

Olin Corporation and Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 3-CA-10410

19 January 1984

DECISION AND ORDER

On 29 April 1983 Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified herein and to adopt the recommended Order.

The facts are fully set forth in the judge's decision. In brief, the Union is the exclusive collective-bargaining representative of the Respondent's approximately 260 production and maintenance employees. The 1980-1983 collective-bargaining agreement contained the following provisions:

Article XIV—Strikes and Lockouts

During the life of the Agreement, the Company will not conduct a lockout at the Plant and neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly, with the full operation of the plant.

Employee Salvatore B. Spatorico was president of the Union from 1976 until his termination in December 1980.¹ On the morning of 17 December, the Respondent suspended two pipefitters for refusing to perform a job that they felt was more appropriately millwright work. A "sick out" ensued during which approximately 43 employees left work that day with medical excuses. The Respondent gave formal written reprimands to 39 of the employees who had engaged in the sick out. In a letter dated 29 December, the Respondent notified Spatorico that he was discharged based on his entire record and in particular for threatening the sick out, participating in the sick out, and failing to prevent it.

Spatorico's discharge was grieved and arbitrated. After a hearing, the arbitrator found that a sick out had occurred at the Respondent's facility on 17 December, that Spatorico "at least partially caused or participated" in it, and that he failed to try to stop it until after it had occurred. The arbitrator

concluded that Spatorico's conduct contravened his obligation under article XIV of the collective-bargaining agreement set forth above. The arbitrator also stated, "Union officers implicitly have an affirmative duty not to cause strikes which are in violation of the clause, not to participate in such strikes and to try to stop them when they occur." Accordingly, the arbitrator found that Spatorico had been appropriately discharged.

Noting that the unfair labor practice charges had been referred to arbitration under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), the arbitrator addressed these charges and found "no evidence that the company discharged the grievant for his legitimate Union activities." The arbitrator again stated his conclusion that Spatorico had been discharged for participating in and failing to stop the sick out because Spatorico "is a Union officer but the contract's no strike clause *specifically* prohibits such activity by Union officers." (Emphasis added.)

The judge declined to defer to the arbitration award on the grounds that although the arbitrator referred to the unfair labor practice issue he did not consider it "in any serious way." The judge determined that the arbitrator was not competent to decide the unfair labor practice issue because the award was limited to interpretation of the contract. Moreover, he determined that the arbitrator did not explicitly refer to the statutory right and the waiver questions raised by the unfair labor practice charge. On the merits, however, the judge agreed with the arbitrator's conclusion in that he found Spatorico's "participation in the strike was inconsistent with his manifest contractual obligation to attempt to stem the tide of unprotected activity." The judge concluded that article XIV of the collective-bargaining agreement was sufficiently clear and unmistakable to waive, at the least, the sort of conduct in which Spatorico engaged, that, therefore, "Spatorico exposed himself to the greater liability permitted by the Supreme Court" in *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983), and that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging him while merely reprimanding other employees.

We agree with the judge that the complaint should be dismissed. We do so, however, without reaching the merits because we would defer to the arbitrator's award consistent with the standards set forth in *Spielberg Mfg. Co.*² In its seminal decision in *Spielberg*, the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitra-

¹ Unless otherwise indicated, all dates hereafter are in 1980.

² 112 NLRB 1080 (1955).

tor is not clearly repugnant to the purposes and policies of the Act. The Board in *Raytheon Co.*³ further conditioned deferral on the arbitrator's having considered the unfair labor practice issue. Consistent application of the *Raytheon* requirement has proven elusive, and as illustrated by the recent *Propoco*⁴ case, its scope has expanded considerably. Accordingly, in his dissent in *Propoco*, Member Hunter proposed certain standards limiting the application of *Raytheon*. As set forth below, we adopt these standards which in our view more fully comport with the aims of the Act and American labor policy.

It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums.⁵ In our view, the *Propoco* majority diminished significantly the role of private dispute resolution by formulating a standard of review that arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issues just as the Board would have. This approach of determining the merits *before* considering the appropriateness of deferral was applied here by the judge, and he predictably reached a decision not to defer. The judge's decision here, like so many other past decisions of this sort, serves only to frustrate the declared purpose of *Spielberg* to recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes.

Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is

factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.⁶ In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong,"⁷ i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.⁸

The dissent attempts to distort our holding here by asserting, in essence, that we are depriving employees of their statutory forum. On the contrary, the Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceeding by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act. We differ with our dissenting colleague concerning the scope of the inquiry into the arbitrator's consideration of unfair labor practices because our clarifications of the *Spielberg* standards are, in our view, necessary to restrict the "overzealous dissection of [arbitrators'] opinions by the NLRB" decried by the Ninth Circuit in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 355 (9th Cir. 1979). That misdirected zeal has resulted in such infrequent deferral by the Board that its occasional exercise has had little substantive relationship to a mechanism which daily settles uncounted labor disputes to the satisfaction of the labor relations community.

³ 140 NLRB 883 (1963).

⁴ *Propoco, Inc.*, 263 NLRB 136 (1982), enf. with unpublished, nonprecedential opinion, Case No. 83-4058 (2d Cir. 1983). See also *American Freight System*, 264 NLRB 126 (1982).

⁵ See for example Sec. 203 of the LMRA, 29 U.S.C. 173(a) and the so-called Steelworkers Trilogy, *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

The Supreme Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), recognized the importance of grievance-arbitration as a machinery for dispute resolution.

Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c). . . . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." [Id. at 653.]

⁶ This approach is supported by Board precedent. See, e.g., *Kansas City Star Co.*, 236 NLRB 866 (1978), and *Atlantic Steel Co.*, 245 NLRB 814 (1979).

⁷ *International Harvester Co.*, 138 NLRB 923, 929 (1962), aff'd. sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964), quoted in Member Penello's dissenting opinion in *Douglas Aircraft Co.*, 234 NLRB 578, 581 (1978), enf. denied 609 F.2d 352 (9th Cir. 1979).

⁸ To the extent that *Suburban Motor Freight*, 247 NLRB 146 (1980), provided for a different allocation of burdens in deferral cases, it is overruled.

Accordingly, the infrequent deferrals by the Board (and the General Counsel's concomitant failure to defer at the complaint stage) under the allocation of burdens set forth in *Suburban Motor Freight*, 247 NLRB 146 (1980), lead us to the conclusion that a different allocation of burdens is more consistent with the goals of national labor policy.⁹ For these reasons we are requiring that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, if a respondent establishes that an arbitration concerning the matter before the Board has taken place, the burden of persuasion rests with the General Counsel to demonstrate that there are deficiencies in the arbitral process requiring the Board to ignore the determination of the arbitrator and subject the case to *de novo* review.¹⁰

The dissent argues that some courts have, at least implicitly, approved the *Suburban Motor Freight* standard. The decisions cited, however,

⁹ We note that no party to this proceeding has placed in the record those statistics relied on by our dissenting colleague. The basis for the statistics and how they were compiled is unexplained. For these reasons we find it inappropriate to base any decision on this equivocal material.

Furthermore, the statistics cited by the dissent, even if they established the proposition our dissenting colleague urges, do not diminish the need to adopt the standards enunciated today. Our primary concern is with the failure of the Board itself to defer in a consistent manner thus setting an improper example for the General Counsel and administrative law judges. We are aware that arbitration has been successful and consider that all the more reason to provide the General Counsel with firm guidelines particularly in the area of discriminatory treatment of individuals now subject to deferral once again under *Collyer* as set forth in our decision in *United Technologies Corp.*, 268 NLRB No. 83, issued today. In this regard we note that the statistics relied on by our colleague are not enumerated according to types of charges filed nor do they indicate what percentage of the total figures are being referred to, nor even whether those charges were meritorious and would otherwise have resulted in issuance of complaint; the last being a discretionary decision of the General Counsel not reviewable by the Board. In addition, the statistics do not reveal how many of the previously deferred cases were dismissed or withdrawn for reasons unrelated to the deferral such as the merits of the underlying charge.

