

The American Can Company and Stanley H. Egan and Donald R. Egan

United Steelworkers of America and Local 5490 of the United Steelworkers of America and Stanley H. Egan and Donald R. Egan. Cases 27-CA-4945 and 27-CB-1032

August 30, 1979

SUPPLEMENTAL DECISION AND ORDER

On April 5, 1978, the National Labor Relations Board issued its Decision and Order¹ in this proceeding finding that the superseniority provision of the collective-bargaining agreement was lawful on its face, and that application of the provision was not unlawful. Accordingly, the Board ordered that the complaint be dismissed in its entirety. On May 2, 1978, Stanley H. Egan and Donald R. Egan, the individual Charging Parties, filed a petition for review with the United States Court of Appeals for the Tenth Circuit. After announcement to the parties the Board, on September 26, 1978, filed a motion with the court to withdraw the record herein to permit it to reconsider its Decision and Order. On November 6, 1978, the Board notified the parties that the processing had been remanded for reconsideration and invited them to submit briefs. Thereafter, the Charging Parties, Respondent Employer, and the General Counsel filed briefs on remand.

Upon the entire record in this proceeding, including the briefs of the parties, the Board makes the following:

FINDINGS AND CONCLUSIONS

A. The Issue

At issue herein is whether Respondent Employer and Respondent Unions violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, by applying the superseniority provision of the collective-bargaining agreement to permit local union officers, including a guard (i.e., a position similar to ones usually titled "Sergeant-at-Arms") and a trustee, to retain their employment in the face of layoffs of employees with greater plant seniority.

B. Facts

The pertinent facts are not in dispute. The Employer and the International Union were parties to a collective-bargaining agreement covering various of

the Employer's plants, including the Denver, Colorado, plant involved herein. Local 5490 represented the production and maintenance unit employees at the Denver plant. In October 1975 the Employer told the union that it was going to cease production at the Denver plant as of December 5, 1975.² Accordingly, on that day the Employer laid off all but 11 of its unit employees, who were retained to dismantle, crate, store, and ship machinery. Subsequently, the Employer made additional layoffs and recalls.

The collective-bargaining agreement between the Union and the Employer provided that in the event of layoffs unit employees with the greater seniority were to be retained provided that they could perform the work. The agreement also provided that superseniority would "apply to a total of not more than ten local union officers and grievance committeemen who, notwithstanding their positions on the seniority roster, shall have preferential seniority in case of lay-off or recall." Pursuant to the agreement a seniority roster had been posted in the plant, and the Union had advised the Employer of the 10 union officers and committeemen for whom it claimed superseniority status.³

The parties stipulated that of the 11 employees retained on December 5, 1975, C. E. Bugh and D. R. Howard were retained on the basis of superseniority. Bugh was the Local Union's treasurer and a grievance committeeman. (A grievance committeeman served as a steward at the plant.) Howard was a trustee for the Local. The union constitution describes a trustee's duties as "to have charge of the hall and all property of the Local Union . . . and perform such other duties as the Local Union may require." The record does not show that Howard had any other duties as trustee.⁴

The Administrative Law Judge found that C. Thompson, a trustee, was also retained because of his superseniority. Although Thompson was on the superseniority list and was only 25th in plant seniority, the parties did not stipulate and the General Counsel did not argue in its brief to the Administrative Law Judge that he was retained because of superseniority. In addition, in their brief on recall the Charging Parties state, "Thompson had a secondary basis for his recall based upon his specific job qualifications." There is no direct evidence why Thompson was retained. Accordingly, we find that the record

² Pursuant to its usual practice in plant closures the International appointed an administrator over the affairs of Local 5490.

³ Employee seniority ranking and the Union's superseniority claims are detailed in the Administrative Law Judge's Decision, attached to our original Decision and Order herein.

⁴ Howard was also chairman of the health and safety committee. This, however, was not the result of his being a trustee and was not the reason he was given superseniority. In addition, the Administrative Law Judge found, and the record supports his finding, that the testimony that Howard was active in this role in the period in question was not convincing.

