

**West Penn Power Company and Edward L. Pattock and Frank R. Zubal.** Cases 6-CA-13010-1 and 6-CA-13010-2

28 March 1985

### DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

On 22 September 1981 Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The judge found that the Respondent, which imposed a 5-day suspension on five of the seven employees participating in an unprotected work stoppage, violated Section 8(a)(3) and (1) of the Act by singling out for harsher treatment the other two employees, namely, Union President Edward L. Pattock and Union Vice President Frank R. Zubal, and discharging them because of their status as union officers.

In so concluding, the judge declined to defer to the award of an arbitration board because he found it repugnant to the policies and purposes of the Act. The award determined that the Respondent could properly impose harsher punishment on Pattock and Zubal in view of their failure to comply with the "no strike-no lockout" provision of the collective-bargaining agreement that requires union officers to make a "sincere, active effort" to end any work stoppage. For reasons given below, we find deferral appropriate and, without reaching the merits of the alleged unfair labor practices, we shall dismiss the complaint.

The collective-bargaining agreement contains, inter alia, the following provisions:

#### Section XV—INCLEMENT WEATHER

Employees engaged in the construction and maintenance of lines . . . will not be required to work outdoors in inclement weather on jobs which can reasonably be deferred until weather conditions are less severe. . . .

It is the supervisor's responsibility to determine when weather conditions are too severe for the work at hand . . . .

. . . .

#### Section XXX—NO STRIKE-NO LOCKOUT

There shall be no strike or lockout or any slowdown or refusal to carry out work assignments during the term of this Agreement or any renewal thereof, nor during any period of time while the parties are negotiating a change or renewal of the Agreement. All matters of dispute arising under this Agreement shall be settled by conference or by arbitration as herein provided.

It is further agreed that if any employees engage in any strike, slowdown, or refusal to carry out work assignments during the term of this Agreement, the Union and its officers will forthwith make a sincere, active effort to have work resumed at a normal rate, and it is understood that if the Union and its Officers take such action there shall be no further liability upon the Union and its Officers for such incidents. However, should such action on the part of the Union and its Officers fail to end such a strike, slowdown, or work refusal, it is agreed that the Company shall have the unqualified right to discipline or discharge employees participating in or encouraging such violations; the Union shall, however, have the right of recourse to the grievance and arbitration procedures herein provided, to the extent of establishing fact as to whether or not any individual employee has participated in or encouraged such violations.

On 15 November 1979 the seven employees involved herein discontinued their outdoor work because of what they regarded as inclement weather. Despite the repeated order of their foreman, Jerry Cooper, who disagreed with their assessment of the weather, the employees, including union officials Pattock and Zubal, refused to resume work.

In the course of the employees' discussion as to whether to comply with Cooper's back-to-work order, Pattock told his fellow employees that, in the past when employees were ordered to work under what they deemed to be inclement weather conditions, they resumed their work and thereafter filed grievances asking for double time. However, neither Pattock nor Zubal told their fellow employees that they had a contractual obligation to go back to work or urged them to do so. In this connection, these union officials rejected the request of another representative of the Respondent to engage in a private discussion concerning this matter.

On 19 November Cooper notified Pattock and Zubal of their discharge because of their "refusal to proceed with a work assignment and to make an

active effort as [union officers] to have work resumed by other union employees." Cooper also notified the other employees that they were suspended for 5 days. On the same day, the employees filed a grievance protesting the suspensions and discharges.

On 26 August 1980, following a hearing, an arbitration board sustained the 5-day suspensions and Pattock's discharge, but reduced Zubal's discharge to a 30-day suspension.<sup>1</sup> In so holding the arbitration board reasoned as follows:

Under section XXX of the collective-bargaining agreement, management clearly had authority to discipline any of the grievants for refusal to work. The Company's determination to discharge Pattock and Zubal, rather than to impose suspensions on them, was due largely to their failure to make active efforts as union officers to have work resumed. Section XXX contains and imposes on union officers the responsibility to initiate positive action to have work resumed in situations such as that which arose on 15 November 1979. The failure to carry out this responsibility may warrant the imposition of discipline where, as here, nothing in the record suggests that management is thereby attempting to discourage union membership or otherwise improperly interfere with or discriminate against union officers in the exercise of their lawful rights. As Pattock on an earlier occasion failed to discharge his contractual duties, the penalty of discharge stands. However, as Zubal had no previous record of any refusal to carry out his duties as a union officer in a refusal-to-work situation and was a lower ranking union official, the discharge penalty is reduced to a 30-day suspension.