Member Dennis does not quarrel with the dissent's citation of Agency statistics, but she finds that the statistics at most show that deferral by the General Counsel at the regional level works. The past policy of inconsistent and infrequent deferral by the Board itself, however, has created misunderstanding and has overly restricted deferral. Member Dennis agrees with her colleagues in the majority that the correction of this past policy is especially important to give full force and effect to today's decision in *United Technologies Corp.*

¹⁰ Contrary to the dissent's claim, we are not returning to *Electronic Reproduction Service*, 213 NLRB 758 (1974), in its entirety. Rather, we agree only with that part of *Electronic Reproduction* which placed on the General Counsel the burden of demonstrating that the arbitration is unworthy of deferral. We do not resurrect that part of *Electronic Reproduction* which required no more than an "opportunity" to present the unfair labor practice issue to the arbitrator to warrant deferral. We further note that *Electronic Reproduction* was criticized by the Ninth Circuit in *Arthur N. Stephenson v. NLRB*, 550 F.2d 535 (1977), that court's subsequent decisions in *NLRB v. Max Factor & Co.*, 640 F.2d 197 (1980), cert. denied 451 U.S. 983 (1981), and *Ad Art v. NLRB*, 645 F.2d 669 (1980), made clear that its objection was to that part of *Electronic Reproduction* which we do not adopt today. These later decisions also cast doubt on that court's adoption of the criteria set forth in *James Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). Thus, the dissent's reliance on *Stephenson* is questionable.

have said no more than that *Suburban* fell within the Board's "wide discretion"; the decisions do *not* find that the *Suburban* standards are the only ones consistent with the statute. Similarly, although some of these decisions have approved the Board's refusal to defer, these decisions have been based on the Board's conceded discretion in this area. Significantly, some courts have concluded that the Board failed to exercise its discretion under *Spielberg* consistently and evenhandedly. At least six circuits have found that the Board abused its discretion in failing to defer to arbitral awards; three of those decisions reversed Board decisions not to defer made under *Suburban Motor Freight*.¹¹ Indeed, recently one court noted that the only explanation for the erroneous refusal of the Board (including our dissenting colleague) to defer, while deferring correctly in a prior similar case, was the intervening issuance of *Suburban Motor Freight*.¹² Contrary to the dissent, therefore, we find that the courts' opinions are further evidence that the Board's past *Spielberg* policy was not so much policy as it was whim. What we declare today is

¹¹ *Douglas Aircraft Co. v. NLRB*, supra; *NLRB v. Pincus Bros.*, 620 F.2d 367 (3d Cir. 1980); *Liquor Salesmen's Local 2 (Charmer Industries) v. NLRB*, 664 F.2d 318 (2d Cir. 1981); *NLRB v. Motor Convoy*, 673 F.2d 734 (4th Cir. 1982); *American Freight System v. NLRB*, 114 LRRM 3513, 99 LC ¶ 10,581 (D.C. Cir. 1983); and *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499 (5th Cir. 1983). In *Douglas Aircraft* and *Pincus Bros.* the courts found, contrary to the Board, that the arbitrator's decisions were not repugnant to the Act and were thus worthy of deferral. The courts used formulations essentially similar to the one we rely on here. In this regard, the Ninth Circuit in *Douglas Aircraft* held that "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award is 'clearly repugnant' to the Act." (Id. at 354.) Similarly, the Third Circuit in *Pincus Bros.* stated:

As a result of both judicial and Board deference to arbitration awards, an arbitral result could be sustained which is only arguably correct and which would be decided differently in a trial *de novo*. The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case. The parties are not injured by deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process. To the extent that the parties surrender their right to a subsequent full hearing before the Board or a court, it is a voluntary waiver, consistent with the national policy. [650 F.2d at 374. Footnote omitted.]

The other three cases arose subsequent to *Suburban Motor Freight* and concerned the requirement that arbitrators consider the unfair labor practice issues. These courts found that the Board had abused its discretion by construing this requirement too broadly. We note in particular that in *Charmer Industries* the court stated: "Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a factfinder strengthen the case for deference to his findings. [Citation omitted.] Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement." 664 F.2d at 325.

¹² *American Freight System*, above, denying enforcement of the Board's decision, 264 NLRB 126 (1982) (former Chairman Van de Water and Member Hunter dissenting separately). Most recently the Board has been criticized for its failure to defer in *Richmond Tank Car*, above, in which the Fifth Circuit agreed with Member Hunter's dissenting position that deferral was appropriate.

our commitment to a policy of full, consistent, and evenhanded deference to a significant process within our national labor policy where it meets what we understand to be appropriate safeguards for statutory rights.

Turning now to the case before us, we find that the arbitral proceeding has met the *Spielberg* standards for deferral, and that the arbitrator adequately considered the unfair labor practice issue. First, it is clear that the contractual and statutory issues were factually parallel. Indeed, the arbitrator noted that the factual questions that he was required to determine were "1) whether or not there was a sick out and 2) whether the grievant caused, participated in or failed to attempt to stop the sick out, i.e., whether the grievant failed to meet the obligation imposed upon him by Article XIV." These factual questions are coextensive with those that would be considered by the Board in a decision on the statutory question—i.e., whether the collective-bargaining agreement clearly and unmistakably proscribed the behavior engaged in by Union President Spatorico on 17 December 1980.

Second, it is equally apparent that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.¹³ In this respect, the General Counsel has not shown that the arbitrator was lacking any evidence relevant to the determination of the nature of the obligations imposed by the no-strike clause in the collective-bargaining agreement and to the determination of the nexus between that clause and Spatorico's conduct. Thus the evidence before the arbitrator was essentially the same evidence necessary for determination of the merits of the unfair labor practice charge.

Finally, we turn to whether the arbitrator's award is clearly repugnant to the purposes and policies of the Act.¹⁴ In this regard, the Supreme Court in *Metropolitan Edison Co.*, above, recently addressed the merits of the substantive issue involved here. In *Metropolitan Edison* the collective-bargaining agreement contained only a general no-strike/no-lockout clause. Two arbitral awards had interpreted a similar clause in prior contracts to impose a higher duty on union officials, but the currently operative collective-bargaining agreement stated that arbitral awards were binding only for

the term of the agreement. On these facts, the Court found that the Union had not clearly and explicitly waived the Section 7 rights of its employee officials, and accordingly that the employer violated Section 8(a)(3) and (1) of the Act by disciplining the officials more severely than rank-and-file employees. The Court noted, however, that a "union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages,"¹⁵ and that a union lawfully may bargain away the statutory protection accorded union officials in order to secure gains it considers more valuable to its members. A union's "decision to undertake such contractual obligations," the Court added, "promotes labor peace and clearly falls within the range of reasonableness accorded bargaining representatives."¹⁶

Article XIV of the parties' contract here, in addition to a general no-strike/no-lockout obligation similar to the clause in issue in *Metropolitan Edison*, includes a proscription that "neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly, with the full operation of the plant." Certainly, were we reviewing the merits, Board Members might differ as to the standards of specificity required for contractual language waiving statutory rights and as to whether the above language meets those standards at least as applied to employee Spatorico. The question of waiver, however, is also a question of contract interpretation. An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes. Particularly in view of the additional proscriptions in the no-strike clause quoted above, the arbitrator here had a reasonable basis for finding as he did, in reference to the unfair labor practice charge, that the clause "specifically prohibits" union officers from engaging in activity of the sort engaged in by Spatorico.¹⁷ We find that the arbitrator's contractual interpretation is not clearly repugnant to either the letter or the spirit of the Supreme Court's opinion in *Metropolitan Edison*, which held that a union may waive the right of its officials to acquiesce in unprotected work stoppages.

Accordingly, we find that there is no evidence that the statutory and contractual issues are factual-

¹³ The only factual discrepancy revealed by the record is one which, if anything, might have made the record of the arbitral proceeding more favorable to the alleged discriminatee than the record in the instant proceeding. Thus, in the arbitration hearing Spatorico apparently testified that he was genuinely physically ill and was unaware of the work stoppage when he left the plant. At the unfair labor practice hearing, however, Spatorico conceded that he was not physically ill and did know that a work stoppage was underway as he left the plant.

¹⁴ No party contends that the parties had not agreed to be bound by arbitration or that the proceedings were not fair and regular.

¹⁵ *Metropolitan Edison Co. v. NLRB*, above at 1477.

¹⁶ *Id.*

¹⁷ See generally the dissent of former Chairman Van de Water and Member Hunter in *United States Steel Corp.*, 264 NLRB 76 (1982).

ly dissimilar or that facts generally relevant to the unfair labor practice issue were absent from the record made before the arbitrator. Additionally, the General Counsel has failed to show that the arbitrator's award is clearly repugnant to the Act, i.e., that the arbitrator's decision is not susceptible to an interpretation consistent with the Act. Thus, we shall defer to the grievance arbitration award and dismiss the complaint in its entirety.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER ZIMMERMAN, dissenting in part.

I dissent from the overruling of *Suburban Motor Freight*, 247 NLRB 146 (1980), and *Propoco, Inc.*, 263 NLRB 136 (1982). My colleagues in the majority have grossly mischaracterized and unjustifiably rejected a well-reasoned and judicially approved addition to the original *Spielberg*¹ standard for Board review of arbitration decisions. That standard, properly applied, is entirely consistent with and promotes the national labor policy favoring the resolution of disputes through the arbitral process. Instead, the majority has articulated a new standard which is indistinguishable in result from the rule of *Electronic Reproduction Service*, 213 NLRB 758 (1974), a judicially discredited case which the majority opinion (not surprisingly) refrains from expressly endorsing.