¹ 235 NLRB 704.

will not support the finding that Thompson was retained on the basis of his superseniority as a union officer.

The parties stipulated that W. S. Miller, grievance committee chairman, and S. Schneider, a guard, were recalled on January 5, 1976, on the basis of superseniority. The Union's constitution describes the duties of a guard as "to take charge of the door and see that no one enters who is not entitled to do so." Schneider performed no other official duties for the Union.

On February 13 and 20, 1976, there were general layoffs. Thereafter, as stipulated by the parties, Howard was recalled on May 25, 1976, on the basis of superseniority. He was laid off on September 2, 1976.

C. Discussion

The record shows that Howard and Schneider were the only employees retained or recalled solely on the basis of their superseniority as union officers, namely, trustee and guard, respectively.⁵ The record further shows that other employees who were not retained or recalled had greater plant seniority than Howard, who was 14th on the list, and Schneider, who was 22d on the list, and who would have been retained or recalled but for the superseniority afforded Howard and Schneider.⁶

In *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), the Board majority held that superseniority clauses which operate to keep a union steward on the job are permissible because the steward's functions benefit all unit employees. The governing considerations were stated in *Dairylea* at 658:

[I]n view of the inherent tendency of super seniority clauses to discriminate against employees for union-related reasons . . . we do find that super seniority clauses which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality.

Dairylea, however, applied only to superseniority afforded to union stewards. In *United Electrical, Radio and Machine Workers of America, Local 623 (Limpro Mfg., Inc.)*, 230 NLRB 406 (1977), enfd. *sub nom. Anna M. D'Amico v. N.L.R.B.*, 582 F.2d 820, 824 (3d

⁵ Other officers were retained but not solely because they were officers. Some were at the top of the seniority list, some were also grievance committeemen (stewards), and some were not shown to have been retained because they were officers (as with Thompson).

⁶ For example, the individual Charging Parties, Stanley H. Egan and Donald R. Egan, were 9th and 10th, respectively, on the seniority list and were apparently discriminated against. Actual determination of who would have been recalled or retained but for the superseniority afforded Howard and Schneider is to be determined in the compliance stage of this proceeding.

Cir. 1978), the Board majority held that the *Dairylea* presumption that superseniority protection for stewards is lawful because it "furthers the effective administration of the bargaining agreements on the plant level" applies to union officers because they play an important role in contract administration. In *Otis Elevator Company*, 231 NLRB 1128 (1977), the Board majority held that union officers may lawfully be given superseniority because they generally contribute, in their official capacities, to the ability of the union to represent the unit effectively and efficiently.

The panel majority issuing the Board's Decision and Order in this proceeding, relying in part on the above-cited cases, found that the superseniority provision involved herein was presumptively lawful because it covered only union officers and committeemen, and that the Board would not question a union's decision as to which officers aid the union in effectively representing the unit. Subsequent to that decision the Third Circuit issued *Anna M. D'Amico v. N.L.R.B.*, *supra*. In doing so the court stated that the respondent "was obligated to produce credible proof that the individual in question was officially assigned duties which helped to implement the collective bargaining agreement in a meaningful way. Any less rigid interpretation of the Board's ruling would leave substantial room to dilute the statutory neutrality principle without the requisite collective bargaining justification" (582 F.2d 825).

Upon reflection of the issues involved herein and consideration of the *D'Amico* decision the Board decided to reconsider *sua sponte* its earlier Decision and Order herein. As can be seen from the above-cited cases the Board Members have widely divergent views on *Dairylea* issues, particularly on that issue involved herein. Thus, this Supplemental Decision and Order is based on an aggregate majority as follows: Chairman Fanning and Member Truesdale do not agree with the restrictions placed on superseniority by *Dairylea* and its progeny (see their dissent herein); Members Jenkins and Penello would not permit union officers to benefit from superseniority except when the officers also serve as stewards or otherwise engage in administration of the contract at the place and during the hours of their employment (see their concurrence herein); and Member Murphy adheres to *Dairylea* and *Limpro, supra*, but finds that the General Counsel has rebutted the presumption that the union officers here involved were lawfully afforded superseniority by showing that Howard and Schneider are not engaged in contract administration (see her separate concurrence herein). Thus, the majority of the Board finds that Respondents violated the Act as alleged in their application of the superseniority provision in question to trustee Howard and guard Schneider.