In *Olin Corp.*, 268 NLRB 573 (1984), we recently adopted the following standard for deferral to arbitration awards in order to effectively carry out the declared purpose of *Spielberg*,<sup>2</sup> namely, recognition of the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes: An arbitrator will be deemed to have adequately considered an unfair labor practice allegation if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with facts relevant to resolving the unfair labor practice. In this respect, difference, if any, between the contractual and statutory standards of review will be weighed by the Board as part of its determination

under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board will defer.

The evidence herein shows that a full factual record was made before the arbitration board; the board considered and rejected the contention that Pattock and Zubal were unlawfully singled out for excessive punishment because of their status as union officers; and the board found that the Respondent was specifically empowered by its collective-bargaining agreement with the Union to impose penalties on Pattock and Zubal for failing to take affirmative action to terminate the unauthorized work stoppage. As noted above, the judge concluded that the decision of the arbitration board was repugnant to the Act and that therefore deferral was inappropriate. In so doing the judge, relying, *inter alia*, on *Gould Corp.*, 237 NLRB 881 (1978), concluded that the failure of union officials Pattock and Zubal to attempt to end the work stoppage did not constitute a lawful basis for singling them out for harsher treatment. Contrary to the judge, we conclude that the decision of the arbitration board was not clearly repugnant to the Act. In this regard, the substantive issue involved in *Gould* and here was recently considered by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), in which the Court stated 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,"<sup>3</sup> and that a union may lawfully 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."<sup>4</sup> In view of the language of the no-strike provision involved in the instant case, the arbitration board had a reasonable basis for finding, as it did, that management clearly had the authority under the collective-bargaining agreement to discipline the union officials for their failure to make active efforts to have work resumed. We find that the contractual interpretation of the arbitration board is not clearly repugnant to the letter or the spirit of the Supreme Court's opinion in *Metropolitan Edison* which held that a union may waive the

<sup>1</sup> The parties in the instant case stipulated that the General Counsel is not contending that the 5-day suspensions constituted unfair labor practices.

<sup>2</sup> *Spielberg Mfg Co.*, 112 NLRB 1080 (1955) The parties in the instant unfair labor practice proceeding stipulated that the arbitration proceedings were fair and regular and that the parties agreed to be bound thereby.

<sup>3</sup> *Metropolitan Edison Co v NLRB*, supra at 707

<sup>4</sup> *Id*

right of its officials to acquiesce in unprotected work stoppages.

In view of the foregoing, it is evident that the statutory and contractual issues are not factually dissimilar and that the facts generally relevant to the unfair labor practice issue are not absent from the record made before the arbitrator. In addition, the General Counsel has failed to show that the arbitrator's decision is not susceptible to an interpretation consistent with the Act. Accordingly, we shall defer to the arbitration award and give it conclusive effect. We shall therefore dismiss the complaint in its entirety.

### ORDER

The complaint is dismissed.

### DECISION

#### STATEMENT OF THE CASE

LEONARD M WAGMAN, Administrative Law Judge. Upon a charge in Case 6-CA-13010-1, filed by Edward L. Pattock, and a charge filed in Case 6-CA-13010-2 by Frank R Zupal, each alleging that the Company, West Penn Power Company, had engaged in unfair labor practices in violation of the National Labor Relations Act (29 U S C § 151), the Regional Director for Region 6 issued a consolidated complaint and notice of hearing on November 3, 1980, alleging that the Company had violated Section 8(a)(1) and (3) of the Act by terminating its employees Pattock and Zupal. Specifically, the consolidated complaint alleges that the Company terminated Pattock and Zupal rather than suspending them for 5 days, as it had done to other participants in a work stoppage, solely because of Pattock's and Zupal's status as officers in System Local No 102 of the Utility Workers Union of America, AFL-CIO (the Union).<sup>1</sup> The Company by its answer to the consolidated complaint denied commission of the alleged unfair labor practices. The hearing in this consolidated case was held before me in Pittsburgh, Pennsylvania, on June 18, 1981.