This new standard is significantly flawed in several respects. Specifically, (1) it represents an impermissible abdication of the Board's statutory obligation to prevent unfair labor practices; (2) it contradicts a substantial body of judicial precedent; (3) it imposes a novel and inequitable burden of proof on the General Counsel; (4) in conjunction with the unwarranted change in prearbitral deferral doctrine announced today in *United Technologies Corp.*, 268 NLRB No. 83, the standard here signals a Board policy of broadscale deferral which, contrary to the majority's intent, may actually discourage the use of grievance and arbitration dispute resolution systems; (5) it proceeds from the wholly erroneous premise that under the Board's prior policy, overruled today, deferral to the arbitral process has only been infrequent; and (6) ironically, the new standard is unnecessary to justify deferral in this case, where the Board should in any event reverse the judge, defer under *Suburban Motor*

Freight and *Spielberg* to the arbitration award, and dismiss the complaint.

Very early in the Board's experience with the *Spielberg* doctrine, it became apparent that there must be some minimal proof that an unfair labor practice issue has been resolved in arbitration before the Board can defer to an arbitration award. With such proof, the Board can reasonably evaluate the award according to the *Spielberg* standards and can accommodate and encourage the arbitral process by deferring to it when the award meets those standards. Without such proof, the Board cannot defer because it has no reasonable basis for determining whether the award fulfills the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices.

Accordingly, the Board refused to defer to an arbitration award in *Monsanto Chemical Co.*, 130 NLRB 1097 (1961), where an arbitrator expressly refused to resolve an unfair labor practice issue presented to him. The Board reasoned that:

It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it. [130 NLRB at 1099.]

In *Raytheon Co.*, 140 NLRB 883 (1963), the Board again refused to defer to an arbitration award. The employer in arbitration had expressly limited the scope of the arbitrator's authority to the contract issue whether two employees had violated a contractual no-strike provision and were consequently subject to discharge. The union acquiesced to this limitation and the arbitrator ruled solely on the contract issue in upholding the discharges. In refusing to defer to the award, the Board reiterated the principles of *Monsanto* and stated that it could not defer where the arbitrator had failed to resolve, indeed could not resolve, the unfair labor practice issue of whether the assigned cause for discharge was a pretext for unlawful antiunion motivation. Notably, the *Raytheon* majority expressly rejected a contention by the dissenting minority that the unfair labor practice issue had been resolved in arbitration because "the underlying factual issue in both the arbitration and the unfair labor practice proceedings was whether the dischargees engaged in a walkout or in conduct inciting a walkout." In other words, mere factual parallel between contract and statutory issues will not suffice to prove

¹ In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board established a policy of deferring to an arbitrator's award if the following criteria were met: (1) all parties agreed to be bound by the results of the arbitration; (2) the arbitration proceedings were fair and regular; and (3) the arbitrator's decision is not repugnant to the Act.

that an arbitrator must have resolved an unfair labor practice issue.

Subsequent cases further refined the *Monsanto/Raytheon* requirement that an unfair labor practice issue must be presented to and considered by an arbitrator if the Board is to defer to an arbitration award. In *Airco Industrial Gases*, 195 NLRB 676 (1972), the Board held that it would not defer to an arbitration award which gave no indication that the arbitrator ruled on the unfair labor practice issue. Furthermore, the Board indicated that the statutory issue had not even been presented where the issue in arbitration was whether the employer had "just cause" to impose the discipline grieved. In *Yourga Trucking*, 197 NLRB 928 (1972), the Board logically held that the burden of proving that an unfair labor practice issue had been presented and considered in arbitration must be borne by the party asserting the affirmative defense that the Board's statutory jurisdiction to resolve the issue should not be exercised.

In *Electronic Reproduction*, above, the Board abruptly departed from a consistent line of precedent and held that in the absence of "unusual circumstances" it would defer to an arbitrator's decision even in cases where there was no indication that the arbitrator had considered or was even presented with the unfair labor practice issue before the Board. Simply stated, the *Electronic Reproduction* Board adopted a presumption that an arbitrator's resolution of a contract issue must also have resolved the unfair labor practice issue. The principal justification for this presumption was that prior Board requirements had artificially separated contract and unfair labor practice issues and had thereby discouraged the use of grievance and arbitration by permitting parties to withhold evidence from arbitration in order to get a perceived "second bite of the apple" in Board litigation. In particular, the *Electronic Reproduction* majority rejected Board precedent by holding that resolution in arbitration of the contract issue whether discipline was for "just cause" necessarily entailed resolution of the unfair labor practice issue whether discipline was for unlawful discriminatory reasons.

The *Electronic Reproduction* rule was not well received. In *Arthur N. Stephenson v. NLRB*,² the Ninth Circuit expressly rejected the rule because the Board would defer to arbitration upon "mere presumption in total absence of any evidence" whether the unfair labor practice issue had been resolved, thereby failing to meet the "clearly decided" criterion which the Ninth Circuit adopted from the D.C. Circuit's decision in *James Banyard*

v. NLRB.³ The *Stephenson* court reasoned that "legislative history of [the Act] does not support the interpretation that arbitration is meant to be a substitute for Board resolution of statutory issues or that the arbitration process is a prerequisite for the resolution of unfair labor practice charges." It went on to state that it was "illogical for the Board, which is responsible for resolving the unfair labor practice issues, to defer to a decision by an arbitrator, who is under no duty and indeed may not be particularly predisposed to consider the statutory issue, solely on the basis of a factually unfounded presumption that the arbitrator has considered the issue."⁴

Recognizing the validity of criticism leveled against *Electronic Reproduction*, the Board overruled that case in *Suburban Motor Freight*, above, and returned to the standard for deferral set by *Monsanto, Raytheon, Airco*, and *Yourga*. Consistent with that precedent, the Board held that it again would "no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." This threshold requirement for deferral under *Spielberg* has now been endorsed by numerous circuit courts of appeals, which in the process either expressly or implicitly rejected the *Electronic Reproduction* rules.⁵ In addition, a Board majority recently reaffirmed the *Suburban Motor Freight* standard in *Propoco*, above.⁶

³ 505 F.2d 342 (1974).

⁴ 550 F.2d at 540. For other criticism of the *Electronic Reproduction* rule, see Simon-Rose, *Deferral under Collyer by the NLRB of Section 8(a)(3) cases*, 27 Lab. L.J. 201, 209-221 (1976), and Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. Penn. L. Rev. 897, 909 (1975).

⁵ *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981); *NLRB v. Designcraft Jewel Industries*, 675 F.2d 493 (2d Cir. 1982); *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981); *NLRB v. Motor Convoy*, 673 F.2d 734 (4th Cir. 1982); *NLRB v. Magnetics International*, 699 F.2d 806 (6th Cir. 1983); *St. Luke's Memorial Hospital v. NLRB*, 623 F.2d 1173 (7th Cir. 1980); *Ad Art v. NLRB*, 645 F.2d 669 (9th Cir. 1980). See also *Banyard v. NLRB*, above; and *Illinois Ruan Transport Corp. v. NLRB*, 404 F.2d 274, 280 (8th Cir. 1968).

⁶ The majority opinion today contains the inexplicable statement that *Propoco* "diminished significantly the role of private dispute resolution by formulating a standard of review that arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issues just as the Board would have." *Propoco* did nothing of the kind.

A reader of the *Propoco* majority opinion will search in vain for the standard which my colleagues attribute to it. Contrary to their view, *Propoco* merely reaffirmed and applied the *Suburban Motor Freight* and *Spielberg* standards for limited review of an arbitration award. The majority incorrectly implies that my views necessarily require the Board to withhold deferral whenever the result on the merits would be decided differently in a hearing de novo. To the contrary, in applying the prior standards in recent cases, particularly as to the test of whether the arbitration award is repugnant to the Act, it has consistently been my view that "the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law [footnotes omitted]." *G & H Products*, 261 NLRB 298 (1982). Only after the

² 550 F.2d 535 (1977).

Continued

Offering no explanation other than the unsubstantiated conclusion that the judicially approved *Suburban Motor Freight* standard is not consistent with the national labor policy favoring the voluntary arbitration of disputes, my colleagues in the majority have today rejected that standard for one which they insist, again without legal or factual substantiation, more fully comports "with the aims of the Act and American labor policy." Under the new standard, most recently proposed by Member Hunter in his dissenting opinion in *Procopo*, an arbitrator need no longer actually consider and pass upon the unfair labor practice issue before the Board defers to his award. Instead, the Board will now presume that the unfair labor practice issue has been "adequately considered" by the arbitrator, and it will defer to an arbitration award if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice question. Moreover, it will now be the General Counsel's burden to rebut the presumption that these criteria have been met.

