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## Arbitration and Selective Discipline of Union Officials After *Metropolitan Edison*

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# Arbitration and Selective Discipline of Union Officials After *Metropolitan Edison*

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## I. INTRODUCTION

Decisions by management to selectively discipline union officials who violate the no-strike provision of a collective bargaining agreement have met with varying degrees of acceptance by arbitrators, the National Labor Relations Board ("NLRB" or "Board"), and the courts. The extent to which the various forums have accepted selective disciplining reflects the different function that each forum serves in federal labor law and the collective bargaining system. In turn, the function each forum serves defines to some extent the values that the different decisionmakers bring to the determination of the selective discipline issue. As the doctrinal focus of the Board and the courts has evolved, the role played by arbitrators in private dispute resolution has experienced a corresponding change. Two factors in particular have affected the arbitrator's role in deciding the selective discipline issue. The first is the United States Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*<sup>1</sup> which established the legal standard for a contractual waiver of a union leader's statutory right to be free from selective sanctions.<sup>2</sup> The second is the Board's adoption

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1. 460 U.S. 693 (1983).

2. *Id.* at 707-10.

of a more expansive deferral policy.<sup>3</sup> Both the waiver standard and the Board's deferral policy have expanded the scope of arbitral adjudication, increasing the possibility that public statutory issues will be decided in the context of a private dispute resolution process. The way in which the arbitral values that traditionally have informed private dispute resolution affect and are affected by external public law will be the focus of this Comment.

*Metropolitan Edison* resolved the legality of disparate sanctioning of union officials. In that case, the Supreme Court held that, in the absence of an explicit contractual provision imposing a higher duty upon union officials to prevent work stoppages, imposing more severe sanctions on union representatives than on other employees for participating in an unlawful work stoppage violates Section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act")<sup>4</sup> by unfairly discriminating against an employee because of his union membership.<sup>5</sup> In so holding, the Court made the resolution of an unfair labor practice charge of discriminatory treatment synonymous with the determination of whether the statutory right of union leaders to be free from selective discipline had been waived through collective bargaining. The Court required any waiver of this right to be "clear and unmistakable";<sup>6</sup> however, in determining whether this standard had been met, the Court would permit the Board to consider the "circum-

3. "Deferral" occurs when the Board refrains from adjudicating the merits of a claim because an arbitrator has already decided the case or could do so under the collective bargaining agreement. For a discussion of the Board's current deferral policy, see *infra* notes 9-13 and accompanying text. See generally Comment, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341 (1989).

4. The Labor Management Relations Act (LMRA) makes it "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." Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, tit. II, § 202(3), 61 Stat. 136, 153 (codified as amended at 29 U.S.C. § 158 (1982 & Supp. IV 1986)). The LMRA served to amend the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)) (NLRA). Subsections 8(a)(1) and 8(a)(3) of the NLRA provide:

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

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

....

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

NLRA § 8, 29 U.S.C. § 158.

5. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702-05, 708 (1983).

6. *Id.* at 708.

stances surrounding the collective-bargaining relationship.”<sup>7</sup> Thus, the Court allowed the Board some leeway in interpreting a contractual waiver. When the Board subsequently adopted its new deferral standards,<sup>8</sup> this “leeway” was effectively transferred to arbitrators, the net result being a considerable role for arbitrators in defining the parameters of a “clear and unmistakable” waiver.

The expansion of the Board’s deferral policy not only gave arbitrators greater discretion in interpreting a contractual waiver, but also created greater opportunities for arbitrators to exercise this discretion. In 1971, the Board announced in *Collyer Insulated Wire*<sup>9</sup> that it would defer any claims that were covered by the collective bargaining agreement, even if the arbitration process had not yet been undertaken.<sup>10</sup> Although this policy was initially extended to charges of violations of Section 8(a)(3) of the Act,<sup>11</sup> in 1977, the Board reversed its position with its holding in *General American Transportation Corp.*;<sup>12</sup> therefore, at the time the Supreme Court decided *Metropolitan Edison*, the Board did not defer to arbitrators in cases in which the union alleged violations of Subsections 8(a)(1) and 8(a)(3) of the Act. If an arbitrator had already made an award, the Board would defer only if it determined on de novo consideration that the arbitrator had disposed of the issues just as the Board would have.<sup>13</sup> Less than one year after *Metropolitan Edison* was decided, however, the Board substantially broadened its deferral policies on claims brought both before and after an arbitral determination of the grievance.<sup>14</sup> Extending the *Collyer* doctrine, the Board held in *United Technologies Corp.* that it would routinely defer claims alleging violations of Subsection 8(a)(1) or 8(a)(3) of the Act that had not yet been arbitrated by the parties’ own grievance machinery.<sup>15</sup> With regard to post-arbitral deferral, the Board subsequently announced in *Olin Manufacturing, Inc.*<sup>16</sup> that it would defer to an arbitrator’s resolution of a

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7. John Morrell & Co., 270 N.L.R.B. 1, 1 (1984); see *Metropolitan Edison*, 460 U.S. at 708-09 & n.13.

8. See *infra* notes 14-18 and accompanying text.

9. 192 N.L.R.B. 837 (1971).

10. *Id.* at 839, 843. Although a matter is deferred to arbitration, the Board retains jurisdiction to decide the issue in the event it is shown that: the dispute was not amicably settled in arbitration; the procedures were not fair and regular; or the result reached was repugnant to the Act. *Id.* at 843.

11. National Radio Co., 198 N.L.R.B. 527 (1972).

12. 228 N.L.R.B. 808 (1977).

13. Professional Porter & Window Cleaning Co., Div. of Propoco, Inc., 263 N.L.R.B. 136 (1982).

14. United Technologies Corp., 268 N.L.R.B. 557 (1984).

15. *Id.* at 558.

16. 268 N.L.R.B. 573 (1984).

grievance based on a Subsection 8(a)(1) or 8(a)(3) issue if the contractual issue was factually parallel to the unfair labor practice issue and if the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.<sup>17</sup> The Board did not require that an arbitrator's award be totally consistent with Board precedent, as long as the award was not "palpably wrong."<sup>18</sup>

In combination with the Supreme Court's decision in *Metropolitan Edison*, the Board's easing of its deferral standards has put the determination of unfair labor practices in disparate discipline cases right in the lap of arbitrators. Because disparate sanctioning of union officials is an unfair labor practice only if the contract contains no clear and unmistakable waiver of an official's right to be free from discriminatory treatment,<sup>19</sup> the arbitrator's resolution of the contractual grievance becomes, in effect, an adjudication of an unfair labor practice question under the Act.

Given arbitrators' traditional focus on giving effect to the intent of the parties in entering into collective bargaining agreements,<sup>20</sup> as well as arbitrators' relative lack of concern with public law and social policies,<sup>21</sup> several questions arise concerning the consequences of permitting an arbitrator to decide unfair labor practice issues such as the selective disciplining of union leaders. First, to what extent will the values an arbitrator brings to the dispute resolution process be

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17. *Id.* at 574.

18. *Id.* An arbitrator's decision is "palpably wrong" if it is not susceptible to any interpretation consistent with the Act. *Id.* For an example of the application of the "any interpretation consistent with the Act" standard, see *infra* notes 149-62 and accompanying text.

19. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).

20. See *United Technologies Corp.*, 268 N.L.R.B. 557, 563 (1984) (Zimmerman, Member, dissenting) (An arbitrator's function is to effectuate the parties' intent rather than to enforce the Act.); *Babcock & Wilcox Co.*, 56 Lab. Arb. (BNA) 1301, 1303 (1971) (Talent, Arb.) (The parties, not the arbitrator, make the contract.).