Upon the aggregate majority outlined above the Board makes the following:

CONCLUSIONS OF LAW

1. The Employer was at all material times an employer engaged in commerce, and the Unions were labor organizations within the meaning of the Act.

2. United Steelworkers of America and Local 5490 of the United Steelworkers of America violated Section 8(b)(1)(A) and (2) of the Act by requesting the Employer to retain or recall trustee Howard and guard Schneider under the superseniority provision of the applicable collective-bargaining agreement while senior employees holding superior contractual retention and recall rights were denied retention and recall inasmuch as the union duties of those officers do not involve the representation of unit employees in matters involving the administration of the agreement or grievance processing.

3. The American Can Company violated Section 8(a)(1) and (3) of the Act by complying with the above-described request of the Unions.

4. The above-described unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that Respondents violated the Act by effecting a discriminatorily unlawful application of their superseniority provision, we shall order them to cease and desist from any such discriminatory application. Because trustee Howard and guard Schneider were retained or recalled pursuant to an unlawful application of the superseniority provision of the collective-bargaining agreement in derogation of the rights of senior employees to contractual retention and recall rights, it shall be ordered that Respondent Unions and Respondent Employer make whole any wage losses suffered by those senior employees who would have been retained or recalled between December 5, 1975, and September 2, 1976, but for the unlawful retention and recall of Howard and Schneider, less any net earnings, such employees would have received in the periods they would have been employed. The lost wages and interest thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁷

ORDER

Pursuant to the provisions of Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

A. Respondent, The American Can Company, Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Permitting, in any layoffs or recalls within units covered by agreements between The American Can Company and United Steelworkers of America and its affiliated local unions, superseniority to be invoked for other than a reasonable number of local union officers whose duties involve the administration of the agreement or the processing of grievances whenever such invocation or permission results in the displacement of unit employees with greater seniority status under the agreement for purposes of layoff or recall.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Make whole those unit employees who would have been retained or recalled under the agreement but for the retention or recall of trustee Howard and guard Schneider between December 5, 1975, and September 2, 1976, at the Employer's Denver, Colorado, plant in the manner set forth in the section of this Supplemental Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at the plants of the Employer where employees are covered by national agreements between the Employer and the United Steelworkers of America copies of the attached notice marked "Appendix A."⁸ Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by the Employer's representative, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that said notices are not defaced, altered, or covered by any other material.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

⁸ In the event that this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an order of the National Labor Relations Board."

B. Respondent United Steelworkers of America and Local 5490 of the United Steelworkers of America, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Invoking, in any layoffs or recalls within units covered by agreements between The American Can Company and United Steelworkers of America and its affiliated local unions, superseniority for other than a reasonable number of local union officers whose duties involve the administration of the agreement or the processing of grievances whenever such invocation results in the displacement of unit employees with greater seniority status under the agreement for purposes of layoff and recall.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights protected by Section (7) of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Make whole those unit employees who would have been retained or recalled under the agreement but for the retention or recall of trustee Howard and guard Schneider between December 5, 1975, and September 2, 1976, at the Employer's Denver, Colorado, plant in the manner set forth in the section of this Supplemental Decision and Order entitled "The Remedy."

(b) Post at the meeting halls of local unions affiliated with the United Steelworkers of America which have members covered by national agreements between the Employer and the United Steelworkers of America copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent Union's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not defaced, altered, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

MEMBERS JENKINS and PENELLO, further concurring:

We agree that this contractual provision herein which permitted trustee Howard and guard Schneider to benefit from superseniority is unlawful, not merely because it applies to union officers who play no role in the effective and efficient administration of the contract, but also because it applies to all union offi-

cers without regard to whether they act as stewards. In our opinion, the contract provision in question is unlawful on its face.