The majority suggests that *Suburban Motor Freight* has been overruled only to the extent that it "provided for a different allocation of burdens in deferral cases." I will not indulge my colleagues in the canard that *Procopo*, *Suburban Motor Freight*, *Yourga*, and *Airco* have not been totally overruled, or that *Raytheon* and *Monsanto* have not suffered the same fate, or at least been limited strictly to their factual circumstances.

Initially, I note the conundrum presented by the two-step majority rule here. If the contractual issue is factually parallel to the unfair labor practice issue, then how can one possibly prove that the facts relevant to resolving the unfair labor practice issue have not been presented to the arbitrator unless one proves the absurdity that even the facts relevant to the contract issue were not presented? In reality, the majority's new test involves only one step. It will presume that an arbitrator has considered both contract and unfair labor practice issues unless the General Counsel can prove that there is no factual parallel between the issues. The more broadly the Board construes the notion of

factual parallelism,⁷ the more difficult the General Counsel's task becomes.

The majority makes only brief footnote reference to *Electronic Reproduction* in its opinion. Yet the doctrine of factual parallelism—a doctrine rejected in *Raytheon* and *Airco*—is precisely the doctrine upon which the *Electronic Reproduction* majority founded its presumption that an arbitral resolution of a contract issue necessarily resolved an unfair labor practice issue in discharge and discipline cases. In addition, I note the identity between the rule announced today and the *Electronic Reproduction* rule, as accurately summarized by the dissenting opinion in that case:

Now it becomes the burden of the party seeking correction of an alleged violation of the Act to show that the arbitrator did not decide the statutory issue, and next, or perhaps now, that the arbitrator *could not* have decided the issue regardless of whether it was presented to him. [*Electronic Reproduction*, above at 765.]

Under *Electronic Reproduction* and under the rule adopted today, the result is the same: the Board will now defer to an arbitrator's award based on a presumption that an unfair labor practice issue has been resolved, without actually knowing if the issue was presented to or considered by the arbitrator. I understand my colleagues' reluctance openly to embrace the *Electronic Reproduction* rule, but their reformulation of that rule here suffers from the same infirmity of the original. First, and most importantly, the new standard expands the Board's deferral policy beyond permissible statutory bounds. For all the reasons stated by the Board in the long line of cases upon which I rely, I find that the use of a presumption here to justify deferral amounts to an abdication by this Board of its obligation under Section 10(a) of the Act to protect employees' rights and the public interest by preventing and remedying unfair labor practices. Nowhere in the Act itself, its legislative history, or in its judicial interpretation is there authority for the proposition that the Federal labor policy favoring arbitration requires or permits the Board to abstain from effectuating the equally important Federal labor policy entrusted to the Board under Section 10(a).

Second, I emphasize that the overwhelming weight of judicial precedent stands for the proposition that the Board *has no authority to defer* if it does not have some affirmative proof that an unfair

Board determines under *Suburban Motor Freight* that there is no discernible "result" to the unfair labor practice issue in arbitration, or that the arbitration award otherwise fails to satisfy *Spielberg*, will the Board engage in de novo review of the statutory issue.

The United States Court of Appeals for the Second Circuit enforced the Board's order in *Propoco* in an unpublished decision dated 16 September 1983 (Case No. 83-4058). The court expressly approved the Board's refusal to defer to the arbitration award there.

⁷ Deferring to arbitration on the basis of factual parallelism, of course, is a broader standard for deferral than deferring only when contract and statutory issues are identical. See, e.g., *NLRB v. Motor Convoy*, above.

labor practice issue was presented to and considered by an arbitrator. Judicial rulings on this point stand in sharp contrast to the general proposition that the Board has broad discretionary authority to defer to the grievance and arbitration process.⁸

For example, in *Stephenson v. NLRB*, above, the Ninth Circuit stated that the "arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give inference." The court defined the "clearly decided" requirement as meaning that "the arbitrator's decision must specifically deal with the statutory issue." (Emphasis added.) It went on to state that:

Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory, and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act. The "clearly decided" requisite is designed to enable the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act.⁹

In *NLRB v. Magnetics International*, above, the Sixth Circuit stated that it would honor the Board's decision to defer "only when it appears from the arbitrator's award that the arbitrator considered and clearly decided all unfair labor practice charges." Of particular significance, the court further commented that it would not "speculate about what the arbitrator must necessarily have considered" and that any doubts regarding "the propriety of deferral will be resolved against the party urging deferral." Similarly, in *United Parcel Service v. NLRB*, 706 F.2d 972 (1983), the Third Circuit held that "for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue *has actually been decided*." (Emphasis added.)¹⁰ It thus upheld the Board's refusal to defer on the ground that the statutory issue had not been fully presented to or considered by the grievance panel.¹¹

⁸ *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964).

⁹ 540 F.2d at 536. Contrary to the suggestion of the majority, the "clearly decided" requirement remains the law of the Ninth Circuit, as explained in *Ad Art v. NLRB*, 645 F.2d 669 (1980), where the court affirmed the Board's refusal to defer to an arbitration award.

¹⁰ The Third Circuit recently reaffirmed this view and expressly endorsed the *Propoco* majority opinion in *Ciba-Geigy Pharmaceuticals Div.*, 722 F.2d 1120 (3d Cir. 1983).

¹¹ I do not "argue," as my colleagues put it, that "some courts have, at least implicitly, approved the *Suburban Motor Freight* standard." It is incontrovertible that the First, Second, Third, Sixth, and Seventh Circuits have expressly approved that very standard and that the Fourth, Ninth, and D.C. Circuits have applied a similar standard. Not a single circuit court of appeals has approved the *Electronic Reproduction* rule or even suggested that it or a similar rule would fall within the Board's discretion

A third unacceptable aspect of the majority's new rule is the inequity of requiring that "the party seeking to have the Board reject deferral . . . show that the above standards for deferral have not been met." In *Yourga Trucking*, above, the Board confronted the question of which party to a proceeding under the Act must adduce proof regarding the "scope of matters presented in the arbitration proceeding." The Board there held that:

. . . the burden to adduce such proof rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should not be exercised. That party may be presumed to have the strongest interest in establishing that the issue has been previously litigated, if that is the case. Moreover, in the usual case, that party will have ready access to documentary proof, or to the testimony of competent witnesses, to establish the scope of the issues submitted to the arbitrator.

The Board readopted the *Yourga* allocation of proof in *Suburban Motor Freight* and I adhere to the view that it is proper to place the burden of establishing an affirmative defense on the party raising the defense. To invoke a presumption and shift the burden of disproving a naked defense claim to the General Counsel amounts to an abuse of the Board's discretion. In effect, once the existence of an arbitration award has been proved by a respondent, the majority will transform an affirmative defense into part of the General Counsel's prima facie case. As previously discussed, rebutting the presumption will be difficult enough in light of the doctrine of factual parallelism. Moreover, there appears to be no sound procedural basis at all for imposing on the General Counsel—the one party in unfair labor practice litigation who is not in privity through a collective-bargaining agreement—the responsibility of producing evidence about arbitral proceedings under that agreement.

A fourth major criticism of the new standard for postarbitral deferral involves the relationship of this standard to the expansion of prearbitral deferral policy announced by the majority today in *United Technologies*, above. In that decision, my colleagues seek to temper the broadened "postponement of the use of the Board's processes" by noting that those processes "may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg*." The majority's reversal of

to defer. Cases cited by the majority are not to the contrary. They involve situations where the reviewing court disagreed with the Board about whether an arbitrator had clearly decided a statutory issue under *Suburban Motor Freight*, or whether an arbitrator's decision on the statutory issue was "clearly repugnant" under *Spielberg*.

policy in this case, however, suggests that such postarbitral review will be of scant significance. This raises a broader question about my colleagues' assumption that the more the Board defers to arbitration awards—and it undoubtedly will defer more under the law announced today in this case and in *United Technologies*—the better it will serve the Federal labor policy favoring dispute resolution through grievance and arbitration proceedings. They do not articulate any rationale for this assumption nor do they refer to any particular administrative expertise which might warrant judicial deference to their view.

I suggest that the Board has reached a point where it actually discourages arbitration by the extent to which the Board defers to it. Sometimes less expensive, more informal, or more expeditious arbitration may be an attractive way to resolve minor grievances and disputes which are essentially contractual in nature. The more we force parties to resolve unfair labor practice issues in a contractual forum, however, the more we risk impairing those attributes which make arbitration attractive. Knowing the risks of failing to litigate statutory issues in arbitration, unions might best serve their duty of fair representation by insisting in collective bargaining that arbitration have all the formal procedural features of an unfair labor practice case before the Board. Even without such a development, an increase in the arbitration caseload could strain the resources of many unions, employees, and arbitrators, as well as delay the hearing and resolution of each grievance. The final irony of the stress created by a Board policy of wholesale deferral may be that one or both parties to collective-bargaining negotiations will oppose the inclusion of any form of arbitration provision in a contract.