21. See *Clinton Corn Processing Co.*, 71 Lab. Arb. (BNA) 555, 567 (1978) (Madden, Arb.) ("Securing to the parties the proper effect of their bargain is the sphere of the arbitrator; securing to the parties the proper legal position from which to bargain is that of the National Labor Relations Board."); *Bucyrus-Erie Co.*, 69 Lab. Arb. (BNA) 93, 99 (1977) (Lipson, Arb.) (The contract rather than the law will determine the outcome of the arbitration.); see also Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 384 (1983) ("[A]rbitrators are retained by the parties to decide cases on the basis of the collective bargaining agreement and not as public judges to enforce external, public law."). For a discussion of subsequent changes in arbitral attitudes, see *infra* notes 140-44 and accompanying text. For a further discussion of the possible impact of arbitral determination of statutory matters on the structure of the grievance arbitration, see Comment, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. MIAMI L. REV. 767, 797-98 (1988) (arguing that arbitral consideration of statutory policy will result in a broader scope of judicial review, fundamentally altering the private nature of arbitration).

affected by the realization that, in the great majority of cases, resolution of the contractual issue will also be a final determination of the unfair labor practice charge? Second, to what extent will the arbitrator's values define the parameters of a "clear and unmistakable" waiver? Third, will an arbitrarily defined waiver standard adequately protect union leaders from unfair labor practices? Finally, is the control of a statutory right through contract and private dispute resolution a proper arbitral function?

Section II of this Comment explores and contrasts the approaches historically taken by arbitrators, the Board, and the courts in resolving the question of selective sanctioning of union leaders. Section III of this Comment discusses the arbitral values that appear to inform an arbitrator's consideration of the selective discipline issue. In Section IV, this Comment sets out two aspects of public law that have intruded upon the private nature of arbitral resolution of selective discipline cases—the Supreme Court's decision in *Metropolitan Edison* and the Board's deferral policies. Section V discusses the ways in which arbitrators' treatment of disparate sanctions has evolved in response to these various factors. This Comment then concludes in Section VI that, although the role of arbitrators is somewhat altered by the imposition of external legal standards upon the dispute resolution process in the arbitral forum, consideration of external law by arbitrators is not incompatible with their role in resolving private disputes. Further, because an unfair labor practice claim is dependent upon a contractual interpretation of whether the statutory right of union officials to be free from disparate discipline has been waived, the issue of selective sanctioning is one best decided by arbitrators.

## II. HISTORICAL TREATMENT OF SELECTIVE DISCIPLINE OF UNION LEADERS

### A. Arbitration

Arbitrators historically upheld the selective sanctioning of union officials who violated the no-strike clause of a collective bargaining agreement.<sup>22</sup> Generally, arbitrators' decisions to uphold disparate

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22. See, e.g., *Hertz Corp.*, 81-1 Lab. Arb. Awards (CCH) ¶ 8012, at 3058 (1980) (Sabo, Arb.); *Zellerbach Paper Co.*, 73 Lab. Arb. (BNA) 1140, 1143-44 (1979) (Sabo, Arb.); *Clinton Corn*, 71 Lab. Arb. (BNA) at 570; *Gulf City Fisheries*, 78-2 Lab. Arb. Awards (CCH) ¶ 8512, at 5390 (1978) (King, Arb.); *International Union of Operating Eng'rs, Local Union No. 132*, 78-1 Lab. Arb. Awards (CCH) ¶ 8004, at 3018-19 (1977) (Hunter, Arb.); *Cities Serv. Co.*, 60 Lab. Arb. (BNA) 585, 594 (1973) (Blackmar, Arb.); *Babcock*, 56 Lab. Arb. (BNA) at 1304; *Acme Boot Co.*, 52 Lab. Arb. (BNA) 585, 588 (1969) (Oppenheim, Arb.); *American Hard Rubber Co.*, 41 Lab. Arb. (BNA) 155, 157 (1963) (Lehoczky, Arb.); see also Leahy,

punishment were not based on specific contractual language, but instead were justified under three distinct status-based theories that linked a "higher duty" not to strike to the union leader's position.<sup>23</sup> Under the first theory, arbitrators viewed union officials as having a greater duty to abide by the collective bargaining agreement and to serve as an example to other union members.<sup>24</sup> Under the second theory, arbitrators imposed an affirmative duty on officials to actively dissuade other employees from violating the agreement.<sup>25</sup> In *United Parcels Service, Inc.*,<sup>26</sup> the arbitrator relied on both of these justifications for disciplining union officials more severely than the rank-and-file:

If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. . . . It is the obligation of the steward to set an example for all Union members . . . by demonstrating his loyalty to the terms and conditions of the contract by his Union with the Employer.<sup>27</sup>

Under the third status-based theory, arbitrators considered union representatives to be "leaders" by virtue of the office they held, and thus more influential.<sup>28</sup> Accordingly, union officials were subject to more severe discipline than other employees.<sup>29</sup> *Litton Sys-*

*Arbitration, Union Stewards and Wildcat Strikes*, 24 ARB. J. 50, 58 (1969) (discussing arbitrator's view that a steward's failure to act to stop a wildcat strike is deserving of punishment).

23. "Status-based" in this context refers to the notion that obligations inhere in the very position of a union official; acceptance of the position is an acceptance of those obligations. For a more detailed explanation of the status-based theories of selective discipline of union officials, see Note, *Discriminatory Discipline of Union Representatives for Breach of their "Higher Duty" in Illegal Strikes*, 1982 DUKE L.J. 900.

24. See, e.g., *Powermatic/Houdaille, Inc.*, 65 Lab. Arb. (BNA) 1245, 1248 (1976) (Byars, Arb.); *Stokely-Van Camp, Inc.*, 72-2 Lab. Arb. Awards (CCH) ¶ 8604, at 5116 (1973) (Karasick, Arb.); *Babcock*, 56 Lab. Arb. (BNA) at 1304.

25. See, e.g., *New Jersey Bell Tel. Co.*, 77 Lab. Arb. (BNA) 1038, 1040 (1981) (Wolff, Arb.); *Clinton Corn*, 71 Lab. Arb. (BNA) at 565; *International Union of Operating Eng'rs*, 78-1 Lab. Arb. Awards (CCH) ¶ 8004, at 3018.

26. 47 Lab. Arb. (BNA) 1100 (1966) (Schmertz, Arb.).

27. *Id.* at 1100.

28. *Clinton Corn*, 71 Lab. Arb. (BNA) at 565; *Litton Sys.*, 71-1 Lab. Arb. Awards (CCH) ¶ 8215, at 3710 (1971) (Abernethy, Arb.).

29. *Litton*, 71-1 Lab. Arb. Awards (CCH) ¶ 8215, at 3711. Disparate discipline of the leaders of a work stoppage is well accepted by both the Board and arbitrators. See, e.g., *Lectromelt Casting & Mach. Co.*, 278 N.L.R.B. 696 (1986) (An employer may punish any employee more severely for actual instigation of an unprotected strike.); *Midwest Precision Casting Co.*, 244 N.L.R.B. 597, 598 (1979) (Employees who provide leadership for an unprotected strike may be subject to more severe discipline than other employees.); *Continental Can Co.*, 86 Lab. Arb. (BNA) 11, 17 (1985) (Hunter, Arb.) (Instigating mass refusal of overtime work would constitute just cause for disparate discipline.).

*tems*<sup>30</sup> illustrates this rationale for the imposition of higher duties on union officials. The arbitrator in *Litton* stated:

Job Stewards and other Union officers are, by the very nature of the positions which they hold, leaders in their Union community. . . . When Union Stewards and other Union officers participate in an illegal walkout, by mere fact of that participation as Union officials, they provide "leadership" support for the strike, "leadership" which inescapably goes beyond the mere "following" of other workmen who have no recognized and official leadership positions in the Union.<sup>31</sup>

Whichever justifications arbitrators employed, the general assumption was that management was entitled to treat union representatives more harshly than rank-and-file union members for participation in an illegal work stoppage.<sup>32</sup> This assumption may have reflected arbitrators' concerns with both maintaining the stability of labor relations within the particular bargaining unit and with making the grievance process work for that unit, as opposed to reflecting general concerns that the imposition of a higher duty might create disincentives to becoming a union leader.<sup>33</sup>

### B. *The Board*

The Board also initially permitted selective sanctioning of union officials for violations of no-strike clauses.<sup>34</sup> The Board agreed with arbitrators that officials had a greater duty than the rank-and-file to comply with the terms of the contract.<sup>35</sup> Unlike arbitrators, however, the Board would not impose any duty on an official to prevent violations of the agreement by other employees.<sup>36</sup> The initial acceptance by the Board of disparate discipline for union officials who violated

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30. 71-1 Lab. Arb. Awards (CCH) ¶ 8215 (1971) (Abernethy, Arb.).