In *Dairyalea, supra*, the Board held that superseniority provisions giving benefits to stewards with regard to layoff and recall are lawful. The Board majority, however, has expanded *Dairyalea*, in *Limpco, supra*, in *Otis Elevator, supra*, and in this case to include union officers with those employees who may lawfully benefit from superseniority. We do not agree; see our dissents in *Limpco* and *Otis Elevator*. Superseniority provisions which benefit union officials, be they stewards, officers, or others, are by their very nature coercive because they discriminatorily encourage and reward union participation contrary to the Section 7 right to refrain from such activity. We recognized, however, in *Dairyalea* that a steward's processing of grievances and enforcement of the collective-bargaining agreement on the job offset any restraint on Section 7 rights by the facilitation of unit employees' contractual rights. Thus, *Dairyalea* found that superseniority protection with respect to layoff and recall for union stewards was lawful because its objective was to retain on the job those union officials whose activities facilitate employee rights and whose presence on the job is required for the proper performance of this function.

In our view, permitting union officers who do not so act as stewards to benefit from superseniority is contrary to the operative principles of *Dairyalea*. Even if union officers facilitate employee rights by acting to effectively and efficiently administer the collective-bargaining agreement, the proper performance of such activities does not require the continued presence of the officers on the job. Thus, at most, union officers meet only half of the twofold test of *Dairyalea*. In contrast, the steward's activities, i.e., the handling and adjustment of on-the-job grievances, serve to benefit employees, and are such that the steward's presence on the job is necessary. Put differently, the activities of union officers, however they benefit employees, do not generally involve on-the-job functions, while those of stewards are primarily on-the-job activities.

In this case the superseniority provision in issue, on its face and in its application, permits union officers to benefit merely because of their status as officers and not because their presence on the job is necessary for handling grievances. Accordingly, we would find that the superseniority provision is unlawful on its face, and that, perforce, application of that provision to benefit union officers is unlawful.

MEMBER MURPHY, concurring:

As I stated in *Union Carbide Corporation Chemical and Plastics Operations Division*, 228 NLRB 1152

⁹ See fn. 8, *supra*.

(1977), I find presumptively lawful those clauses giving job retention superseniority—including layoff, recall, shift assignment, or retention of the same job or category of job during incumbency in such position—for union stewards and officers whose functions relate, in general, to furthering the bargaining relationship. I have also stated that the General Counsel has the burden of proving affirmatively that the application of a superseniority clause to a union officer is *invalid*. *Limpro Mfg., Inc.*, 230 NLRB 406, 408 (1977). The Third Circuit, in enforcing *Limpro*, *supra*, *enfd. sub nom. Anna M. D'Amico v. N.L.R.B.*, 582 F.2d 820, 825 (1978), found the Board's accommodation permissible when a proper justification appears. The court stated that it read the Board's Decision to mean that "the Union was obligated to produce credible proof that the individual in question was officially assigned duties which helped to implement the collective bargaining agreement in a meaningful way."

These, then, are the burdens which must be satisfied. An examination of the undisputed facts here discloses that the General Counsel has met his initial burden of showing invalidity in the application of this clause. The duties of the guards, according to the International Union's constitution, are to "take charge of the door and see that no one enters [a meeting] who is not entitled to do so." The trustees' duties are defined as "to have charge of the hall and all property of the Local Union . . . and perform such other duties as the Local may require." None of the duties of either office, as so specified in the Union's constitution, relates to the general furthering of the bargaining relationship as set forth by the court. Hence, the duties of guard and trustee are too remote to justify superseniority for such positions. The burden thus shifted to Respondents to come forward with evidence that these officers, in fact, do perform functions which relate to the "general furthering of the bargaining relationship." But Respondents have failed to establish that either trustee Howard or guard Schneider has any such responsibilities.¹⁰

Therefore I emphasize that while I *find the clause lawful on its face*, I find that under the facts here Respondents violated the Act by their application of the superseniority provision to trustee Howard and guard Schneider. Accordingly, I join in adopting the remedy set forth in the principal opinion.