Fifth, the majority's attack against the purported infrequency of deferrals by the Board under the law overruled today is uninformed and contrary to the Agency's actual experience. It seems that the majority's perception has been distorted by the disposition of the handful of contested cases which present the most difficult issues under *Suburban Motor Freight* and *Spielberg* and are decided by the Board Members themselves. A vast number of cases are disposed of through deferral accommodation procedures, however, before they ever reach the Board. The Agency's own statistics, officially maintained by the Data Systems Branch of our Division of Administration, indicate that at the end of December 1983 there were 2185 pending unfair labor practice cases which had been deferred to arbitration machinery under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), or *Collyer Insulated Wire*, 192 NLRB 837 (1971). Between 1 October 1981 and

the end of December 1983, in excess of 3800 cases were deferred under *Collyer* and *Dubo*. During the same period, the General Counsel's application of *Suburban Motor Freight* and *Spielberg* standards resulted in the issuance of complaints in only 163 previously deferred cases. In sharp contrast, over 1700 previously deferred cases were dismissed (357), withdrawn (1159),¹² or settled (62). These statistics dramatically belie the majority's specious claim of infrequent deferrals.

For all the foregoing reasons, I dissent from the change in Board law made today. As a final point, however, I reiterate that no change in law was necessary to justify Board deferral to the arbitration award at issue here. I agree that the judge should have deferred to the arbitration award by applying the proper standard of *Suburban Motor Freight*. The arbitrator expressly found that Spatorico was not discharged for his legitimate union activities, but instead was discharged pursuant to the contractual no-strike clause which specifically prohibits union officers from causing work stoppages. It is clear that the arbitrator was presented with, considered, and ruled on the statutory issue. Further, I find that the arbitrator's award is not repugnant to the Act. The award is consistent with the Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983). The award also comports with the Board's holding in *Midwest Precision Castings Co.*, 244 NLRB 597 (1979), that employees—be they union officers or not—who instigate unauthorized strikes are properly subject to more severe discipline than are employees who merely participate in such activity. In this case, the arbitrator found that Spatorico "at least partially caused" the work stoppage.

¹² Cases classified as withdrawn include those numerous cases in which the General Counsel has formally notified the charging party that the case will be dismissed if not withdrawn.

DECISION

BERNARD RIES, Administrative Law Judge: This matter was tried in Buffalo, New York, on January 11, 1983. The legal issues presented are whether the Board should defer to an arbitration award rendered with respect to the suspension of employee Salvatore B. Spatorico on December 17, 1980, and his discharge on December 23, 1980; and, if not, whether those actions were unlawful under Section 8(a)(3) and (1) of the National Labor Relations Act.

Briefs have been filed by the parties. Having carefully considered the briefs, the entire record, and my recollection of the demeanor of the witnesses, I make the following findings of fact,¹ conclusions of law, and recommendation.

¹ Certain errors in the transcript are hereby noted and corrected.

I. FINDINGS OF FACT

The Respondent manufactures chemical products in a plant in Niagara Falls, New York, where it employs about 375 workers. For many years the Respondent has recognized Local 8-77 of the Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the collective-bargaining representative of its approximately 260 Niagara Falls production and maintenance employees. As of the time of the hearing, the most recent bargaining agreement executed by the Respondent and the Union covered the period April 1, 1980, to April 1, 1983. The agreement contained the following provision relevant to this case:

Article XIV—Strikes and Lockouts

During the life of this Agreement, the Company will not conduct a lockout at the Plant and neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its [sic] members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly, with the full operation of the plant.

Salvatore B. Spatorico began employment with the Respondent on February 1, 1970. A millwright, Spatorico became active in the Union and served in various capacities over the years, most prominently as the president of Local 8-77, beginning in 1976 and still so serving at the time of his termination from employment in December 1980.

The bulk of the testimony at this hearing relating to Spatorico's termination was given by Spatorico himself. The focus of that testimony was on the nature of the role played by Spatorico in a "sickout" in which some 40 maintenance employees engaged on December 17, 1980.² In an unusual development, Spatorico here dramatically and deliberately altered his testimony from that given by him in an earlier arbitration hearing concerning this same incident. At the prior hearing, Spatorico had asserted, under oath, that he had been genuinely ill when he left the plant on December 17, and had further stated that he had no knowledge that an undeclared concerted work stoppage was in progress when he himself left the plant. At the present hearing, Spatorico conceded that, in fact, he had not been physically ill when he departed on December 17, and he further admitted that he had known that a work stoppage was underway, having been made aware of that fact by the purported instigator, fellow employee and Union Secretary Gary Prokop.

The record affords no more reason to believe Spatorico's present tale that Prokop was the provocateur behind the sickout than there was to believe Spatorico's original version before the arbitrator that he was sick and had no knowledge that a work stoppage was taking place; presumably, the change of heart represents a pragmatic assessment that the first account is not very marketable. No matter how often or in what terms Spatorico describes the events, I suspect that any reader of the record will come away, as I did, with the indelible impression

that Spatorico deliberately instigated and participated in the sickout. However, it is unnecessary to find causation here, since the Respondent refrained from making such a judgment and confined its conclusion to the more limited "encouragement" of other employees.

The uncontroverted testimony of Michael C. Bentley, the Respondent's industrial relations manager at Niagara Falls, furnishes a context for the events of December 17 and thereafter. Bentley testified that Spatorico had received a "final written warning" in February 1979 for "using abusive and threatening language towards supervision, engaging in self-help methods basically, rather than going through the grievance procedure." Subsequently, in October 1980, Spatorico was given a written reprimand for "threatening a walk-out and using abusive language towards a member of management." Very soon thereafter, Spatorico was suspended for a week for "interfering with our rights to manage." On October 31, Bentley sent Spatorico a letter, outlining his entire record to that point, reminding him of "numerous informal counseling sessions that we had with him over a period of two or three years" regarding his "disruptive behavior in the plant," and telling him that he would have to "take corrective action or he would not have a job at Olin." It was against this background that the events of December 17 were played out.

The work stoppage on that day was triggered by the refusal of two pipefitters to perform a certain job which they deemed to be millwright work. After Spatorico was notified in the morning of December 17 about the suspension of the pipefitters, he contacted Bentley. Bentley looked into the problem and notified Spatorico that the Company considered the work assignment to be a proper one. Angered by this stance, Spatorico told Bentley, "There are some sick people working and that if you, by flexing your muscles like you had the week before, you are going to cause people to become sick and go home."³

Bentley investigated further, but came to the same conclusion as before, and he so informed Spatorico. When the latter inquired as to the length of the suspension of the pipefitters, and Bentley replied that they would discuss that matter later on, Spatorico responded, according to his own testimony, "We are going to talk about it today. *We are going to shut down. You are talking thirty-two more men. We need to get this resolved. We are not letting this wait.*" When Bentley refused to budge on the point, Spatorico got "very hot" and said, as he testified, "You are just playing with my string. If you don't want these two, then I'm not available and I'm sick. My ulcer is bothering me and I'm going home."

Spatorico thereupon wrote a note to his supervisor stating that he was going home for medical reasons, and left his work area. Instead of going directly to the medical department, however, he went to the "HTH repair

³ The incident of the "week before" is not further mentioned in the record. I do not accept Spatorico's explanation that by this statement he was merely attempting to inform Bentley that many of the workers had been loyally working even though genuinely sick, and that management's callousness might cause them to stop being as heroic as they had been up to that point.

² Unless indicated otherwise, all dates hereafter refer to 1980.

shop," assertedly for the purpose of informing Union Vice President Bateman that he was going home, so that Bateman could assume the presidential duties. Bateman was not at work that day, but Spatorico did fall into conversation with other employees at the HTH repair shop. He recalled speaking to steward Atkinson and employee Shirback and "a few pipefitters." He testified that Atkinson had told him about an aspect of the pipefitters-suspension incident in which he had been personally involved. There is no direct evidence that Spatorico encouraged the employees to join in a sickout, although such an invitation might be suggested by the fact that when a supervisor walked up to the group to make work assignments, Spatorico resisted: "I told him that I was on Union business and that I needed to talk to these individuals."