31. *Id.* at 3710-11.

32. W. BAER, *THE LABOR ARBITRATION GUIDE* 166 (1974); F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 201-02 (4th ed. 1985).

33. For a discussion of the concern with union leadership, see *infra* notes 45-50 and accompanying text.

34. See, e.g., *University Overland Express, Inc.*, 129 N.L.R.B. 82, 92 (1960) (upheld discipline of union steward for violating "higher duty"); *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629, 643 (1949) (failure to attempt to avert strike was breach of official's "greater duty" to uphold contract).

35. *University Overland*, 129 N.L.R.B. at 92.

36. *Pontiac Motors Corp.*, 132 N.L.R.B. 413, 415 (1961). The basis for the distinction between the duty to comply and the duty to ensure that others comply may be that, while an official's greater duty to comply with the terms of the agreement derives from a duty placed on all employees, an official's duty to actively dissuade others from breaching the terms of the contract represents a completely separate affirmative obligation. Note, *supra* note 23, at 905-06.



the no-strike clause of the agreement may have been an attempt by the Board to paint the most desirable image of the roles of each of the parties in the collective bargaining process.<sup>37</sup> According to this image, the union relinquished the right to strike in exchange for a grievance arbitration process. The Board thus may have viewed a union leader's obligation to preserve the ideal image as part of the exchange.<sup>38</sup>

The Board abandoned a status-based justification for discriminatory discipline of union officials with its holding in *Precision Castings Co.*,<sup>39</sup> and seemed to adopt instead a contractually-based theory for defining the duties of union officials.<sup>40</sup> Nevertheless, apparently disregarding the contractually-imposed duty of union officials to attempt to restore normal operations in the event of a work stoppage, and the Board held simply that a union official could not be "held to a greater degree of responsibility for participating in the strike," because "discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3)."<sup>41</sup> The Board's narrow view of the possible contractual waiver of a union leader's Section 8(a)(3) rights,<sup>42</sup> coupled with its subsequent decisions on the issue,<sup>43</sup> indicate that the Board had not really embraced a contractual image of the relationship between the employer and the union official.<sup>44</sup> Rather, an employee's status as a

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37. See *Pontiac Motors*, 132 N.L.R.B. at 415.

38. In 1961, a federal court would not grant injunctive relief to enforce a no-strike clause in a collective bargaining agreement. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 196 (1962). In *Sinclair Ref.*, the Supreme Court held that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp. V 1987) prohibited the issuance of such an injunction. The Court reversed its position in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). After *Boys Markets*, a federal court could force employees to use arbitration procedures rather than engage in work stoppages. *Id.* at 253. Thus, the need to put pressure on union officials in order to protect the ideal vision of labor relations through differential sanctions was lessened.

39. 233 N.L.R.B. 183 (1977).

40. See *id.* at 183; Comment, *New Proscriptions Against Selective Discipline of Union Officials*: *Metropolitan Edison Co. v. NLRB*, 27 J. URB. & CONTEMP. L. 361, 363 & n.12 (1984).

41. *Precision Castings*, 233 N.L.R.B. at 184.

42. *Id.*

43. *Gould Corp.*, 237 N.L.R.B. 881 (1978) (Discharge of steward was not validated by contract clause that placed duty on union official to end illegal strike.), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980); *Consolidation Coal Co.*, 263 N.L.R.B. 1306 (1982) (Disparate treatment of union officials on the basis of their union office was patently discriminatory under the Act, whether or not disparate punishment was meted out as a consequence of an alleged breach of a higher contractual duty.).

44. See *Gould*, 237 N.L.R.B. at 881; *Consolidation Coal*, 263 N.L.R.B. at 1306; see also *N.L.R.B. v. South Cent. Bell Tel. Co.*, 688 F.2d 345, 352 (5th Cir. 1982) (Board's legal view that disparate discipline can never be imposed is equivalent of per se rule that union officers' protected status cannot be bargained away.).

union official was still an important consideration, but the underlying policies had shifted toward protecting both the union leader and the union's internal political autonomy in defining the role of its officials without employer interference.<sup>45</sup> For example, in *Gould Corp.*,<sup>46</sup> the Board appeared to forbid the selective sanctioning of union officials per se, holding that any such action by an employer was a violation of an employee's statutory rights under Subsections 8(a)(1) and 8(a)(3) of the Act.<sup>47</sup> Unlike arbitrators, whose role is basically one of contract interpretation,<sup>48</sup> the Board functions as a protector of employees' statutory rights.<sup>49</sup> Therefore, unlike many arbitrators, the Board was not willing to sacrifice those rights for the possible productivity gains associated with selective sanctioning.<sup>50</sup>

### C. The Courts

Prior to the Supreme Court's decision in *Metropolitan Edison*, the federal courts of appeals disagreed as to whether it was permissible to selectively discipline union officials for participating in unauthorized work stoppages.<sup>51</sup> In deciding the selective discipline issue, the courts looked toward Congress' intent to encourage peaceful and

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45. See, e.g., *Consolidation Coal Co.*, 263 N.L.R.B. 1306 (1982); *Gould Corp.*, 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980); *Precision Casting Co.*, 233 N.L.R.B. 183 (1977).

46. 237 N.L.R.B. 881 (1978), *enforcement denied*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

47. *Id.* at 881. The Board held that harsher punishment of a union steward who had joined an illegal work stoppage was "not validated by a contract clause that specifie[d] the responsibilities of union officers" during strikes. *Id.*

48. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

49. See Comment, *New Proscriptions Against Selective Discipline of Union Officials*: *Metropolitan Edison Co. v. NLRB*, 27 J. URB. & CONTEMP. L. 361, 363 & n.12 (1984).

50. *Consolidation Coal Co.*, 263 N.L.R.B. 1306, 1310 (1982) (The Board stated that "the fundamental statutory right of employees to support and assist labor organizations by becoming union officers cannot be sacrificed to a contractual right of employers to be free from unauthorized work stoppages.").

51. In *Indiana & Mich. Elec. Co. v. NLRB*, 599 F.2d 227, 232 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980), the Seventh Circuit held that harsher discipline of union officials was justified by the greater duty of officials to enforce the union's obligations. This rationale was also accepted by the Third Circuit in *Gould*, 612 F.2d at 732-33 and by the Eighth Circuit in *NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 55 (8th Cir. 1981). Both cases cite *Indiana & Michigan* extensively. *Gould*, however, was ultimately decided on the basis of the language in the collective bargaining agreement. 612 F.2d at 733. In contrast to a status justification, the Fifth and D.C. Circuits applied a contractual waiver theory. See *NLRB v. South Cent. Bell Tel. Co.*, 688 F.2d 345 (5th Cir. 1982) (disparate sanctioning not permitted absent specific contractual obligations); *Szewczuga v. NLRB*, 686 F.2d 962 (D.C. Cir. 1982) ("collective bargaining process had explicitly established higher duties for union officials"). The Third and Seventh Circuits subsequently adopted this rationale in later decisions. See *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *aff'd*, 460 U.S. 693 (1983); *Hammermill*

productive labor relations through the collective bargaining process.<sup>52</sup> Their decisions seem to reflect an attempt to effectuate the congressional desire to promote industrial stability and productivity.<sup>53</sup>

