

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

April 5, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On November 4, 1977, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent Employer filed exceptions and a supporting brief and a motion to reopen the record;¹ Respondent Union filed exceptions and a supporting brief; the Charging Parties filed a brief in answer to Respondent's exceptions;² and the General Counsel filed an answering brief and a second supplemental brief.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

At issue here is whether, under the Board's holding in *Dairyalea Corporate Inc.*, 219 NLRB 656 (1975), *enfd.* 531 F.2d 1162 (C.A. 2, 1976), Respondents violated the Act by permitting union officers to exercise superseniority to retain their employment in the face of layoffs, to the detriment of employees with greater plant seniority. We find, contrary to the Administrative Law Judge, that Respondents did not violate the Act by applying and enforcing their contractual superseniority clause in this instance.

On December 5, 1975, pursuant to a plant closure, the Employer laid off all but 11 of its unit employees, who were retained to dismantle and crate machinery. Subsequently, the Employer engaged in further layoffs and recalls. Under the seniority provisions of the collective-bargaining agreement, employees with the greatest seniority were to be retained provided

they could perform the work. The bargaining agreement also gave superseniority for the purposes of layoff and recall to not more than 10 local union officers and grievance committeemen. Most of the employees who were retained (or recalled) were local union officials. Although some officers had regular plant seniority and one may have been retained because he possessed special skills, the parties stipulated that certain employees were retained solely on the basis of their superseniority. Some of these, as did certain other local officers, served dual functions as grievance committeemen (i.e., stewards). Others remained employed, however, on the basis of their superseniority as officers alone. S. Schneider was a guard whose duties, as described by the Union's constitution, were "to take charge of the door and see that no one enters who is not entitled to do so." D. R. Howard was a trustee whose duties were "to have charge of the hall and all property of the Local Union . . . and perform such other duties as the Local Union may require."³ C. Thompson was also a trustee.⁴

In *Dairyalea, supra*, the Board held that superseniority for the purposes of layoff and recall is presumptively lawful when applied to a steward, because retention of a steward on the job "furtheres the effective administration of the bargaining agreements on the plant level." In *United Electrical, Radio and Machine Workers of America, Local 623 (LimpcO Mfg. Inc.)*, 230 NLRB 406 (1977), the Board held that the presumption of lawfulness of superseniority provisions extends also to union officers because they play a role in contract administration. In *Otis Elevator Company*, 231 NLRB 1128 (1977), the Board 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 efficiently and effectively. As the superseniority clause in the instant case covered local union officers and committeemen, we find that the clause is presumptively lawful under the foregoing precedents.

A documentary description of officers' duties showing no visible or direct impact by them on contract administration is insufficient evidence to overcome the presumption and to establish a violation of the Act. The Board will not, on the basis of such evidence, second-guess a union's decision as to

¹ Respondent Employer moved to reopen the record to submit an arbitration decision on the matter involved herein, to which it contends the Board should defer. The motion is denied. The issues raised in this case are not matters to which the Board will defer to the decision of an arbitrator because the interests of the parties (the Employer and the Union) to the grievance-arbitration proceeding are adverse to the interests of the Charging Parties herein.

² The motion of the Charging Parties for special leave to file an answer beyond the due date because of special circumstances was granted.

³ In addition, Howard apparently served as chairman of the Local's health and safety committee.

⁴ Although Thompson was not included in the stipulation naming those employees who were retained because of superseniority, the Administrative Law Judge found that his retention violated the Act. Both Respondents except to the Administrative Law Judge's finding and contend that Thompson was retained because he possessed special skills. In view of our disposition herein, we need not decide the matter.

what officers aid the union in effectively representing the unit. Thus, the parties to a collective-bargaining agreement do not have to justify applications of superseniority to union officers, but, in order to establish a violation, the General Counsel must prove that a particular application is invalid. We conclude that the General Counsel has failed to prove that the application of the superseniority provision of the collective-bargaining agreement herein is invalid under the Act. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER PENELLO, dissenting:

For the reasons set forth in Member Jenkins' and my dissent in *Limco, supra*, and *Otis Elevator, supra*, I would find that the superseniority provision is unlawful on its face, insofar as it gives superseniority to union officers, and that, perforce, application of that provision is unlawful.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On May 19, 1977, I conducted a hearing at Denver, Colorado, to hear issues raised by complaints issued on March 23, 1977, pursuant to charges filed by Stanley H. Egan and Donald R. Egan¹ against the American Can Company² and the United Steelworkers of America and Local 5490 of the United Steelworkers of America³ on May 28, 1976. On March 24, 1977, the cases against the Company and the Unions were consolidated for purposes of hearing and disposition inasmuch as they involve common parties and issues.