When Spatorico left the HTH repair shop, he went looking for chief steward Frank Presutti, again assertedly for the purpose of appointing a substitute in his absence. Since Presutti "historically" ate his lunch in either of two places, Spatorico first went to the HTH maintenance shop. He did not find Presutti there, but he was approached by some employees who asked about the suspension of the pipefitters. As more employees began to crowd around, perhaps 10-16 in all, Spatorico "gathered all the individuals together" and purportedly told them that the two pipefitters were going home and "we got a job that we have to do out there. Let's do what we have to do and that means we are going to work under protest for the rest of the day, but we have to get the job done." There is no testimony which contradicts the foregoing, but I consider it quite unlikely that Spatorico, in such marked contrast to his angry and defiant attitude exhibited elsewhere that morning, would have affirmatively exhorted these employees to "get the job done."

Spatorico then went to the locker room of the shipping department and found Presutti. After bringing Presutti up to date, Spatorico proceeded to the medical department, where 6-8 employees were waiting. Spatorico told the nurse that his gums were hurting from new dentures; she gave him some medicine to swab on the gums.⁴

The record does not set out in any precise fashion Spatorico's activities between 12:05 p.m., the time at which, he says, he entered the medical department,⁵ and 1:05 p.m., when, he says, he signed out.⁶ He did say that,

⁴ As previously indicated, Spatorico acknowledged at the hearing that neither his gums nor his ulcer had played any part in his presence at the medical department. He testified, however, that his reason for leaving the plant was essentially health-related, referring to a longstanding "mental disorder" which had in the past caused him to become violent when subjected to a stressful situation. His concern that the problem might recur because of the conflict over the pipefitters' suspension led him, he testified, to leave the plant. Nurse Sylvia Burke, who appeared as a witness for the Respondent, agreed that, on prior occasions, Spatorico had "probably" said that "simply because of the emotional stress in the plant he had to go home." In view of that prior history, it is difficult to understand why Spatorico would have on this occasion conjured up gum and ulcer problems if he were really concerned about his mental state, a problem which he obviously had not been shy about alluding to in the past.

⁵ He conceded at the hearing that he might have arrived as early as 11:55 a.m.

⁶ The sign-out sheet states that he left at 1:30. At the hearing Spatorico testified that he falsified his time of signing out in order to gain a half-hour's pay, offering what he plainly recognized as a lame half-excuse that

after the nurse gave him some medication for his gums, he left her office, went to a foyer area in front of the medical department, and attempted to page Maintenance Superintendent Robert F. Histing, purportedly on the theory that Histing might be more amenable to settling the pipefitters dispute than would Bentley. Unable to reach Histing immediately, Spatorico returned to the nurse and said that his ulcer was bothering him; she gave him a pill.

The foregoing would indicate that Spatorico spent at least 1 hour in and around the medical department, but his activities during that time are not clearly accounted for, other than his two conversations with the nurse, his attempt to page Histing, and his later conversation with Histing. During this period, according to Spatorico, some 20-24 maintenance employees visited the nurse. Spatorico did state that it was in the medical department that Union Secretary Prokop told him, about 12:15, that a concerted sickout was in progress, saying, "We are not going to take this shit no more. We are going to walk. I'm going to get everybody organized and we are going to do it." When he was initially asked about his response to Prokop, Spatorico quoted himself as merely saying, "Sounds like a good idea." When asked again, Spatorico had himself answering Prokop's announcement with amazement: "You got to be kidding me," and, after Prokop had stated that they were going out for sure, Spatorico remarking, "It's a good idea. I don't know if we can pull it off." Prokop reportedly replied, "I'm taking care of it."⁷

At the hearing, Spatorico conceded that he stayed in the medical department as long as he did because he "wanted to see if it could be pulled off . . . I wanted to see how strong the Union was."

After being informed by Bentley at 1:30 p.m. of his suspension from employment, Spatorico consulted union representative Alvarez about his situation. Alvarez worked out an arrangement with Bentley that if the sick-out employees returned to work the next day, they would receive only written reprimands. Spatorico procured a list of these employees and, about 10 p.m. on December 17, he called, from the Respondent's guardhouse, each of the 43 employees who had departed on a medical pretext, telling them that "if you are participating in this sickout, I need you to stop" and urging them to report for work the following day (except for the ones who were "really sick"). He also gave each one the opportunity to directly report his availability to the guard, the normal procedure for returning from sick leave.⁸ All the employees returned to work the next day.

two foremen had briefly detained him to inquire about "what's going on" as he was leaving the plant. It may be that this display of candor was prompted by the fact, testified to by Spatorico and Bentley, that the latter found the former at home about 1:30 on December 17 when Bentley had called to say that Spatorico was suspended.

⁷ Although there was no contradiction of this testimony, I consider Spatorico's asserted response, "You got to be kidding me," inherently improbable; Spatorico was an aggressive union president who had himself only recently been threatening a walkout and who was even then in the medical department admittedly under false pretenses.

⁸ Spatorico had already declared his own availability at 4:30 p.m.

On December 18, in letters to 39 employees, the Respondent accused them of having engaged in a work stoppage, indicated that the letters constituted a "formal written reprimand," and warned that similar future activity would subject them to more severe discipline.⁹

On December 22, an "investigatory" meeting was held with Spatorico and other union representatives at which the Company stated its "tentative conclusions" that Spatorico had violated the bargaining agreement in a manner which provided grounds for discharge. In a detailed letter dated December 29, the Respondent notified Spatorico of his discharge "effective December 23, 1980."

Thereafter, the matter was grieved and arbitrated (together with two other grievances filed by Spatorico which were already pending at the time of his discharge). The arbitrator held, *inter alia*, that there had been, in fact, a sickout, and that, by virtue of his having "participated in it" and having "failed to try to stop it until after it occurred," Spatorico had not honored article XIV of the agreement, earlier set out, under which, according to the arbitrator, union officers such as Spatorico "implicitly have an affirmative duty not to cause strikes which are in violation of the clause, not to participate in such strikes and to try to stop them when they occur."

Somewhat diffuse is the evidence relating to the Respondent's reasons for discharging Spatorico. So that a full understanding of the point can be had, it seems useful to quote at length from the December 29 termination letter from Bentley to Spatorico, the first excerpt being a recitation of the "tentative conclusions" given by the Company to Spatorico at the December 22 meeting:

1. You threatened a work stoppage when you stated to me that the Company was "just asking" for people to get sick and not work. This threat of a work stoppage was a direct violation of Article 14 of the Agreement. In light of the fact that you have previously been warned and disciplined for making threatening remarks of this kind, as recently as October of 1980, your threat of a work stoppage on December 17, 1980 is grounds for discharge.

2. Within minutes of your threat of a work stoppage, an actual work stoppage began. This work stoppage consisted of a sickout in which 42 people participated over a mere two (2) hour period and you were one of the participants. Your participation in a work stoppage in direct violation of Article 14 of the Agreement is grounds for discharge.

3. You knew first hand precisely what was occurring. You knew that a work stoppage in the form of a sick-out was occurring. You knew that a work stoppage of any kind is prohibited under Article 14 of the Agreement and you knew that you had an obligation as a Union officer to prevent your Union members from engaging in a work stoppage. You did absolutely nothing to prevent your Union members from engaging in the work stoppage. In fact, you were present in the Medical Department when

14 of the 42 people who participated in the work stoppage entered the Medical Department with the express purpose of alleging to be too sick to continue working.

You failed to fulfill your contractual obligation to prevent your Union members from causing any work stoppage or any interference, directly or indirectly, with the full operation of the plant. Moreover, your participation in the work stoppage actually supported and encouraged your Union members to engage in the work stoppage.

Your failure to exercise your duties and responsibilities under Article 14 of the Agreement is particularly serious and is grounds for discharge.

4. Your involvement in the events of December 17, 1980 is particularly intolerable in light of your entire disciplinary record. You have been repeatedly warned and disciplined for engaging in disruptive behavior, for making threatening statements and for interfering [sic] with the Company's rights to manage. As recently as October of 1980 you were warned specifically about violating Article 14 of the Agreement.

Your entire record in this regard is totally unacceptable and is grounds for discharge.

Thereafter in the letter, the Respondent set out the defenses and explanations urged by Spatorico at the December 22 meeting and then concluded:

The Company has carefully reviewed and considered your explanation of your involvement in the events of December 17, 1980. The Company's conclusions are as follows:

1. There was indeed a collective work stoppage on December 17, 1980. The work stoppage took the form of a sick-out and a significant number of hourly Maintenance personnel assigned to different areas of the plant participated in the sick-out. The sick-out was sudden, it was rapid, it began almost immediately after the two (2) Pipefitters had been suspended and after our telephone conversation and no employees, hourly or salaried, from other departments were affected by the "sickness." The suggestion that 42 hourly Maintenance and Services personnel working in different areas of the plant all becoming sick at approximately the same time is mere coincidence is simply not credible.