Those courts that found that selective discipline was justified by the higher duty of a union official to comply with the no-strike provision in the agreement did not consider the practice to be inherently destructive of any protected employee right;<sup>54</sup> therefore, following the Supreme Court's analysis in *NLRB v. Great Dane Trailers, Inc.*,<sup>55</sup> the federal appellate courts initially held that the function of discriminatory discipline in preventing or limiting illegal disruptions of business outweighed any ill-effects on the union.<sup>56</sup> In later rejecting the notion that higher duties inhered in the position of a union official and instead adopting a contractual waiver theory, the courts did not cease to recognize that selective sanctioning may have peace and productivity value.<sup>57</sup> Rather, the courts shifted the legal entitlement to the union, forcing management to bargain with the union if it wished to reserve this additional method of ensuring compliance with the no-strike clause.<sup>58</sup> Without sacrificing whatever productivity value the practice of selective disciplining held for employers, the courts thus protected the bargaining position of unions and gave effect to Congress' intent to protect the freedom of employees to engage in union

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Paper Co. v. NLRB, 658 F.2d 155, 163-65 (3d Cir. 1981), *cert. denied*, 460 U.S. 1080 (1983); C.H. Heist Corp. v. NLRB, 657 F.2d 178, 182-83 (7th Cir. 1981).

52. Congress' intent is easily determinable from Section 203(d) of the Act, which provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." LMRA § 203(d), 29 U.S.C. § 173(d). For further discussion of the purposes of the Act, see *infra* notes 64-66 and accompanying text.

53. In fact, courts that applied a status-based justification for imposing higher duties on union officials to abide by the terms of the agreement may not have promoted industrial peace and productivity. See *infra* note 144.

54. See, e.g., *Armour-Dial*, 638 F.2d at 55; *Gould*, 612 F.2d at 733; *Indiana & Michigan*, 599 F.2d at 232.

55. 388 U.S. 26 (1967). Under *Great Dane*, if an employer's discriminatory conduct is "inherently destructive" of employee rights, union animus may be inferred and an unfair labor practice found unless the employer can prove a legitimate business purpose for the conduct. If, however, the employer's discrimination has only a "comparatively slight" effect on employee rights, and serves a legitimate business purpose, the burden of proving union animus falls to the complainant. *Id.* at 33.

56. See *Armour-Dial*, 638 F.2d at 55; *Gould*, 612 F.2d at 733; *Indiana & Michigan*, 599 F.2d at 229-30.

57. See *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *aff'd*, 460 U.S. 693 (1983); *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), *cert. denied*, 460 U.S. 1080 (1983).

58. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (Court gave initial entitlement to be free from discriminatory discipline to union).

activities.<sup>59</sup>

### III. TRADITIONAL ARBITRAL VALUES INFORMING SELECTIVE DISCIPLINE DECISIONS

Arbitral decisions in disparate discipline cases decided prior to *Metropolitan Edison* reveal several recurring concerns including continued productivity,<sup>60</sup> management's right to run the business,<sup>61</sup> the integrity of the collective bargaining process,<sup>62</sup> and the parties' expectations.<sup>63</sup>

#### A. Productivity

One of the primary purposes of the National Labor Relations Act was to preserve industrial peace in order to promote productivity.<sup>64</sup> National labor policy has established collective bargaining as the primary means of accomplishing this goal,<sup>65</sup> and Section 203(d) of the Act declares arbitration to be the most desirable method for the settlement of grievances in the collective bargaining scheme.<sup>66</sup> Because the system within which arbitrators function was developed as a means to minimize industrial strife and increase productivity in

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59. *Id.*; see also *NLRB v. City Disposal Sys.*, 465 U.S. 822, 835 (1984) (In enacting Section 7 of the Act, Congress intended to equalize the bargaining power of the employee and the employer by allowing employees to "band together.").

60. See, e.g., *Hertz Corp.*, 81-1 Lab. Arb. Awards (CCH) ¶ 8012, at 3054 (1980) (Sabo, Arb.); *Zellerbach Paper Co.*, 73 Lab. Arb. (BNA) 1140, 1142 (1979) (Sabo, Arb.).

61. See, e.g., *Specialty Paper Box Co.*, 51 Lab. Arb. (BNA) 120, 125 (1968) (Nathanson, Arb.).

62. See *infra* notes 97-103.

63. See, e.g., *International Union of Operating Eng'rs, Local Union No. 132*, 78-1 Lab. Arb. Awards (CCH) ¶ 8004, at 3018-19 (1977) (Hunter, Arb.) (The union stewards did not act the way union officials are expected to act.); *American Hard Rubber Co.*, 41 Lab. Arb. (BNA) 155, 157 (1963) (Lehoczky, Arb.) (The failure of union officials to act as expected represented the most important contract violation.).

64. NLRA § 1, 29 U.S.C. § 151; see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1980) (Preserving the flow of interstate commerce by establishing and maintaining industrial peace was the primary goal of the NLRA.).

65. *First Nat'l Maintenance*, 452 U.S. at 674; see also *NLRB v. City Disposal Sys.*, 465 U.S. 822, 833-34 (1984) (The purposes of the Act explicitly include the encouragement of collective bargaining.); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975) (The goal of national labor policy is to minimize industrial strife by encouraging collective bargaining.).

66. NLRA § 1, 29 U.S.C. § 151; see also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("[A]rbitrators under . . . collective bargaining agreements are indispensable agencies in a continuous collective bargaining process."); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-82 (1960) (Arbitration of labor disputes under the collective bargaining agreements is part and parcel of the collective bargaining process.).

the American workplace,<sup>67</sup> it is not surprising that these values are so important to the arbitrators who play a vital role in that system. The opinion of the arbitrator in *Sprayon Products, Inc.*<sup>68</sup> illustrates the importance arbitrators place on productivity in the workplace. In *Sprayon*, a supervisor asked an employee to remove from the production area a tape recorder that the employee had brought to work.<sup>69</sup> The employee complained to a union official who instructed the employee to disregard the supervisor's order.<sup>70</sup> A relatively minor but prolonged disruption ensued.<sup>71</sup> The recorder was passed from employee to employee, including two union officials, throughout the course of the day.<sup>72</sup> Management discharged the participating employees who subsequently filed grievances contesting the discipline.<sup>73</sup> At the arbitration proceedings the arbitrator found that, although no actual loss in production was proven conclusively, the concerted actions of the grievants were a departure from the norm and tantamount to a work stoppage.<sup>74</sup> The arbitrator stated:

If there is anything clear . . . , it is that there was an awful lot, if not an inordinate amount of employee non-production activity going on that evening, in total disregard of any notion of the concept of "a fair day's work for a fair day's pay," or that "working time is for work," or the Union's own assurance of "a full day's work on the part of its members . . . ."<sup>75</sup>

Clearly, concerted work stoppages in violation of the no-strike clause were viewed by arbitrators as extremely serious offenses.<sup>76</sup> Management claimed that punishing union officials more harshly than others who participated in a work stoppage was necessary to ensure compliance with the no-strike clause of the agreement.<sup>77</sup> Therefore, prior to *Metropolitan Edison*, arbitrators may have been inclined to give management the tools it purportedly needed to prevent such interruptions in production.

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67. See *supra* notes 64-66.

68. 80-1 Lab. Arb. Awards (CCH) ¶ 8031 (1979) (Dyke, Arb.).

69. *Id.* at 3121.

70. *Id.* at 3130.

71. *Id.* at 3131.

72. *Id.*

73. *Id.* at 3128.

74. *Id.* at 3129.

75. *Id.*

76. See, e.g., *Associated Wholesale Grocers*, 89 Lab. Arb. (BNA) 227, 230 (1987) (Madden, Arb.) (restrictions on production a serious matter); *Clinton Corn Processing Co.*, 71 Lab. Arb. (BNA) 555, 563 (1978) (Madden, Arb.) (concerted work stoppages viewed as one of most serious industrial offenses).

