may give greater weight to actions taken by the officer because they may have “inducement effect.” It was not, then, that the standard of conduct was different for the steward in Midwest Precision Castings. Rather, the act itself was different because it

115. Id., slip op. at 10 n.16, 102 L.R.R.M. at 1076 n.16.
116. Id., slip op. at 9, 102 L.R.R.M. at 1076. Fanning recognized the potential inducement effect of an officer’s actions: “An employee who is told she ‘better slow down’ may well view it as a threat coming from a steward, while dismissing as banter the same comment from an employee.” Id., slip op. at 9, 102 L.R.R.M. at 1076.
117. Id., slip op. at 17, 102 L.R.R.M. at 1078.
was performed by a steward. The employer in *Midwest Precision Castings*, therefore, did not violate the Act, for it utilized disciplinary measures appropriate for any employee who led a strike or slowdown.

Admittedly, the Board’s statement that the employer could have used a “higher standard of conduct” when disciplining the steward was a factor in Penello’s confusion between the *Gould* and *Midwest Precision Castings* holdings. But careful study of the facts and the entire opinion yields the conclusion that the Board and Fanning’s concurrence are in accord. The Board permitted the employer to “view [the steward’s] comment . . . in a more serious manner than similar comments made by regular employees.” The context shows that the comment was more serious because of its potentially greater impact on fellow employees. The majority statement upon which Penello so heavily relies, then, seems to be little more than a careless characterization of the extent to which union status may inform an employer’s calculations when imposing discipline.

*Armour-Dial, Inc.*, is one of the Board’s more recent treatments of this difficult issue. In that case, the Board found that the suspended members of the union’s executive committee had neither led nor participated in the work stoppage. Partially relying on *Pontiac Motors*, the Board found unlawful the discipline of the members of the executive committee. In deciding that the committee members could not be disciplined for mere failure to prevent a work stoppage in which they did not participate, the Board made clear that *Gould* and *Precision Castings* left room for explicit contractual provisions imposing affirmative duties on union officers to halt unauthorized work stoppages. Such provisions might permit an employer “to discipline union officials on the basis of their failure as union officers to abide by the contract.” By once again noting that employers could bargain for contract clauses which subjected employees to discipline for their performance as union officers, the Board emphasized the narrowness of its *Gould* and *Precision Castings* decisions.

In light of the narrowing effect of *Midwest Precision Castings* and *Armour-Dial*, a brief review of the Board doctrine is warranted before evaluating its treatment by the courts. Where there is no contract provision imposing specific duties on stewards as employees, the Board has

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119. 244 N.L.R.B. No. 63, slip op. at 7, 102 L.R.R.M. at 1076.
120. Id.
122. The Eighth Circuit disagreed, finding that the executive committee members had indeed “fomented the illegal work stoppage.” 106 L.R.R.M. at 2268.
123. See text accompanying notes 36-42 supra.
124. 245 N.L.R.B. No. 123, slip op. at 4 n.8, 102 L.R.R.M. at 1442 n.8 (emphasis added).
held that the criteria employed in disciplining union officers in the context of a wildcat strike must not depend on their union status. Rather, officers may be singled out for discipline only for more severe breach of duties owed as employees. The employer may, however, consider the officers' status when assessing the impact of their conduct on other employees. If that evaluation reveals the conduct to be so akin to leadership that it would subject a rank and file employee to discipline, the employer may take disciplinary action. In other words, the Board doctrine after *Precision Castings* and its progeny appears very much like its doctrine before that controversial decision.

V

THE BOARD'S DOCTRINE IN THE COURTS

Despite the consistency in Board doctrine, the Seventh Circuit in *Indiana & Michigan Electric Co. v. NLRB* found that *Precision Castings* and *Gould* represented "a departure from prior law." In that case the five disciplined stewards had joined a walkout. Three later returned and urged other employees back to work. These stewards received one-day suspensions. The two other officials received two-day suspensions. Participating rank and file employees received written warnings. Relying on *Precision Castings* and a review of relevant Board precedents, the Administrative Law Judge found the disparate discipline to be without contractual justification and violative of the Act. The Board upheld the ALJ, rejecting the employer's argument that the broad no-strike clause in the contract imposed greater duties on union officers.