2. While the Company does not know for a fact that you advised any hourly Maintenance or Services personnel to become sick and go home, the Company maintains that you encouraged your Union members to engage in a sick-out by doing so yourself. The fact that you have previously gone home sick when your ulcer flared [sic] up does not excuse you from encouraging, by your action, other personnel to engage in a work stoppage. Moreover, you neither said nor did anything to discourage and to prevent your Union members from engaging in a work stoppage.

⁹ The record does not reconcile the discrepancy between the 43 employees assertedly telephoned by Spatorico and the 39 who received letters.

3. Your claim that your statements to me that the Company was "just asking" for Maintenance employees to get sick and not work was merely a statement of fact is not credible in light of your previous record and particularly in light of the fact that an actual work stoppage, in the form of a sick-out, occurred.

4. Your claim that you had no knowledge of any organized or collective sick-out by your Union members is impossible to believe. While you were not directly involved in the actual suspensions of the two (2) First Class Pipefitters, you knew of the suspensions immediately after they were imposed. And, despite the fact that you were assigned to work in Plant 2 on the morning of December 17, 1980, you were observed meeting with groups of hourly Maintenance employees in Plant 1 shortly after the two (2) First Class Pipefitters were suspended and immediately prior to the sick-out. It is significant that you left your assigned work area (Plant 2) without permission from your supervisor and without notifying your supervisor. It is also significant that after meeting with Maintenance personnel in Plant 1 you proceeded immediately to the Medical Department. Moreover, you were present in the Medical Department while 14 of the 42 hourly Maintenance and Services employees who went home sick filed through Medical. And, while in the Medical Department area you were also observed making phone calls. It must be obvious that you knew first hand precisely what was occurring. You knew that your Union members were engaging in a work stoppage in violation of Article 14 of the Agreement. You did absolutely nothing to prevent this work stoppage. In fact, as stated before, you participated in the work stoppage thereby supporting and encouraging a direct violation of Article 14 of the Agreement by 41 of your Union members.

5. Your claim that you were quoting me when talking on the phone in Guard House #1 to hourly Maintenance personnel is flattering but, again, not very credible. If you made reference to a walkout it was because that is precisely what happened on December 17, 1980, not because I labelled [sic] it as such.

Therefore, effective December 23, 1980 you have been discharged for threatening a work stoppage. You have been discharged for participating in that work stoppage. You have been discharged for failing to prevent that work stoppage. And, you have been discharged because your entire record, including your involvement in the events of December 17, 1980, is totally unacceptable.

As can be seen, a concise articulation of the Respondent's reason or reasons for discharging Spatorico is not so easy. On December 22, the Company listed four independent potential "grounds for discharge": Spatorico's "threat" of a work stoppage on December 17; his "participation" in the stoppage; his failure to "fulfill [his] contractual obligation" to prevent Union members from en-

gaging in a work stoppage, and "support[ing] and encourag[ing]" the other union members to engage in the impermissible conduct by "participat[ing]" in it (termed "particularly serious"); and his "involvement in the events of December 17" in the light of his "entire disciplinary record." The December 29 letter referred separately to the foregoing four "grounds for discharge" and concluded, almost liturgically, that Spatorico "[has] been discharged" for each such ground.

Since, presumably, the Respondent did not intend to undertake the metaphysically questionable task of discharging Spatorico four times, it must be assumed that each of the grounds set out was simply a component of the decision to terminate. The decision-making process was further complicated by Bentley's insistent testimony at the hearing that the decision was jointly made by himself, four other company officials, and company counsel. Despite the improbability that all six men shared power equally, Bentley was rather adamant in maintaining that the decision was "joint." I was much impressed with Bentley as a witness and, on this point I suspect, he simply had not thought through prior to hearing the complicated, and perhaps hypothetical, matter of the exercise of authority involved in the termination of Spatorico.

II. DISCUSSION

A. Deferral to Arbitration

At the threshold, I see no merit in the Respondent's contention that deference to the arbitration award is in order here. In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board spelled out the basic criteria to be applied in evaluating the propriety of such deferral, i.e., that all parties agree to be bound by arbitration, that the arbitration proceeding be fair and regular, and that the arbitrator's award not be repugnant to the policies of the Act. Recently, the Board has refined these criteria to specify that an arbitration award will not be honored "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight*, 247 NLRB 146, 147 (1980).¹⁰ It is obvious here that the unfair labor practice issue was not in any serious way presented to and considered by the arbitrator, even though reference was made in the arbitration proceeding to the existence of such an issue.

Initially, it does not appear that the arbitrator was competent to decide the unfair labor practice issue, since the bargaining agreement only provides for arbitration of a grievance which "involves the interpretation or application of any specific provision or specific provisions" of the agreement. Moreover, the arbitrator at several points indicated that he did not think himself empowered to pass upon an unfair labor practice issue. He began his award with a paragraph headed "The Issues," under which appeared the limiting statement, "The following

¹⁰ This principle has been approved by several courts of appeals. *Ban-yard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974); *Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977); *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981); *NLRB v. Magnetics International*, 699 F.2d 806 (6th Cir. 1983).

mutually agreed upon issues have been submitted for consideration." The third issue, and the only one material here, was phrased "Under the terms of the collective bargaining agreement, was the discharge of the grievant effective December 23, 1980 for just cause? If not, what shall be the remedy?"

After lengthy consideration of Sparatorico's discharge in the context of the contract, the arbitrator concluded, "The grievance is denied." Immediately following that statement of denial is a section entitled "The Unfair Labor Practice Charges," in which the arbitrator briefly discusses some charges filed against the Respondent, including one relating to Sparatorico's discharge. The discussion reads in its entirety:

For reasons of record, I have concluded that the grievant was discharged for his participation in a sick out and for his failure to try to stop it until after it had occurred in violation of the contract's no strike clause. The grievant is a Union officer but the contract's no strike clause specifically forbids such activity by Union officers. I find no evidence that the Company discharged the grievant for his legitimate Union activities.

While the arbitrator came to the same conclusion reached here, his postdenial discussion of the unfair labor practice charge demonstrates no cognizance of the statutory right and waiver issues implicated by the charge, as hereafter discussed. Abstention from deferral has been approved by the Court of Appeals for the First Circuit in a similar case, *Pioneer Finishing Corp. v. NLRB*, above; see, as well, *Propoco*, 263 NLRB 136 (1982).

Accordingly, I find unmeritorious Respondent's deferral contention.

B. The Merits

Quite recently, in *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983), the Supreme Court imposed some order upon the theretofore uncertain area of disparate punishment of union officials for their participation in wildcat strikes. In essence, the Court (1) approved the Board's view that an employer cannot, consistent with Section 8(a)(3) of the Act, unilaterally insist that union officials must assume greater obligations than rank-and-file employees with respect to the enforcement of a general no-strike clause, and (2) concluded that "[a] union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages." Such an added burden upon union officials, however, with its implied additional sanctions, must be clearly shown: "Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."

The Court examined in *Metropolitan Edison* whether such a waiver might be found in that case, an examination which sheds light on the proper approach to the problem. The contract clause involved was totally silent

on the obligation of union officials,¹¹ but the employer argued that rulings by two arbitrators under previous agreements, holding that the identical clause gave rise to an implied "affirmative" duty on the part of union officials to take corrective action against unlawful work stoppages, were implicitly incorporated into the latest contractual adoption of the language.

The Supreme Court disagreed. While it did "not doubt that prior arbitration decisions may be relevant—both to other arbitrators and to the Board—in interpreting bargaining agreements," the Court believed that the renegotiation of the same clause did not necessarily constitute an adoption of "only two" arbitration decisions imposing higher duties on union officials, and that this was "especially so" in the light of the limiting provision in the bargaining agreement that arbitral decisions should only be "binding . . . for the term of this agreement." While the Court several times referred to the "clear and unmistakable" requirement, it also found consistent its holding in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, where a waiver of the right to strike was inferred from the existence of a binding arbitration clause: "*Lucas Flour* established that there does not have to be an express waiver of statutory rights, but waiver was implied in that situation only because of the unique conjunction between arbitration and no-strike clauses."

The "clear and unmistakable" standard is the one which the Board has applied for many years in determining whether a statutory right has been waived. The Court of Appeals for the Sixth Circuit, however, has recently pointed out certain variances in the Board's application of the standard, saying, in *Tocco Division of Park-Ohio Industries v. NLRB*, 702 F.2d 624, 626 (1983):

The Board has been somewhat inconsistent, however, when delineating what evidence may establish a clear and unmistakable waiver. In *McDonnell-Douglas Corp.*, 224 NLRB 881, 895 (1976), the Board held:

Whether there has been such a "clear and unmistakable" relinquishment of a right is determined on the basis of the contractual language as well as the facts and circumstances surrounding the making of the contract.