77. See *American Enka Co.*, 83-1 Lab. Arb. Awards (CCH) ¶ 8229, at 4024 (1983) (Jedel, Arb.); *Babcock & Wilcox Co.*, 56 Lab. Arb. (BNA) 1301, 1303-04 (1971) (Talent, Arb.).

### B. Management's Right to Run the Business

Accepting management's productivity rationale, arbitrators construed the practice of selectively sanctioning union officials as a permissible exercise of management's rights under the no-strike clause.<sup>78</sup> Management's right to discharge and discipline was generally seen as limited only by federal and state labor relations acts and applicable provisions of the collective bargaining agreement.<sup>79</sup> If the agreement expressly addressed management's right to discipline, but placed no restrictions on this right, arbitrators might nevertheless imply a just cause limitation.<sup>80</sup> Any such limitation notwithstanding, disparate punishment of union officials often was found to be for just cause because the union representative had engaged in activities for which any employee could be punished under the terms of the collective bargaining agreement.<sup>81</sup> Further, once an arbitrator found that just cause existed for discipline, many agreements provided that the degree of discipline was strictly a matter of employer discretion.<sup>82</sup> For example, *Gulf City Fisheries, Inc.*,<sup>83</sup> involved the singling-out and discharge of a local union president for her part in a work stoppage.<sup>84</sup> In that case, the restrooms at a seafood processing plant were inoperative, interfering with the employees' ability to wash up or use the facilities during their break.<sup>85</sup> The local union president called the union business agent who told her to tell the employees to "stay put"; she followed these instructions.<sup>86</sup> Approximately one hour later, when water was restored to the restrooms, the employees returned to work.<sup>87</sup> The local union president was later discharged for her con-

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78. See *Sprayon*, 80-1 Lab. Arb. Awards (CCH) ¶ 8031, at 3131 (Disparate discipline of officials upheld when officials, as well as other employees, engaged in actions tantamount to work stoppage); *Zellerbach Paper Co.*, 73 Lab. Arb. (BNA) 1140, 1144 (1979) (Sabo, Arb.) (upheld company's decision disciplining union officials who should have acted to prevent violation of no-strike agreement, but not disciplining other employees who took part in the work stoppage); *Clinton Corn*, 71 Lab. Arb. (BNA) at 565 (union officials' passivity and silence in the face of a work stoppage justified selective discipline).

79. F. ELKOURI & E. ELKOURI, *supra* note 32, at 610-11.

80. *Id.*; see also *Zellerbach Paper*, 73 Lab. Arb. (BNA) at 1142 ("[E]ven where a contract fails to include any general limitations as to the right to discharge, Arbitrators have concluded that a just cause restriction is implied in a modern Collective Bargaining Agreement . . .").

81. See cases cited *supra* note 22.

82. See, e.g., *Gulf City Fisheries, Inc.*, 78-2 Lab. Arb. Awards (CCH) ¶ 8512, at 5390 (1978) (King, Arb.); see also F. ELKOURI & E. ELKOURI, *supra* note 32, at 667-68, 668 n.91 (discussion of authority of arbitrators to modify penalties).

83. 78-2 Lab. Arb. Awards (CCH) ¶ 8512 (1978) (King, Arb.).

84. *Id.* at 5390.

85. *Id.* at 5387.

86. *Id.*

87. *Id.*

duct.<sup>88</sup> At the grievance hearing, the arbitrator found that the employees' action constituted a work stoppage that interfered with the company's production.<sup>89</sup> Further, the arbitrator found that because of the grievant's position as local president, and because she possessed natural leadership qualities that were recognized by her fellow employees, she had more responsibility for the work stoppage than other employees.<sup>90</sup> Thus, there was just cause for discipline. The arbitrator, however, was not convinced that the severity of the discipline was predicated upon only the reasons stated by the company at the hearing.<sup>91</sup> Nevertheless, once he found that some discipline was justified, he stated that he had no authority under the contract to judge the appropriateness of the degree of discipline.<sup>92</sup> If some discipline was justified, then the specific extent of the discipline was a prerogative reserved to management under the contract.<sup>93</sup>

An arbitrator's assumption of retained management rights, combined with the apparent management goal of increased productivity, provided a strong justification for the practice of disparate punishment. Selective discipline was not seen as arbitrary or capricious because it had a basis in logic<sup>94</sup>—albeit management's logic. While concern with productivity and management rights clearly influenced arbitrators' determinations of the issue, the language in arbitral decisions indicates that philosophic concerns may have exerted some influence as well.

### C. *Integrity of the Collective Bargaining Process*

Arbitrators believe in the efficacy of the dispute resolution process of which they are a part. Upholding "industrial law and order" facilitates the economic effort and permits greater prosperity for

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88. *Id.*

89. *Id.* at 5389.

90. *Id.* at 5390.

91. *Id.*

92. *Id.* The *Gulf City* arbitrator's reliance on contractual limitations to justify his refusal to examine management's possible ulterior motives for disparately disciplining the local's president is disturbing to proponents of a tighter deferral policy. These proponents fear the situation will occur more frequently if statutory issues are permitted to be resolved in the context of private arbitration and contract interpretation. This fear, however, appears to be largely unfounded, both because proper application of the present deferral standards would prevent such a result, see *Ryder/P.I.E. Nationwide*, 278 N.L.R.B. 713 (1986), and because arbitrators have become more willing to interpret contracts within the context of broader statutory policies, see *infra* notes 140-44.

93. *Gulf City*, 78-2 Lab. Arb. Awards (CCH) ¶ 8512, at 5388.

94. See *Clinton Corn Processing Co.*, 71 Lab. Arb. (BNA) 555, 564 (1978) (Madden, Arb.).

employees and employers alike.<sup>95</sup> To have its greatest effect, however, the collective bargaining agreement must be accorded full respect by both parties.<sup>96</sup> If the parties are free to disregard the provisions of the contract, the system cannot function.<sup>97</sup>

Union officials serve one of the parties to the contract in a representative capacity.<sup>98</sup> In that capacity, they represent the union both to its members and to management.<sup>99</sup> A union representative thus has obligations to his constituents,<sup>100</sup> and some would argue to his employer as well.<sup>101</sup> In addition, some arbitrators seem to impose upon union officials an obligation to the agreement—to the process of collective bargaining in which the official chose to take a leading role.<sup>102</sup> It is the union official's abandonment of his obligation to preserve the integrity of the process which constitutes the greater wrong in the eyes of some arbitrators.<sup>103</sup> The importance arbitrators place on protecting the collective bargaining process is apparent in the language they use. Arbitrators have variously described union officials as "custodians of the Agreement" and "guardians of its rights,"<sup>104</sup> and as holding positions of "honor and trust."<sup>105</sup> Union officials have pledged their "loyalty"<sup>106</sup> and "honor,"<sup>107</sup> and have the "highest duty to faithfully adhere"<sup>108</sup> to all the provisions of the agreement. They must preserve the "sanctity"<sup>109</sup> and "uphold the integrity"<sup>110</sup> of the contract. To do otherwise would be "violative of their trust."<sup>111</sup>

95. *Id.* at 563; see also *Associated Wholesale Grocers*, 89 Lab. Arb. (BNA) 227, 230 (1987) (Madden, Arb.).

96. See *Bucyrus-Erie Co.*, 69 Lab. Arb. (BNA) 93, 99 (1977) (Lipson, Arb.); *McConway & Torley Corp.*, 55 Lab. Arb. (BNA) 31, 36 (1970) (Cohen, Arb.).

97. See *Bucyrus-Erie*, 69 Lab. Arb. (BNA) at 98-99.

98. See *American Hard Rubber Co.*, 41 Lab. Arb. (BNA) 155, 157 (1963) (Lehoczy, Arb.) (union officials represent union management to the employees).

99. *McConway & Torley*, 55 Lab. Arb. (BNA) at 35.

100. *Id.*; *Acme Boot Co.*, 52 Lab. Arb. (BNA) 585, 588 (1969) (Oppenheim, Arb.).