On the entire record in these cases, from my observation of the demeanor of the witnesses, and after having considered the briefs filed by the General Counsel<sup>2</sup> and the Company, I make the following

#### FINDINGS OF FACT

##### I. THE COMPANY'S BUSINESS

The Company, a Pennsylvania corporation with an office and place of business at Arnold, Pennsylvania, is engaged as a public utility in the generation, transmission, distribution, and sale of electricity. During the 12-month period ending October 1, 1980, the Company enjoyed gross revenues in excess of \$250,000 from its business operations. In addition, the Company, in the con-

duct of its business operations, received at its Pennsylvania facilities products, goods, and materials valued in excess of \$5,000, which were shipped directly to those facilities from points outside the Commonwealth of Pennsylvania. From the foregoing facts, which the Company admitted in its answer, I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that System Local No. 102 of the Utility Workers Union of America, AFL-CIO has been at all times material to this case a labor organization within the meaning of Section 2(5) of the Act

##### III THE ALLEGED UNFAIR LABOR PRACTICES

###### A. The Issues Presented

On November 19, 1979,<sup>3</sup> the Company, by letters to Pattock and Zupal, notified each of them that they had been "discharged, effective November 16 . . . for your refusal to proceed with a work assignment and to make an active effort as a union officer to have work resumed by other union employees"

Pattock and Zupal filed grievances challenging the discharges. Five of their fellow employees involved in the same incident, who were suspended for 5 days, also filed grievances. After a hearing, a board of arbitration issued an award on August 26, 1980, sustaining Pattock's discharge and the five suspensions, and reducing Zupal's punishment to a 30-day suspension.

The parties have raised the following issues here regarding the Company's treatment of its employees Pattock and Zupal and the arbitration award: (1) whether the Company violated Section 8(a)(3) and (1) of the Act by imposing harsher penalties against Pattock and Zupal only because they were union officers; and (2) whether, under its policy set out in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board should defer to the arbitration award to the extent it dealt with the punishment imposed on Pattock and Zupal.

###### B. The Facts

At 7.30 a.m. on November 15 Pattock and Zupal, who at the time were president and vice president, respectively, of Local 102-B, a branch local of the Union, reported as usual to the Company's crewroom at Arnold, Pennsylvania, to receive their job assignments for that day. The Company assigned Pattock and Zupal, along with employees Robert H Artman, Lawrence T. Brown, Donald S. Kiebler, Roy F. McLaughlin, and Walter Roberts to work under Foreman Jerry Cooper. The assigned task was to "dress out" a series of utility poles for the attachment of wire. This task required the assembly of cross-beams, brackets, insulators, and other components on the ground and the hoisting of the assembly to the top of a utility pole where a lineman, who was either attached to the pole by a climbing belt or suspended in the air next

<sup>1</sup> The parties stipulated that Pattock and Zupal were officers of Branch Local 102-B of the Union

<sup>2</sup> The General Counsel's motion to correct transcript is granted

<sup>3</sup> Unless otherwise stated, all dates refer to 1979

to the pole by a "bucket truck," would position and attach the equipment to the utility pole. The situs of this job was on Dr. Thomas Boulevard at Arnold, Pennsylvania.

The Company divided the seven employees into three work groups. Brown and Artman worked together with a bucket truck. The second crew, consisting of McLaughlin, Zupal, and Kiebler, was also equipped with a bucket truck. Pattock and Roberts were assigned to a digger truck. As part of their assigned work, Kiebler and Pattock were expected to climb utility poles that morning. Zupal, Pattock, and Brown were classified as linemen. Employees McLaughlin, Kiebler, Artman, and Roberts were classified as leadmen.