In refusing to enforce the Board's decision, the Seventh Circuit purported to follow the *Great Dane* test. Under *Great Dane*, when an employer has engaged in conduct "inherently destructive" of employee rights, the Board and the courts may infer antiunion animus and find an unfair labor practice after weighing any business justifications against the interests protected by the Act. When, on the other hand, the conduct of the employer has a "comparatively slight" effect on employee rights, and the employer has offered a business justification, the complainant must prove antiunion animus. At the outset, the court in *Indiana & Michigan Electric* assumed that the discipline of the stewards was discriminatory. Further, the Board admitted the absence of

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125. 599 F.2d 227 (7th Cir. 1979).
126.  Id. at 230.
129.  Id. at 33-34.  See also  NLRB v. Erie Register Corp., 373 U.S. 221, 233 (1963).
130. 383 U.S. at 34.
antiunion animus. Two questions, therefore, remained: How significant was the employer's business justification? How significant was the effect of the employer's actions on protected employee rights?

Answering the first question, the court stated that "[t]he legitimacy and substantiality of the business justification advanced by the employer are not contested. . . ."131 According to the court, the employer's business justifications were: (1) the "importance of assuring uninterrupted electrical service to the community;" and (2) the absence of any effective remedy besides discipline of the wildcat strikers.132 These justifications are wholly unconnected to the relevant issue. The first merely warrants some action by the employer to avert strikes. The second justifies discipline of the strikers. Neither explains, however, why the stewards had to be singled out for discipline. In sum, the employer provided no business justification for the application of disproportionate discipline.

Since the court assumed that the employer had discriminated, under Great Dane,133 the employer's failure to show a business justification should have resulted in the court sustaining the Board's position. Still, it is instructive to examine the court's treatment of the discriminatory impact of the conduct, for it showed a common misconception of the issues raised by these cases. The court held that the employer's application of discriminatory standards of conduct was not inherently destructive of protected employee rights since it merely deterred stewards from engaging in "clearly unlawful conduct. . . ."134 In essence, the court ruled that no employee engaging in unprotected conduct may claim a right to freedom from discrimination in discipline. To argue that this would not deter the exercise of protected conduct defies common sense. Under the court's rationale, a steward may be discharged for participation in a wildcat, while more active rank and filers may remain employed. Most employees would realize that it was not unprotected activity (i.e., the wildcat) which resulted in additional discipline to the steward, but rather protected activity, i.e., holding union office.

Furthermore, the court failed to grapple with the principle enunciated in Pontiac Motors that a union officer has a statutory right to be free from discriminatory discipline. At the very least, the employer's conduct should have been considered inherently destructive of that important employee right.

In addition, the court argued that the Board had misstated the is-

131. 599 F.2d at 229.
132. Id. at 229-30 n.4.
133. 383 U.S. at 34.
134. 599 F.2d at 230.
issues: "The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status. . . ." The court's statement is reminiscent of Penello's dissent in Gould. The major issue presented in each instance was whether the contract expressly or implicitly imposed higher responsibilities on union officers. Both the court and Penello assumed, without explanation, the existence of higher responsibilities as justification for the greater punishment.

The remainder of the court's opinion consisted of a superficial analysis of the Board precedents discussed earlier. The court's review of the cases suffered from the same infirmities as Penello's treatment of the subject. Neither made the distinction between allowing an employer to consider the status of union officers in evaluating their conduct and actually imposing different criteria for discipline. Both, therefore, failed to grasp that such a distinction lay at the very core of the Board's doctrine.

Nonetheless, the Seventh Circuit's opinion in Indiana & Michigan Electric Co. found considerable support in the Third Circuit decision in Gould, Inc. v. NLRB. The issues differed between the two cases, for the Seventh Circuit dealt with a contract which contained only a broad no-strike clause. In Gould, as previously noted, the union also pledged that the union officers would "use every reasonable effort to terminate . . . unauthorized action." The distinction resulted more in a difference in emphasis than in substance: the Third Circuit found an affirmative duty on the part of a union officer to prevent wildcats, while the Seventh Circuit found that officers had a higher responsibility to uphold the contract.

The decisions were fundamentally in accord, for both permitted an employer to apply different criteria in disciplining union officers, despite the absence of specific contractual authorization to do so. The Third Circuit even adopted much of the Seventh Circuit's reasoning. For example, the court in Gould expressly accepted the Seventh Circuit's specious argument that discipline based upon discriminatory criteria was not inherently destructive of employee rights since it merely deterred union officers from engaging in unlawful activities. The Third Circuit also concurred in the bootstrap argument that the officer's discipline stemmed not from his union status, but from duties imposed upon any person who happened to hold that status.

This latter argument, of course, recalls Penello's dissent in the

135. Id.
136. 612 F.2d 728 (3d Cir. 1979).
137. Id. at 730-31 n.3.
138. Id. at 733.
Board's Gould decision. But Penello's dissent never clarified how or why the union's undertaking to use reasonable efforts imposed an affirmative duty on stewards as employees. As if in recognition of this infirmity, the Third Circuit endeavored to link the union's commitment to the officer's susceptibility to discipline. Violation of the no-strike clause, the court reasoned, gave the employer the right to discipline any participant. The agreement by the union merely provided the "basis for singling out" the officer for discharge.  