The complaints allege the Company violated Section 8(a)(1) and (3) and the Unions violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (hereafter called the Act), by causing the retention and recall of officials of Local 5490 pursuant to the superseniority provision of a collective-bargaining agreement at times when other employees with greater bargaining unit seniority and retention or recall rights under the contract were laid off or in layoff status.

The Company and the Unions concede certain officials of Local 5490 were retained or recalled under the superseniority provision of their agreement at times when employees with greater bargaining unit seniority were laid off or on layoff status, but deny their actions in causing such retention or recall were violative of the Act.

¹ Hereafter called S. Egan and D. Egan or the Egans.

² Hereafter called the Company.

³ Hereafter called the International Union and Local 5490 or the Unions.

The issue before me is whether or not the Company and the Unions' utilization of the superseniority provision to assure the employment of certain Local 5490 officials rather than the employment of senior bargaining unit employees who otherwise would have been retained or recalled under the regular layoff-recall provision of the company-union agreement violated the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to produce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel, the Egans, the Company, and the Unions.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATIONS

The complaints alleged, the answers admitted, and I find that at all times pertinent the Company was an employer engaged in commerce in a business affecting commerce and the Unions were labor organizations within the meaning of Section 2(2), (5), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Company and the International Union were parties to a collective-bargaining agreement for a term extending from February 15, 1974, through February 28, 1977,⁴ wherein the International Union was recognized by the Company as the exclusive collective-bargaining representative of the Company's employees at various plants in the United States and Canada, including a unit consisting of all the Company's hourly rated production and maintenance employees at its plant located at 4801 East 46th Street, Denver, Colorado, excluding supervisors, office clerical employees, and salaried employees. The employees within the unit just described constituted the membership of Local 5490.⁵

The agreement contained, *inter alia*, the following provisions:

Layoffs and Recalls from Layoffs

When layoffs are made:

1. Probationary employees shall be laid off first. If it is necessary to make an additional reduction in the work force, employees with the least plant seniority shall then be laid off and senior employees retained

2. In recall from layoff, employees shall be recalled to work in the reverse order of their layoff

Super-Seniority

⁴ And a succession of previous agreements.

⁵ The local unit union membership averaged 40 employee-members.

. . . super-seniority shall 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 layoff or recall . . . The employees to whom super-seniority will apply will be designated to the Company in writing.

Posting Seniority Lists

Local seniority lists shall be posted on the plant bulletin boards and revised at least once every six months.

Committeemen and Stewards

Grievance committeemen and shop stewards for each local operating unit will be designated in writing by the local union to local management. There shall be not more than one grievance committeeman for each department . . . For the purpose of meeting with management representatives, the grievance committee will consist of not more than five committeemen, as designated by the union, plus the local union president, if he is not a grievance committeeman . . . The union may change the personnel of this committee.

A seniority list was posted at the Company's Denver plant pursuant to the above-quoted provision on or about September 22, 1975. The 25 unit employees-union members holding the highest seniority on that list and their offices in Local 5490 and/or status as union committeemen on that date were as follows:

Seniority Standing	Name	Union Office
1.	G. P. Rasmussen	Guide
2.	C. A. Burton	Pres.*
3.	R. A. Wallen, Jr.	Guard
4.	I. Dalke	
5.	D. S. Howe	
6.	M. A. Dodson	
7.	O. E. Motzenbocker	
8.	S. H. Egan	
9.	D. R. Egan	
10.	H. J. Kochevar	
11.	C. E. Hugh	Treas.*
12.	L. A. Skell	Trustee
13.	R. L. Schaefer	Finan- cial Sec.*
14.	D. R. Howard	Trustee
15.	F. W. Kunlow	
16.	F. H. Kierstein	
17.	B. A. Carson	Rec. Sec.*
18.	T. DeSalvo	
19.	R. L. Cordova	
20.	W. S. Miller	Chairman*
21.	F. Ramirez	Vice Pres.*
22.	S. Schneider	Guard
23.	H. Gagnon	
24.	M. Rivers	
25.	C. Thompson	Trustee

* Grievance Committee

In accordance with the superseniority provision of the agreement, on or about September 26, 1975, Local 5490 advised company management at Denver it claimed super-seniority status under the agreement for the following local union officials and/or grievance committeemen:

⁶ It retained 11 unit employees to dismantle, crate, and store or ship machinery.