As the seven employees began work on the nearby jobsite, between 8 and 8.15 a.m., a light snow was falling. About 9:30, when Foreman Cooper arrived at the jobsite with a bucket truck, the snow had become mixed with rain and weather conditions had generally deteriorated. Pattock approached Cooper and asked whether the foreman considered the weather to be inclement. Cooper answered, "[N]ot now, I'll tell you when." About the same time, employee Don Kiebler came down off a utility pole and told Zupal that the pole "was too slippery" and that he, Kiebler, would not climb it again.

About 10 o'clock, Foreman Cooper gave all of his crewmembers a coffeebreak. The employees took their break in the cabs of the company trucks at the jobsite. Foreman Cooper went back to the Company's Arnold headquarters, where he took his own coffeebreak. At this juncture, Superintendent Thomas A. Joswick, his immediate supervisor, questioned Cooper about the men taking a coffeebreak in the trucks. Cooper explained that he put the men on coffeebreak because of a squall which had beset them. Joswick invited Cooper to check the weather and asked Cooper if he thought it was inclement. When Cooper replied no, Joswick directed him to put the men back to work. Cooper finished his coffee and went back to his crew.

On his arrival at the jobsite, Cooper's crewmembers gathered around and advised him that they would not return to work because of the inclement weather. Cooper ordered the men to go back to work. The seven employees refused on the ground that the weather was too inclement to perform the assigned work on the pole. Cooper warned the employees that, if they persisted in their refusal, they would probably be sent home. He rejected the employees' offer to perform other work.

Cooper sought out Superintendent Joswick at the Arnold center. When the two supervisors met at the center, Joswick directed Cooper to return to the seven employees and afford them another opportunity to return to work.

While Cooper was talking to Joswick, the seven employees discussed their options under the collective-bargaining agreement. Pattock told his fellow employees that in the past, when ordered to work under inclement conditions, bargaining unit employees had performed the work and thereafter filed a grievance asking for double time. After hearing Pattock, the employees agreed

among themselves that they would not work under what they viewed as a dangerous condition.<sup>4</sup>

However, Cooper's further effort to get his men back to their assigned work was to no avail. He told his crew that they could either work as ordered or, if they refused, they would go home. When the seven employees persisted in their refusal, Cooper told them to load up their trucks and head for the Company's office.

Employee Zupal, who said he wanted to talk to Superintendent Joswick, arrived about 5 minutes ahead of his colleagues and confronted him.

Joswick and Zupal discussed the applicable bad weather provision in the collective-bargaining agreement,<sup>5</sup> the safety on the job, and Pattock's remarks to the crew. Joswick seemed most concerned about having the assigned work performed.

When the remainder of Foreman Cooper's crew caught up to Zupal at the Company's Arnold office, Joswick sought a separate discussion with Pattock and Zupal. Zupal rejected Joswick's request, stating, "It's a common thing here and everybody wants to hear the answer, we'll settle it as a group."

A group discussion ensued. However, Joswick, Zupal, and Pattock did most of the talking. Joswick asked each member of Cooper's crew if he felt the weather was too inclement to work. Each employee answered affirmatively. Joswick rejected the employees' suggestion that they be assigned other work on the ground until the weather cleared up. He also announced to the assemblage that he had stopped their time at 10 o'clock that morning. Pattock suggested that they all go out of the building and observe the weather. Joswick instructed Cooper to take the men outside and put them back to work.

<sup>4</sup> My findings as to Pattock's remarks to his fellow employees during Cooper's absence are based on Pattock's testimony. On cross-examination, Pattock claimed that he made an effort to get his colleagues back to work (Tr 40). However, his account of what he said at Tr 22, 38, 39, and elsewhere on Tr 40 show that Pattock told the employees what options they had under the collective-bargaining agreement. I discounted Zupal's inconsistent testimony as to Pattock's remarks. At Tr 54, Zupal testified that Pattock did not order the men back to work, but told them that they had to option to work and file a grievance. At Tr 57, the "option" became an "obligation" to work and file a grievance.