The court's effort to rescue Penello's argument suffered the same flaws as the argument itself. Certainly only the breach of some duty owed to the employer could provide "a basis for singling out" an employee for discipline. Like Penello, the Third Circuit simply assumed that the contract created a duty owed by the union officer to the employer. Like Penello, the Third Circuit refused to accept that a union officer acts in two capacities: as employee and as agent of the union. Therefore, the court failed to deal with the Board's fundamental assertion that in the absence of an explicit contractual provision for additional duties owed by union officers in their capacity as employees, those officers must be disciplined by the same standards as any other employee. Only by assuming a difference in duties owed by union officers, could the court claim that the steward had in fact been disciplined as an employee rather than as a union officer.

The Eighth Circuit took a more pragmatic, albeit flawed, approach in its refusal to enforce the Board's order in NLRB v. Armour-Dial, Inc. As noted earlier, the Board in Armour-Dial found that the suspended union officials had neither led nor participated in the wildcat. Since no explicit contractual provision imposed affirmative duties on the union officials, the Board held the discipline of the union officials to be unlawful.

The Eighth Circuit rejected the Board's factual findings. The Court noted that each of the disciplined union officials attended meetings with the employer at which the union president stated that employees would refuse to handle products of one of the employer's suppliers. The court concluded that the presence of these officials at the meetings, together with their silent acquiescence in the union's position, "does constitute participation in and inducement of the work stoppage which followed." In focusing on the acts of the union officers rather than the responsibilities owed by officers to employers, the opin-

139. Id.
142. 102 L.R.R.M. at 1442.
143. 638 F.2d at 56, 106 L.R.R.M. at 2266.
144. Id., 106 L.R.R.M. at 2267-68.
ion in *Armour-Dial* represents a step forward from the rulings of the Third and Seventh Circuits. However, *Armour-Dial* is equally flawed.

First, it is absurd to claim, as the court did, that presence at a union-management meeting which preceded the work stoppage constituted participation in that stoppage. Since the court cited no evidence suggesting that the suspended union officers refused to perform work on the “hot cargo”, the lack of participatory conduct should have been obvious. Second, rank and file employees did not know what transpired at the meeting. Since they could not be aware that all of the union officers silently supported the refusal to unload “hot cargo”, it is difficult to conceive how the participation of the officials in the meeting could have induced the wildcat. On the very facts it adduced, then, the Eighth Circuit’s conclusion cannot be supported.

A recognition of the dual roles—as employees and as union officers—that union officers play provides one further reason for condemning the discipline in *Armour-Dial*. In attending meetings with management to discuss the problems giving rise to the wildcat, the union officials acted as representatives of the bargaining unit, not as individual employees. When acting in that representative capacity, union officials were under a duty to express the position of the rank and file employees on whose behalf they acted. The recognition of this duty undermines the court’s analysis. For example, the court stated that if rank and file employees indicated an intention to refuse to handle “hot cargo”, they would be subject to discipline or discharge.\(^{145}\) Assuming the truth of this assertion, it is clear that such discipline would stem from the employees’ conduct as employees. Discipline of union officers for words spoken in *representative capacities*, however, blatantly subjects them to discriminatory discipline for fulfilling the responsibilities stemming from their union status.\(^{146}\)

Thus, although the court in *Armour-Dial* found that the disciplined union officers had participated and induced the work stoppage, it cited no evidence of a refusal to work on the part of the officers or of acts tending to encourage others to refuse to work. Its factual finding is therefore less plausible than the Board’s finding in the same case. In addition, the court repeated the logical errors of *Gould* and *Indiana & Michigan Electric*, inferring greater responsibilities for union officers

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145. 638 F.2d at 55, 106 L.R.R.M. at 2267.
146. It should be noted that in some circumstances acts performed by a union officer in a representative capacity may also violate duties owed by the officer as an employee. *See, e.g.*, *Russell Packing*, supra, and text at nn.44-50. In this case, however, there was no evidence that the union officials owed the employer a duty to refrain from discussing imminent refusals to unload “hot cargo.” Accordingly, the union officials violated no duties as employees by merely expressing the concerns of their membership.
and claiming that failure to infer such responsibilities would discriminate in favor of union officers. The Eighth Circuit's resolution of the issue is thus no more satisfactory than the conclusions of the Third and Seventh Circuit. The Board’s approach remains the most logical and practical.

Given their flawed reasoning, the refusal of the courts to enforce the Board decisions is an unsatisfactory resolution of the issue. Apart from their logical errors, the stances taken by the circuit courts, as will be shown below, are considerably less pragmatic than the Board’s position on the same issue.