101. See, e.g., *Cities Serv. Co.*, 60 Lab. Arb. (BNA) 585, 592 (1973) (Blackmar, Arb.); *Acme Boot*, 52 Lab. Arb. (BNA) at 588.

102. See *Mack Trucks*, 41 Lab. Arb. (BNA) 1240, 1243 (1964) (Wallen, Arb.).

103. See *Litton Sys.*, 71-1 Lab. Arb. Awards (CCH) ¶ 8215, at 3711 (1971) (Abernethy, Arb.); *Babcock & Wilcox Co.*, 56 Lab. Arb. (BNA) 1301, 1304 (1971) (Talent, Arb.).

104. *Mack Trucks*, 41 Lab. Arb. (BNA) at 1243.

105. *McConway & Torley Corp.*, 55 Lab. Arb. (BNA) 31, 35 (1970) (Cohen, Arb.).

106. *United Parcel Serv., Inc.*, 47 Lab. Arb. (BNA) 1100, 1100 (1966) (Schmertz, Arb.).

107. *New Jersey Bell Tel. Co.*, 77 Lab. Arb. (BNA) 1038, 1041 (1981) (Wolff, Arb.).

108. *United Parcel*, 47 Lab. Arb. (BNA) at 1100.

109. *Babcock & Wilcox Co.*, 56 Lab. Arb. (BNA) 1301, 1303-04 (1971) (Talent, Arb.).

110. *United Parcel*, 47 Lab. Arb. (BNA) at 1101.

111. *Sprayon Prods., Inc.*, 80-1 Lab. Arb. Awards (CCH) ¶ 8031, at 3131 (1979) (Dyke, Arb.). One might note that although arbitrators were apparently unwilling to allow management to take direct action against union officials for failing to abide by and protect the integrity of the collective bargaining agreement, unions do not have similar direct recourse



In addition, some arbitrators maintained that union officials, in contrast to the rank-and-file, have or should have greater knowledge and familiarity with the working provisions of the agreement because of their representative positions.<sup>112</sup> By participating in an illegal work stoppage, union officials exhibit a conscious disregard for the contractual provisions that were agreed to in good faith through the collective bargaining process. This knowing disregard makes an illegally striking union representative more culpable than the ordinary employee, and greater punishment is therefore justified. In *American Hard Rubber Co.*,<sup>113</sup> for example, the arbitrator upheld the discharges of two committeemen who walked out with other employees when the employer posted the next week's schedule late.<sup>114</sup> The arbitrator noted that the committeemen "were [presumably] fully aware of their obligations under the terms of the Agreement."<sup>115</sup> Their deliberate act of personally walking off the job and their complete disregard for their duties as union officials were thus compounded and justified more severe discipline.<sup>116</sup>

#### D. *Expectations of the Parties*

When interpreting a contract, an arbitrator attempts to discern the intent of the parties as revealed by the contractual language, past practice, and industry custom.<sup>117</sup> Historically, selective sanctioning was treated fairly consistently by arbitrators.<sup>118</sup> Therefore, arbitrators may have come to assume that this practice was accepted by the parties, absent any indications to the contrary. Arbitrators also may have been somewhat reluctant to rule in a manner contrary to previous selective sanctioning decisions.<sup>119</sup> While not bound by precedent,

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against management personnel who violate the terms of the contract. If a supervisor violates the collective bargaining agreement, only management may punish him directly—the rationale being that control of its employees is strictly a matter of management rights. By the same logic, one might argue that unions should also have the exclusive right to discipline their "employees"—union officials. Union autonomy is no less important than management rights; a union's obligation to protect the integrity of the parties' agreement should be no greater than that of management.

112. *Babcock & Wilcox*, 56 Lab. Arb. (BNA) at 1304; *McConway & Torley Corp.*, 55 Lab. Arb. (BNA) 31, 35 (1970) (Cohen, Arb.); *American Hard Rubber Co.*, 41 Lab. Arb. (BNA) 155, 157 (1963) (Lehoczky, Arb.).

113. 41 Lab. Arb. (BNA) 155 (1963) (Lehoczky, Arb.).

114. *Id.* at 156-57.

115. *Id.* at 157.

116. *See id.*

117. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

118. *See supra* note 22.

119. *See, e.g., American Enka Co.*, 83-1 Lab. Arb. Awards (CCH) ¶ 8229, at 4023 (1983) (Jedel, Arb.).

arbitrators recognized the value of consistency and predictability of result in the bargaining process;<sup>120</sup> therefore, as long as the earlier decision was reasonable, an arbitrator may have been unwilling to upset it.<sup>121</sup> Prior to *Metropolitan Edison*, consideration of productivity, management's rights, the integrity of the collective bargaining process, and the parties' expectations led arbitrators to conclude in many cases that selective sanctioning of union officials for violations of a no-strike clause was permissible under the collective bargaining agreement.<sup>122</sup>

#### IV. ARBITRATION IN RELATION TO EXTERNAL LAW

*Metropolitan Edison* and routine deferral to arbitration have redefined the problems of selective sanctioning for arbitrators. Thus, a consideration of new values and a reassessment of the old is necessary. In the context of collective bargaining, arbitration originated as a method of purely private dispute resolution.<sup>123</sup> Typically, an arbitrator viewed himself as a "creature of the agreement," limited to interpreting its terms within the context of past practice and the "common law of the shop."<sup>124</sup> An arbitrator had no power outside that granted him by the contract.<sup>125</sup> Because he was confined to interpreting the terms of the agreement, the arbitrator was relatively unconcerned with the external law.<sup>126</sup> He had been retained for the purpose of resolving a private contractual dispute; if any statutory issues arose, that resolution was better left for another forum.<sup>127</sup>

120. See *id.*; F. ELKOURI & E. ELKOURI, *supra* note 32, at 430-32.

121. See *American Enka*, 83-1 Lab. Arb. Awards (CCH) ¶ 8229, at 4023.

122. See *supra* note 22 and accompanying text.

123. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

124. *Babcock & Wilcox Co.*, 56 Lab. Arb. (BNA) 1301, 1303 (1971) (Talent, Arb.). The "common law of the shop" is made up of the "practices, assumptions, understandings, and aspirations of the going industrial concern." Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1500 (1959).

125. *Bucyrus-Erie Co.*, 69 Lab. Arb. (BNA) 93, 99 (1977) (Lipson, Arb.) ("[A]n arbitrator must be bound by the 'four corners' of the contract . . ."); *Babcock & Wilcox*, 56 Lab. Arb. (BNA) at 1303 ("The Arbitrator should remember that he is but a creature of [the] agreement . . .").

126. See *Clinton Corn Processing Co.*, 71 Lab. Arb. (BNA) 555, 567 (1978) (Madden, Arb.); *Bucyrus-Erie*, 69 Lab. Arb. (BNA) at 99 ("[I]t is the contract, rather than the law that will determine the [outcome]."); F. ELKOURI & E. ELKOURI, *supra* note 32, at 336-39.

127. As the arbitrator stated in *Clinton Corn*: "Securing to the parties the proper effect of their bargain is the sphere of the arbitrator; securing to the parties the proper legal position from which to bargain is that of the National Labor Relations Board." 71 Lab. Arb. (BNA) at 567.

### A. Waiver

In light of the United States Supreme Court's decision in *Metropolitan Edison*, an arbitrator may no longer be free to confine his attention solely to the parties' private agreement when deciding a discriminatory discipline claim. In *Metropolitan Edison*, the Court established an external standard for determining whether the parties intended to waive their statutory rights through collective bargaining.<sup>128</sup> Theoretically, arbitrators are not bound by law external to the contract, such as court precedent; therefore, they would not necessarily have to apply *Metropolitan Edison*'s "clear and unmistakable" waiver standard. In reality, however, an arbitral award that completely failed to conform to that requirement would likely meet with non-deferral by the Board.<sup>129</sup> An arbitrator who chose to ignore the applicable law in these circumstances would be "remiss in his responsibility to the parties [to render] a 'final and binding' decision."<sup>130</sup> Accordingly, arbitrators must look outside the collective bargaining agreement in order to determine the proper standard for interpreting the meaning of the agreement.