<sup>5</sup> This provision reads

#### Section XV—INCLEMENT WEATHER

##### 15.1 LINES, INSTALLER, AND SUBSTATIONS

Employees engaged in the construction and maintenance of lines and substations will not be required to do work outdoors in inclement weather on jobs which can reasonably be deferred until weather conditions are less severe. It is understood that there are times in which work cannot be deferred. Examples of when work cannot be deferred are when there is an emergency, which is a combination of circumstances which call for immediate action consistent with the safety of employees, or when it is necessary to protect life and property or to restore or maintain customer service.

It is the supervisor's responsibility to determine when weather conditions are too severe for the work at hand with due regard to the nature of work to be performed, temperature, wind velocity, precipitation, snow or ice accumulation on ground or structures, availability of shelter, or combination of these factors. In general, temperatures of 10 degrees F or lower will be considered inclement weather for linemen or installers required to work on pole tops, towers, or structures. It is recognized that weather too inclement for climbing may not be considered inclement for work involving less exposure or exposure of shorter durations.

Foreman Cooper led the group on to the building's porch and asked each crewmember if he would return to work. At this point, a heavy rain was falling. Each of the employees refused to return to outside work. Foreman Cooper rejected employee Roberts' suggestion that the men work on the ground assembling material for use on the poles, eat an early lunch, and then see how the weather looked. Cooper responded negatively, adding that the controversy had "gone too far" and that the only option available to the men was to return to the jobsite and work on the poles as ordered. The men remained adamant in their refusal. At this, Cooper reminded them that they were not being paid, adding that they "might as well go on home." Cooper went back into the office.

Cooper shortly returned and announced that Superintendent Joswick wanted to see the four lead linemen in his office. Artman, Kiebler, McLaughlin, and Roberts went to Joswick's office. Thus, Pattock, Zubal, and Brown remained outside.

While the four leadmen were in the office, Zubal went to his truck and retrieved his lunch pail and thermos. Pattock and Brown also left the porch and stood nearby, near the adjacent garage doors. Zubal joined them after retrieving his belongings from the company truck. When the four leadmen returned shortly from their visit with Joswick, they reported on their discussion with the superintendent. At this, all of the crewmembers left the Company's premises.

On November 19, Cooper, by letters, notified employees Brown, Artman, Kiebler, McLaughlin, and Roberts that because of their refusal to proceed with their work assignment on November 15, they were suspended for 5 days without pay, beginning Friday, November 16.

On the same day, Cooper wrote letters to Pattock and Zubal advising them of their discharges, effective November 16, because of their "refusal to proceed with a work assignment and to make an active effort as a union officer to have work resumed by other union employees." In his letters to Zubal and Pattock, Cooper also stated that the two union officers "made the initial decision to go home," and that it was their status as union officers which imposed responsibility on Zubal and Pattock "to proceed with the assigned work and make every effort to have Messrs. Artman, Roberts, McLaughlin, Brown, and Kiebler return to work."

On November 19, the seven employees filed a grievance protesting the suspensions and the two discharges. On August 26, following a hearing before a three-member Board, a Board majority issued an opinion and award sustaining the five suspensions and Pattock's discharge and reducing Zubal's discharge to a 30-day suspension without pay. Among the provisions of the collective-bargaining agreement which the panel considered were the portion of the inclement weather section quoted in fn 5, above, and the following:

#### Section XXX—NO STRIKE-NO LOCKOUT

30.1 There shall be no strike or lockout or any slowdown or refusal to carry out work assignments during the term of this Agreement or any renewal thereof, nor during any period of time while the

parties are negotiating a change or renewal of the Agreement. All matters of dispute arising under this Agreement shall be settled by conference or by arbitration as herein provided.