VI

CONCLUSION: A PRACTICAL ANALYSIS OF THE DOCTRINE

Three contractual approaches to the issues presented in this article are possible. In the first, the union promises not to strike, often with the subsidiary pledge to make all reasonable efforts to prevent strikes. Such contracts, like those in Precision Castings and Gould, contain no special provisions for additional duties imposed on union officers as employees. The second approach resembles the contract considered in Super Valu Xenia. These agreements specifically provide for separate and distinct discipline for union officers during wildcats. A third possible approach pledges the best efforts of the union and its officers to avert strikes, but specifically precludes the employer from disciplining any employee for a failure “to discharge his responsibilities as a representative or officer of the Union.”

This last presents no problems, for it clearly preserves the employee/union officer’s right to be protected from discipline based on union status. The second type likewise creates few difficulties, provided the waiver of the officer’s right is sufficiently explicit. The problems occur when the no-strike clause makes no specific reference to the duties which union officers, when acting as employees, owe to their employer, and yet the employer disciplines stewards for failing to live up to their responsibilities under the contract. In these cases the Board majority has refused to infer special obligations for union officers in their capacities as employees. The Board minority and the Third, Seventh and Eighth Circuits, on the other hand, simply hold that such contracts do imply special duties.

The Board majority’s rule has a pragmatic appeal lacking in the decisions of the circuit courts. In the day-to-day conduct of their job, union officers cannot be said to feel a greater duty to their employers by

148. See note 60 supra for a discussion of the hesitancy of Board members Jenkins and Fanning to permit a waiver, no matter how explicit.
virtue of their union status. After all, they owe their offices to the union and its members; their duty and loyalty extend to those people. The union officer frequently may act in the employer's interest, but largely because both union and employer have real interests in the enforcement of their collective bargaining agreement. When the steward is pressed, though, it will usually be the employer's interests which give way. The imposition of duties owed by the officer to the employer, absent explicit contractual provision for them, would merely create a legal standard which would be honored in the breach more often than not.

Moreover, the inference of duties by the Board and the courts, rather than the explicit creation of duties by the parties themselves, would violate basic principles of agency law. The law has long imposed upon the agent "a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." In short, the special duties of union officers are owed to the union, not the employer. The duty requires the agent to act in accord with the principal's instruction on all "matters entrusted to him on account of the principal." If a contract contains a no-strike clause, then in all likelihood a union officer's refusal to head off a wildcat strike will be a breach of duty to the union. But, since "[an agent is not liable for a harm to a person other than his principal because of his failure adequately to perform his duties to his principal]," only the union may complain of the officer's nonfeasance. If the employer has a complaint, it must be directed at the union.

On the other hand, as the Board majority recognizes, if the officer participates in, leads or encourages a work stoppage, the officer, when viewed as an employee, has violated a duty to the employer, as well as to the union. Similarly, if an officer/employee disregards a specific contractual provision creating a duty owed by the officer as an employee, that employee has violated a duty owed to the employer. Discipline on this basis derives from officers' failure to fulfill responsibilities as employees rather than from their special roles as union representatives.

Since the presumptions of the Act and basic agency law run counter to the inference of special duties, their existence should not be inferred. By requiring mutual and explicit definition of the duties which a union officer owes to the employer, troublesome reliance on

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149. It is possible that if the employers in Gould and Precision Castings had argued that active participation of the stewards in those cases had had an inducement effect, the results would have been different. See, e.g., notes 63 & 72 supra. Instead, the employer in each case justified the discipline by asserting that the stewards owed affirmative duties under the contract.

150. Restatement (Second) of Agency § 387 (1957) (emphasis added).

151. Id. § 385(2).
implied and undefined duties can be eliminated. As such, the likelihood of arbitrary and discriminatory discipline will be diminished.

In the absence of explicit provisions in the agreement the Board does not require that the employer ignore the union officer's role in the shop. It merely insists that officers' conduct, assessed in light of their role as leaders, be judged by the same criteria used to judge the conduct of rank and file employees. This mandate eliminates the possibility of discriminatory discipline by requiring the employer to specify those affirmative acts of the union officer which have had an inducement effect.

This pragmatic Board doctrine has remained largely unchanged since *Stockham Pipe Fittings* in 1949. Recent attacks on the doctrine by a vocal Board minority and three circuit courts have not disturbed its legal or logical appeal. But the strident criticism does raise the possibility that the carefully crafted doctrine may be breathing its last breath. Such a result would fly in the face of basic principles of agency law, as well as the realities of the workplace. Indeed, the widespread implication of contractual duties for union officers would bring a beneficial rule of labor relations to an unfortunate end.