Although the *Metropolitan Edison* standard for waiver was "clear and unmistakable,"<sup>131</sup> the Supreme Court was ambiguous as to the extent to which arbitrators may rely on factors outside the language of the agreement in making that determination.<sup>132</sup> Judge Harry T. Edwards<sup>133</sup> resolves the *Metropolitan Edison* ambiguity in light of the Supreme Court's opinion in *W.R. Grace & Co. v. Local 759, Rubber Workers*.<sup>134</sup> In *W.R. Grace*, the Court stated that courts must enforce an arbitral award as long as it draws its essence from the agreement, although the basis for the arbitrator's decision may be

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128. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

129. See, e.g., *John Morrell & Co.*, 270 N.L.R.B. 1 (1984). In *John Morrell*, the NLRB refused to defer to the arbitrator's decision because the arbitrator did not interpret the parties' agreement to find that it imposed an explicit duty on union officials to make efforts to end unlawful work stoppages. *Id.* Instead, the arbitrator based his decision on the union leader's status. *Id.*

130. *American Enka Co.*, 83-1 Lab. Arb. Awards (CCH) ¶ 8229, at 4024 (1983) (Jedel, Arb.).

131. *Metropolitan Edison*, 460 U.S. at 708.

132. The Supreme Court noted that prior arbitration decisions may be relevant in interpreting bargaining agreements. In a footnote, the Court noted that "[a]n arbitration decision may be relevant to establishing waiver . . . when the arbitrator has stated that the bargaining agreement itself clearly and unmistakably imposes an explicit duty on union officials to end unlawful work stoppages." *Id.* at 708-09, 709 n.13.

133. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 39 (1985).

134. 461 U.S. 757 (1983).

ambiguous.<sup>135</sup> Judge Edwards has suggested that the Court's opinion in *W.R. Grace* cannot be reconciled with an interpretation of *Metropolitan Edison* that requires an arbitrator's decision to be based on explicit contractual language.<sup>136</sup> Taking a similar but less liberal view, the Board interpreted *Metropolitan Edison* to say that waiver may be established by circumstances surrounding the collective bargaining relationship, as well as by the language of the agreement itself.<sup>137</sup> Thus, the imposition of external law on the arbitral determination of what constitutes a waiver of an official's Section 8(a)(3) rights restricts, but probably does not eliminate, the opportunity for arbitral interpretation of the contract.

### B. *Deferral*

The deferral standards of the Board also give an arbitrator room to interpret the collective bargaining agreement according to his own view of the circumstances. An arbitrator need not decide a case the way the Board would have decided if it had been reviewing the case on the merits.<sup>138</sup> Under *Olin Corp.*, the arbitrator will not be overruled by the Board unless his decision is palpably wrong—that is, unless his decision is not susceptible to an interpretation consistent with the Act.<sup>139</sup> In conjunction, *Metropolitan Edison* and the Board's deferral policy leave a fair amount of discretion to the arbitrator to determine whether there has been a waiver of statutory rights, and thus whether there has been any unfair labor practice.

## V. EVOLUTION OF THE ARBITRAL APPROACH TO THE DISPARATE SANCTIONING ISSUE

Once put in the position of deciding unfair labor practice claims, arbitrators may have felt compelled to consider more closely the statutory entitlements involved and the policies underlying those entitlements.<sup>140</sup> Since *Metropolitan Edison* was decided, an increased concern with the Act and its underlying statutory policies, as well as

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135. *Id.* at 764 (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

136. Edwards, *supra* note 133, at 390.

137. *Indiana & Mich. Elec. Co.*, 273 N.L.R.B. 1540, 1541-42 (1985).

138. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

139. *Id.* For an example of the application of the "palpably wrong" standard, see *infra* notes 149-62 and accompanying text.

140. See, e.g., *Warren Gen. Hosp.*, 86-2 Lab. Arb. Awards (CCH) ¶ 8571, at 5398 (1986) (Duff, Arb.) (reflecting statutory policy of not discouraging employee participation in union activities); *Continental Can Co.*, 86 Lab. Arb. (BNA) 11, 16-18 (1985) (Hunter, Arb.) (directly addressing statutory issue and citing court and NLRB precedent extensively). *But see Schnadig Corp.*, 85 Lab. Arb. (BNA) 692, 699-700 (1985) (Seidman, Arb.) (refusing to base

with court precedents, has been apparent in arbitral opinions dealing with the discriminatory punishment of union officials.<sup>141</sup> Arbitrators have become more aware of problems such as equality of adversarial bargaining positions and free participation in union activities— concepts arising from the Act.<sup>142</sup> When weighed against these concerns, the productivity value of selective sanctioning may not seem as compelling.<sup>143</sup> In fact, some arbitrators have recognized that selective sanctions may actually undermine the integrity of the collective bargaining process.<sup>144</sup> As a result, although the values that an arbitrator traditionally brought to the process are still important, they now must be balanced against other considerations as well.

Although arbitrators have moved away from their prior pro-management view of this issue,<sup>145</sup> it does not necessarily follow that

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ruling on anything outside the contract, but ruling in accordance with the Board and other case law).

141. See cases cited *supra* note 140.

142. *Warren*, 86-2 Lab. Arb. Awards (CCH) ¶ 8571, at 5400 (The possibility of more severe discipline would be likely to discourage employees from holding union office.); *Continental Can*, 86 Lab. Arb. (BNA) at 16 (citing statute and court precedent extensively).

143. In fact, the productivity rationale for selective discipline may have been no more than an excuse to display management's might. For example, in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), members of the Electrical Workers union refused to cross an informational picket line that had been set up by an unrelated union. *Id.* at 696. Although the union officials were instructed to cross the picket line, they refused to do so, believing that the other employees were unlikely to follow. *Id.* Instead, the officials worked diligently to arrange a compromise between management and the other union so that the picket line could be disbanded. *Id.* at 696-97. Although the union officials were successful in negotiating a settlement that resulted in the return to work by members of the Electrical Workers union, the officials were nevertheless punished more severely than other employees for their part in the work stoppage. *Id.* at 697. Clearly, in this case, using differential sanctions to discourage this type of conduct by union officials—conduct that undoubtedly facilitated an early resolution of the strike—was counterproductive. What was accomplished, however, was an unmistakable show of management's authority.

144. *Warren*, 86-2 Lab. Arb. Awards (CCH) ¶ 8571, at 5400; *Continental Can*, 86 Lab. Arb. (BNA) at 17. In *Metropolitan Edison*, the Court discussed selective discipline's possible deleterious effect on the collective bargaining process. 460 U.S. at 702-05. The Court noted that if union officials were to comply with management's demands in a work stoppage situation, they might well lose the respect and support of the union members. *Id.* at 705. In addition, the unilateral imposition of selective discipline might adversely affect the collective bargaining system by impinging on the union's autonomy. As the Court stated, the collective bargaining process presupposes "contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Id.* at 704 (quoting *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 394 (1982) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960))). "Congress has sought to ensure the integrity of this process by preventing both management and labor's representatives from being coerced in the performance of their official duties." *Id.* Using the Court's analysis, one might easily conclude that any short-term productivity benefits produced by the unilateral imposition of selective sanctions would be offset by the long-term damage to union cohesiveness and union autonomy—fundamental principles of the collective bargaining process.