It is further agreed that if any employees engage in any strike, slowdown, or refusal to carry out work assignments during the term of this Agreement, the Union and its officers will forthwith make a sincere, active effort to have work resumed at a normal rate, and it is understood that if the Union and its Officers take such action there shall be no further liability upon the Union and its Officers for such incidents. However, should such action on the part of the Union and its Officers fail to end such a strike, slowdown, or work refusal, it is agreed that the Company shall have the unqualified right to discipline or discharge employees participating in or encouraging such violations, the Union shall, however, have the right of recourse to the grievance and arbitration procedures herein provided, to the extent of establishing the fact as to whether or not any individual employee has participated in or encouraged such violations.

The majority noted that the arbitration board had previously held

. . . that Section 30.1 contains and imposes upon Union Officers an independent responsibility, distinct from and above their obligation to personally refrain from participation in or encouragement of the enumerated prohibited activities, to initiate positive action to have work resumed in situations such as that which arose on November 15, 1979.

The panel majority also noted that they had previously found:

. . . that failure to discharge these responsibilities may warrant the imposition of discipline therefor *so long as nothing on record suggests that Management is thereby attempting to unlawfully discourage Union membership or otherwise improperly interfere with or discriminate against Union Officers in the exercise of their lawful rights.*

After finding that the evidence before it did not establish that any of the grievants, including Pattock and Zubal, were ringleaders of the November 15 work stoppage, the panel majority stated:

Their discharges must in effect stand or fall on the basis of the gravity of their respective violations of the "sincere, active effort" duty they had as Union Officers, especially since Management emphasized the responsibilities of Pattock and Zubal as Union Officers in citing the reasons for their discharges.

The panel majority noted that earlier Pattock had suffered a disciplinary "corrective" suspension because of his failure in another situation "to expend the requisite 'sincere, active effort'" Confronted by what they viewed as a repetition of that misconduct, the panel majority

found that Pattock's conduct on November 15 was an aggravated violation of his contractual duty warranting discharge

Turning to Zubal, the panel majority noted that he had not previously neglected his duty as a union officer in a "refusal-to-work situation" On this ground, the panel majority held Zubal was entitled to "the benefit of some corrective discipline, as Mr. Pattock once was" Accordingly, the panel majority reduced Zubal's punishment to a 30-day suspension

At the hearing before me, I accepted the following stipulations regarding the arbitration proceedings: (1) Neither Pattock, nor Zubal, or the Union appealed the arbitrator's decision in any state or Federal court (2) The arbitration proceedings concerning Pattock, Zubal, and their five colleagues were fair and regular and the parties to that proceeding agreed to be bound by those proceedings

I also accepted further stipulations that (1) The Board is not contending that the 5-day suspensions imposed on employees Roy McLaughlin, Donald Kiebler, Robert Artman, Lawrence Brown, and Walter Roberts were unlawful, and (2) Edward Pattock and Frank Zubal participated in the same events on November 15 as the five employees named above

### C Analysis and Conclusions

The Board has recognized that union office "embodies the essence of protected concerted activities." *General Motors Corp.*, 218 NLRB 472, 477 (1975), enfd. 535 F.2d 1246 (3d Cir 1976) Accordingly, in *Precision Castings Co.*, 233 NLRB 183, 184 (1977), the Board declared that "discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand." Later, in *Gould Corp.*, 237 NLRB 881 (1978), enfd. 612 F.2d 728 (3d Cir 1979), the Board found that an employer violated Section 8(a)(3) and (1) of the Act by discharging a shop steward because he failed to take positive action to terminate a strike as required by a no-strike clause<sup>6</sup> In *Gould*, the Board held that the following provision "[did] not grant the employer the power to enforce it by discharging union officials (237 NLRB at 881, 888)

SECTION 1. . . the Union agrees that it shall not call, sanction, or engage in any strike, slow-down or stoppage of work; . . .

SECTION 2 Any employee or employees, either individually or collectively who shall cause or take part in any illegal unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company.