Under this test, the Board and the courts may infer from the contract and from extrinsic evidence of surrounding circumstances that a party to a collective bargaining agreement has waived its right to bargain.

The Board used a slightly different test in *American Cyanamid Co.*, 246 NLRB 87 (1979), which concerned a union's right to engage in sympathy strikes. The Board held that absent express contractual provisions indicating a waiver of the union's

¹¹ "The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public."

rights, “*unequivocal* bargaining history evidencing an intent to waive the right” (emphasis supplied) would be required before a waiver would be found. *Id.* Though similar to the *McDonnell-Douglas* formulation, this standard on its face additionally requires that extrinsic evidence be “*unequivocal*” or at least very clear before an inference of waiver may be based upon it. See also *Daniel Corp.*, 239 NLRB 1335 (1979).

The Board formulated a significantly different test, however, in *International Union of Operating Engineers, Local Union 18*, 238 NLRB 652 (1978) (hereinafter referred to as *Operating Engineers*):

Waiver may be found in express contractual language or in unequivocal extrinsic evidence bearing upon *ambiguous* contractual language. (Emphasis supplied.)

Under this standard, evidence of bargaining history and of the parties’ practice under a collective bargaining agreement is only admissible if the contractual language is ambiguous. In contrast, neither the *McDonnell-Douglas* nor the *American Cyanamid* tests for waiver contain any prerequisites for admitting extrinsic evidence. The Board applied the *Operating Engineers* formulation in the present case.

In the case under consideration here, there is no direct evidence of the bargaining history of, or the practice under, the clause in question. Accordingly, the issue is whether it may be said that the Union expressly agreed in article XIV to impose a greater strike obligation on its officials.

Article XIV is a rather unusual provision. Unlike the more traditional language employed in the *Metropolitan Edison* contract, the clause at hand does not in so many words constitute an agreement by the bargaining unit employees themselves to refrain from striking; rather, the sole burden, literally read, is thrust upon the officials of the Union (“neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its [sic] members to cause any strike.”¹²

The clause, therefore, being so pointedly addressed to the Unions and their officers and representatives, plainly seeks to impose *some* sort of duty on them in relation to strikes. They first promise not to “cause” a strike, and the meaning of that word is plain enough. Spatorico was not discharged, however, for “causing” the sickout; as shown above, the Respondent, with a superabundance of caution, wrote Spatorico that “the Company does not know for a fact that you advised any hourly Maintenance or Services personnel to become sick and go home.”¹³

¹² The parties, however, clearly consider the clause to be binding on the members of the bargaining unit as well.

¹³ At the hearing, however, Bentley rather clearly evinced a belief that Spatorico had indeed instigated the work stoppage. Given such facts as Spatorico’s contemporaneous threats to call a strike, his admitted statements to Bentley in the late morning of December 17 such as, “We are going to shut down” and “You are talking thirty-two more men,” followed closely by an obviously contrived and concerted sickout in which Spatorico participated and over which he stood watch in the medical de-

partment for an hour, Bentley had every reason to believe that Spatorico initiated, fostered, and controlled the strike.

Thus, we come to the promise not to “permit” a strike. No mortal can, of course, unequivocally agree not to “permit” other employees to engage in a work stoppage; some things will happen no matter how Herculean the effort to not “permit” them to occur. But the obvious sense of the agreement struck here is that the union officials pledged that they would attempt to persuade strikers or potential strikers not to violate the agreement. In order to make sense of the provision, that must have been the intention of the parties. And while the contract does not spell out the precise steps which are expected of the union officials toward that end, it can at least be said with certainty that Spatorico’s participation in the strike was inconsistent with his manifest contractual obligation to attempt to stem the tide of unprotected activity. In this regard, the words of the Court of Appeals for the Third Circuit in *Metropolitan Edison v. NLRB*, 663 F.2d 478, 481 (3d Cir. 1981), are relevant:

If the collective bargaining agreement requires in general terms that union officials take affirmative action to end an illegal work stoppage, a union official does not breach that duty simply because he does not take the exact affirmative steps the employer ordered him to take. *Only if his actions in complying with that duty are not in good faith does he become subject to greater discipline.* [Emphasis added.]

In this case, Spatorico did not undertake in good faith to comply with his contractual responsibility. That he, the spokesman for the Union’s negotiating committee, was fully aware of that obligation was made evident by his testimony at the hearing. In speaking of his endeavors, and those of two other union officials, to return the strikers to work on the evening of December 17, Spatorico said that the three telephoned from the guardhouse so that the guard would witness “that we did indeed perform our duties as the local heads of Union to get the men to come back to work.” However, Spatorico had failed in fulfilling his earlier duty to try to keep the men from going out; even assuming that he was not responsible in the first place for the walkout, his ostentatious participation in it surely added momentum to the event.

The Court of Appeals for the Sixth Circuit recently noted in *NLRB v. Babcock & Wilcox Co.*, 697 F.2d 724, 731 (1983), that “a union officer’s tacit support of a strike can be substantiated by his failure to cross the picket line and failure to go to work.” That Spatorico’s position vis-a-vis an illegal walkout influenced the other employees can hardly be questioned, and that ability to influence is tellingly pointed up by his own testimony that, about 2:30 p.m. on December 17, a production employee called him at home and asked, “Sal, do you want us production guys to walk too?” Spatorico’s answer was negative: “[I]t only pertains to maintenance.”

I conclude that article XIV of the contract was sufficiently “clear and unmistakable” so as to proscribe the behavior of Spatorico on December 17, behavior which

partment for an hour, Bentley had every reason to believe that Spatorico initiated, fostered, and controlled the strike.

was completely inimical to his contractual duty to not "permit" a work stoppage. I see no need to explore the outer boundaries of "permit"; it is only necessary to conclude here that Spatorico's conduct was plainly inconsistent with the most minimal meaning of article XIV. When such a conclusion is manifest, I think the "clear and unmistakable" standard can be invoked even though there may be uncertainty at the perimeters. Spatorico had only recently been formally warned about such behavior, and his testimony indicates that he understood very clearly what posture the contract required him to take. Having acted in a manner totally at odds with his contractual obligation, Spatorico exposed himself to the greater liability permitted by the Supreme Court in *Metropolitan Edison*. I must, accordingly, recommend dismissal of the complaint allegations on this basis.

The Respondent makes an alternative argument which, in view of the foregoing, need not be formally resolved. The argument is that, assuming arguendo that Spatorico's conduct here was no more unprotected than that of the other employees, Spatorico's disciplinary record was so unacceptable that his termination "would have taken place even in the absence of protected conduct," the second part of the test formulated by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980). The record does not lend any direct support to that claim. Bentley did not so testify, and the termination letter does not give overriding weight to Spatorico's record. I question whether I may conclude that the Respondent has "demonstrate[d]," as required by *Wright Line*, that had Spatorico not held union office, he would have been discharged simply for participating in this concerted action.

As indicated above, the Respondent issued written reprimands to the other 39 employees who engaged in the sickout. While Bentley testified that, before doing so, he considered their past disciplinary records in determining their proper punishment, and had completed that thought process within a half hour after hearing about the sickout, it does seem difficult to believe that he consciously engaged in any real deliberate process. On the other hand, it may have been unnecessary for Bentley, who was familiar with the conduct of all the employees, to have to consider such an issue for very long. As he put it, "I didn't know of anyone that had any kind of a record that would warrant anything more than a written reprimand."

The evidence shows that a few of the other sickout employees had committed rule violations, but none very recently. DiFranco had received a warning in 1977 for

being out of his work area and performing personal business on company time, and had been told that "such action, if repeated, will warrant more severe discipline up to and including discharge"; Kontabecki had been given a 30-day suspension, probably in 1978, which "dealt with theft"; and there were others.¹⁴ The 39 other employees, including these miscreants, received the uniform penalty of a written reprimand for the December 17 walkout, while Spatorico was discharged.

Nonetheless, Spatorico's more recent misbehavior, resulting in the issuance of two "final" warnings in 1979 and October 1980, and his repetition of the same general kind of conduct on December 17, would obviously have made him a candidate for more stringent treatment even if the Respondent had considered his breach of contract in a more limited way. On the other hand, the fact that Spatorico had received a "final warning" in February 1979 did not automatically result in his discharge when he engaged in misconduct in October 1980.

I cannot say that the Respondent has "demonstrated" that it would have discharged Spatorico in any event, instead of, say, giving this 10-year employee a month's suspension; accordingly, if I were to reach this argument, I would probably reject it.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established that the Respondent violated the Act as alleged in the complaint.

On the basis of the foregoing findings of fact and conclusions of law, I make the following recommended

ORDER¹⁵

The complaint herein is dismissed in its entirety.

¹⁴ A sickout participant named Zemsal had received a 30-day suspension, but that was in 1974.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.