145. See *supra* note 140.

their concern for employee statutory rights is as great as the concern of the NLRB because, unlike the NLRB, an arbitrator's primary function is not protecting statutory entitlements.<sup>146</sup> Nevertheless, the *Olin* standard of deferral permits an arbitrator to substitute his judgment for that of the Board when deciding the contractual/unfair labor practice issue. Moreover, although it is no longer "universally recognized in the field of industrial relations"<sup>147</sup> that a union official, solely because of his status, merits greater punishment for participating in a work stoppage than an ordinary employee, some remnants of this longstanding, pro-management view undoubtedly remain.<sup>148</sup> Under the present system, some of these status-based justifications for selective discipline may still be interjected into an arbitrator's decision without rendering it "palpably wrong" under *Olin*. As a result, the threshold for establishing a waiver in the arbitral forum may be lower than before the NLRB. For example, in *Brunswick Corp.*,<sup>149</sup> which was decided prior to *Olin*, the contractual provision at issue stated that "neither [the union] nor its officers, representatives, committeemen, Stewards, nor its members will for any reason . . . call, sanction, or engage in any strike."<sup>150</sup> Characterizing this provision of the contract as a general no-strike clause, the Board refused to find that this language constituted a valid waiver of union officials' statutory rights because it failed to meet the *Metropolitan Edison* "clear and unmistakable" requirement.<sup>151</sup> In direct contrast, the arbitrator in *Davis & Geck* interpreted virtually identical contractual language as sufficient evidence of the union's intent to waive the statutory protection of its officers.<sup>152</sup> The language of the no-strike clause read as follows: "[n]either the Union, its officers or members, shall instigate, call, sanction, condone, or participate in any strikes."<sup>153</sup> The arbitrator interpreted the word "condone" as applying solely to union leaders because "condone" usually connotes an act taken by a higher author-

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146. See, e.g., *Schnadig Corp.*, 85 Lab. Arb. (BNA) 692, 699-700 (1985) (Seidman, Arb.) (An arbitrator's decision is strictly based upon a contract; it is unaffected by federal statutes or judicial or administrative interpretation of such federal statutes.); *Clinton Corn Processing Co.*, 71 Lab. Arb. (BNA) 555, 567 (1978) (Madden, Arb.) (Securing the proper effect of a bargain is an arbitrator's role; securing the proper legal position from which to bargain is the role of the Board.).

147. *United Parcel Serv., Inc.*, 47 Lab. Arb. (BNA) 1100, 1100 (1966) (Schmertz, Arb.).

148. See, e.g., *Associated Wholesale Grocers*, 89 Lab. Arb. (BNA) 227, 231 (1987) (Madden, Arb.) ("The steward has greater responsibility to abide by the labor agreement and to encourage others to do so.").

149. 267 N.L.R.B. 457 (1983).

150. *Id.* at 458 n.1 (emphasis added).

151. *Id.* at 457.

152. See *Davis & Geck*, 14 NLRB Advice Mem. Rep. (LRP) ¶ 24033 (1987).

153. *Id.* at 5319 (emphasis added).

ity.<sup>154</sup> Therefore, under this interpretation, union leaders had specifically undertaken a greater contractual duty than the rank-and-file not to "condone" work stoppages; the violation of this duty justified the disparate punishment.<sup>155</sup> After considering the arbitrator's opinion, the Associate General Counsel for the NLRB issued an advice memorandum advising deference to the arbitral award,<sup>156</sup> stating that the arbitrator's interpretation was "not unreasonable."<sup>157</sup> Further, in a footnote, the Associate General Counsel noted that the word "sanction," as well as "condone," implied an action taken by union officials rather than by its members.<sup>158</sup> Thus, for all practical purposes, the contractual language subject to interpretation was the same in both *Davis & Geck* and *Brunswick*. Despite the fact that the Board's interpretation of this language was directly opposed to the arbitrator's interpretation of that same language, the Associate General Counsel determined that the standard for deferral under *Olin* had been met—that is, because the arbitrator had implicitly found a valid contractual waiver as required by *Metropolitan Edison*,<sup>159</sup> disciplining only the union official for "condoning" the work stoppage was lawful and not repugnant to the Act.<sup>160</sup> As the comparison of these two cases illustrates, routine deferral to arbitral determinations of the selective discipline issue may result in a corruption, or at least a broadening, of the "clear and unmistakable" waiver requirement, and thus may provide less protection for employees' statutory rights than was envisioned by the Supreme Court in *Metropolitan Edison*. Pre-arbitral deferral under *United Technologies Corp.*<sup>161</sup> may further exacerbate the situation by severely limiting the unions' access to NLRB review of the merits of a grievance.<sup>162</sup>

It has been charged that the NLRB's present deferral policies, as discussed above, represent an abdication of its duty to protect

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154. *Id.*

155. *Id.*

156. *Id.* at 5318.

157. *Id.* at 5319.

158. *Id.* at 5320 n.12.

159. *Id.* at 5319. The Associate General Counsel recognized that the relevant language "arguably could be interpreted as not meeting the *Metropolitan Edison* waiver standards," *id.*, but concluded that the arbitrator's interpretation was reasonable, and under that interpretation, the waiver standard was met. *Id.*

160. *Id.*

161. 268 N.L.R.B. 557 (1984).

162. A stricter pre-arbitration deferral policy, however, may permit forum shopping by the parties. If NLRB deferral is not relatively automatic, a party may look to the forum more likely to be sympathetic to its cause. Furthermore, if unions perceive the Board as more sympathetic than arbitrators to their position on the selective discipline issue, unions may abandon the arbitral forum when this type of dispute is involved.

employee statutory rights.<sup>163</sup> Although this may be true to a limited extent, the NLRB may still review arbitral decisions that do not meet the *Olin* standards.<sup>164</sup> A stricter standard of review for deferral to arbitration, such as existed under *Propoco, Inc.*,<sup>165</sup> would require the Board to review each case on its merits to determine whether its deferral standard had been met, thereby resulting in repetitive litigation. Moreover, in cases of selective discipline of union officials, the statutory issue is dependent upon a contractual interpretation—a traditional arbitral function. Applying a *Propoco* deferral standard might usurp the function of the arbitrator and undermine his role in the collective bargaining process. On the other hand, the present Board policy encourages recognition of the arbitration process as an important part of the national labor policy by requiring the parties to resolve disputes through the machinery that they voluntarily created for that purpose.

## VI. CONCLUSION

The present waiver and deferral policies have resulted in some tension in delineating the appropriate functions of arbitrators and the Board in resolving disputes involving the selective sanctioning of union leaders who participate in a work stoppage. That tension would not be eliminated by tightening the deferral policies; the purported usurpation of function would simply shift. *Metropolitan Edison* declared the resolution of the discriminatory discipline issue to be contractually based in that whether the imposition of more severe sanctions on union officials constitutes an unfair labor practice depends upon whether the officials' statutory rights have been waived under the collective bargaining agreement.<sup>166</sup> The contractual question must be answered before the statutory question is reached. As with other contractual issues, an arbitrator chosen by the parties to the dispute is better equipped to determine whether a union leader's rights have been contractually waived, and thus, whether any unfair labor practice has occurred. Arbitrators' sensitivity to the realities of the workplace and the emphasis they place on ascertaining and giving effect to the intent of the parties assures that the collective bargaining agreement, contracted to by the parties, will serve its purpose of pro-

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163. For a discussion of NLRB abdication, see Member Zimmerman's dissenting opinions in *United Technologies Corp.*, 268 N.L.R.B. 557 (1984), and *Olin Corp.*, 268 N.L.R.B. 573 (1984). See also Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355 (1985).

164. See, e.g., *Ryder/P.I.E. Nationwide, Inc.*, 278 N.L.R.B. 713, 716 (1986).

165. 263 N.L.R.B. 136 (1982).

166. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707, 710 (1983).



moting peaceful labor relations through industrial self-government. Allotting the selective discipline issue to the arbitral forum has entailed some reassessment by arbitrators of the values that need to be considered in resolving the matter. Arbitrators, however, seem to be up to the task. The imposition of external law in the form of waiver and deferral standards has resulted in greater sensitivity on the part of arbitrators to the statutory policies that support and underlie the collective bargaining system, thereby enhancing, rather than undermining, their role in that system.

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