SECTION 3 In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and Interna-

tional Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following

The Union, its officers and representatives shall immediately order its members to return to work, not withstanding the existence of any wild-cat picket line

The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

I note also that the Board has refused to extend such protection to union officials "who actively led and directed an unauthorized illegal work stoppage." *Midwest Precision Castings Co.*, 244 NLRB 597, 598 (1979)

In the instant case, the parties stipulated that, on November 15, Union Officials Pattock and Zubal participated in a work stoppage along with five other employees. Further, from my view of the record, I find that the two union officers neither fomented nor assumed leadership of the stoppage

Nor is there any support for the Company's assertions that Pattock and Zubal "made the initial decision to go home" and that by not returning to work and by deciding to go home they "led the men in a work refusal." (J. Exhs. 17 and 18). Indeed, I find from Zubal's testimony (Tr 60 and 66) that it was Robert Artman who said "let's go home" to the assembled crew after he and the other three leadmen had concluded their final meeting with Superintendent Joswick. Artman's suggestion was apparently inspired by Foreman Cooper's earlier remarks after his last attempt to end the work stoppage For at that point the exasperated foreman told his assembled crew including Artman: "[Y]ou're not getting paid for this so you might as well go home." (Tr 59.) In any event, there is no evidence suggesting that either Pattock or Zubal voiced such a suggestion at any time on November 15. In sum, I find that on November 15 the two union officers merely participated along with their fellow employees in the work stoppage and the subsequent exodus from the Company's premises

The first paragraphs of Foreman Cooper's letters to Pattock and Zubal and Superintendent Joswick's testimony make plain that it was their failure to attempt to end the work stoppage which provoked the Company to discharge the two rather than impose a 5-day suspension on them. Thus, although Pattock and Zubal merely participated in the stoppage to the same extent as the other employees, the Company singled them out for harsher treatment because of their status as union officers, thereby violating Section 8(a)(3) and (1) of the Act. *South Central Bell Telephone Co.*, 254 NLRB 315 (1981)<sup>7</sup>

<sup>7</sup> As shown above, the arbitration board determined that because Pattock and Zubal neglected their respective contractual duties as union officers to end the stoppage, the Company could properly impose harsher punishment on them than had been accorded the five other participants in the work stoppage I find this determination and the award based on it are repugnant to the policies and purposes of the Act regarding employees' protected union activities Therefore, I reject the Company's conten-

Continued

<sup>6</sup> I note that the United States Court of Appeals for the Third Circuit found the discharge to be lawful and denied enforcement of the Board's order in *Gould* Nevertheless, I am required to look to the Board's decision in *Gould* as binding precedent *Insurance Agents (Prudential Insurance)*, 119 NLRB 768, 773 (1957)

3. By discharging Edward L. Pattock and Frank R. Zubal on November 16, 1979, solely because they were union officers, the Company engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

4. The Company's unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

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

I have found that the Company violated the Act by discharging Edward L. Pattock and Frank R. Zubal, instead of imposing a 5-day suspension on each of them as had been imposed on the other employees who participated with them in the unprotected work stoppage on

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tion that the Board should defer to the arbitration award in this case *South Central Bell Telephone Co*, supra at 317 fn 4, *Hammermill Paper Co*, 252 NLRB 1236 (1980) See also *Kansas City Star Co*, 236 NLRB 866, 867 (1978)

November 15, 1979. I have also found that the Company has reinstated Frank R. Zubal, pursuant to the arbitration award of August 26, 1980, under which his discharge was reduced to a 30-day suspension, and that backpay was awarded to Zubal for the period between the end of the 30-day suspension and his reinstatement. I also note that, at the time of Zubal's reinstatement, the Company imposed a 2-year probationary period on him.

In light of these circumstances, I shall recommend that the Company offer employee Pattock immediate and full reinstatement to his former position or, if that position is not available, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make Pattock and Zubal whole for any losses of pay they may have suffered, by paying to each of them the sums they would have computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>8</sup> I shall also recommend that the Company be required to preserve and make available to Board agents, on request, all pertinent records and data necessary to analyze and determine whatever backpay may be due.

[Recommended Order omitted from publication]

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<sup>8</sup> See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962)