CHAIRMAN FANNING and MEMBER TRUESDALE, dissenting:

We would dismiss the complaint in its entirety for

¹⁰ No evidence was presented with respect to other duties of Schneider. With respect to Howard, the evidence adduced related to his position as chairman of the health and safety committee. This, however, was not the result of his being a trustee and was not the reason that he was given superseniority.

the reasons stated in the original Decision and Order in this proceeding (235 NLRB 704), and because we do not agree with the restrictions placed on superseniority by *Dairylea* and its progeny. See Chairman Fanning's dissents in *Dairylea* and *A.P.A. Transport Corp.*, 239 NLRB 1407 (1979), and Member Truesdale's separate dissent in *A.P.A. Transport*.

Contractually providing superseniority benefits for union stewards and officers does not, in our view, interfere with, restrain, or coerce employees in the exercise of their rights but instead serves to benefit the union, the employer, and the employees. We do not believe that the remote and contingent benefits of superseniority associated with service as a steward or officer have any significant impact on whether an employee chooses to support a union.

Instead, the only real effect of such provisions is to encourage and reward service as a union official. Nor do we believe that rewarding union officials for their service adversely affects unit employees. To the contrary, such rewards serve to benefit all the employees in the unit. A union can represent unit employees only through the actions of its officers and stewards. To encourage quality representation by giving superseniority rewards to such officers thus serves the interests not only of unions and employers but also of all employees, both members and nonmembers. Thus, in our view, superseniority for union officials serves the purpose of effective and efficient representation of unit employees by the union. For these reasons we would find that such provisions which are duly negotiated by the parties and contained in their bargaining agreements are presumptively lawful provided, of course, that they meet the tests of reasons and good faith.

The superseniority provision in issue in the instant proceeding clearly meets these standards. The provision gives superseniority to a reasonable number of union officers and grievance committeemen (10) who contribute, in their official capacities, to the ability of the union to represent all the employees in the unit effectively and efficiently. Accordingly, we would find that the provision in issue is presumptively lawful. A description of the officers' duties showing no visible or direct impact by them on contract administration is not sufficient to rebut the presumption of lawfulness. We would not, on the basis of such evidence, second-guess a union's decision as to which officers aid the union in effectively representing the unit. To do otherwise would be contrary to the realities of bargaining, would ignore the often vital indirect impact on contract administration by apparently low-level officers, and would put the Employer in the impossible position of trying to determine to which officials it

can lawfully give superseniority. For these reasons we would dismiss the complaint in its entirety.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT permit any local union affiliated with the above International Union to invoke superseniority of such agreements for other than a reasonable number of local union officers whose duties involve the administration of such agreements or the processing of grievances whenever such permission results in the displacement of unit employees with greater seniority status under such agreements for purposes of layoff and recall.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights protected by Section 7 of the National Labor Relations Act.

WE WILL make whole for any wage losses, plus interest, those senior employees suffered who would have been retained in or recalled to active employment at our Denver, Colorado, plant between December 5, 1975, and September 2, 1976, but for the retention and recall of Steelworkers

Local Union 5490 trustee D. R. Howard and guard S. Schneider.

THE AMERICAN CAN COMPANY

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT invoke the superseniority provision of such agreements for other than a reasonable number of Local Union officers whose duties involve the administration of such agreements or the processing of grievances whenever such invocation results in the displacement of unit employees with greater seniority status under such agreements for purposes of layoff and recall.

WE WILL NOT in any like or related manner restrain or coerce employees of The American Can Company in the exercise of their rights protected by Section 7 of the National Labor Relations Act.

WE WILL make whole for any wage losses, plus interest, those senior employees suffered who would have been retained in or recalled to active employment at the Denver, Colorado, plant, of The American Can Company between December 5, 1975, and September 2, 1976, but for the retention and recall of Steelworkers Local Union 5490 trustee D. R. Howard and guard S. Schneider.

UNITED STEELWORKERS OF AMERICA