Seniority Standing	Name	Union Office
1.	G. P. Rasmussen	Guide
2.	C. A. Burton	Pres.*
3.	R. A. Wallen, Jr.	Guard
11.	C. E. Hugh	Treas.*
12.	L. A. Skell	Trustee
13.	R. L. Schaefer	Finan- cial Sec.*
14.	D. R. Howard	Trustee
20.	W. S. Miller	Chairman*
22.	S. Schneider	Guard
25.	C. Thompson	Trustee

* Grievance Committee

Local 5490 President Burton testified that, prior to the Union's furnishing the Company the above list, F. Ramirez, Local 5490 vice president and a grievance committeeman (No. 21 on the seniority list), and B. A. Carson, Local 5490 recording secretary and a grievance committeeman (No. 17 on the seniority list), waived their rights under the superseniority provision of the agreement.

In October 1975 the Company advised the Unions it was going to cease production at the Denver plant on December 5, 1975. In accordance with its normal practice in plant closure situations, on November 26 and December 1, 1975, the president of the International Union appointed Staff Representative Wayne Anzick as administrator over the affairs and property of Local 5490 and removed all its officers from office. On the latter date Anzick reappointed the Local 5490 officers to their former offices.

On December 5, 1975, the Company laid off or retained⁶ the following employees within the top 25 on the September 22, 1975, seniority list:

Seniority Standing	Name
6.	Dodson
8.	S. Egan
9.	D. Egan
10.	Kochevar
15.	Kuhlow
17.	Carson*
18.	DeSalvo
19.	Cordova
20.	Miller*
21.	Ramirez*
22.	Schneider*
23.	Gagnon
24.	Rivers
Retained	
1.	Rasmussen*
2.	Burton*
4.	Dalke
5.	Howe
7.	Motzenbocker
11.	Hugh*
12.	Skell*
13.	Schaefer*
14.	Howard*
16.	Kierstein
25.	Thompson*

*Union officers and/or grievance committeemen.

Burton testified Wallen, an officer (guard) and No. 3 on the seniority list, had become ill in April 1975 and remained on sick leave thereafter until he retired. It has

been noted heretofore that Ramirez and Carson waived their rights under the superseniority provision of the agreement. No explanation was offered for the failure of Miller and Schneider to exercise their rights under the superseniority provision over Dalke, Howe, Motzenbocker, and Kierstein to avoid layoff or the retention of Kierstein instead of a senior employee.

It is clear Rasmussen, Burton, Dalke, Howe, Motzenbocker, Bugh, and Skell would have been retained by virtue of their normal seniority standing, inasmuch as 11 men were retained, the No. 3 man (Wallen) was on sick leave, and their seniority numbered 1 through 12. But for the exercise of superseniority by Schaefer, Howard, and Thompson, however, Dodson and the two Egans would have been retained under the general layoff provision of the agreement and, but for the unexplained retention of Kierstein over his seniors, Kochevar also would have been retained under the general layoff provision.

On January 5, 1976, the Company recalled W. S. Miller, No. 20 on the seniority list, and S. Schneider, No. 22 on the seniority list, pursuant to the superseniority provision Miller was Local 5490's grievance committee chairman⁷ and Schneider was a guard.

But for the operation of superseniority by Miller and Schneider, it is clear employees with greater seniority than they would have been recalled.

On February 1, 1976, Rasmussen, No. 1 on the seniority list, retired.

On February 13 and 20, 1976, the Company laid off all employees within the unit except Burton, No. 2 on the seniority list, the president of Local 5490, and a grievance committeeman.

On March 3, 1976, the Company addressed a letter to Anzick asking if the Union still claimed superseniority status under the agreement for the 10 Local 5490 officers and committeemen named in its September 26, 1975, communication to the Company. Anzick replied in the affirmative.

On April 19, 1976, the Company recalled Dodson, No. 6 on the seniority list. No explanation was made why Dalke, No. 4 on the seniority list, was passed over for recall.

On April 25, 1976, Howard, No. 14 on the seniority list and a Local 5490 trustee for whom the Unions claimed superseniority status, was recalled. It was conceded by the Unions and the Company he was recalled pursuant to his superseniority status under the agreement, the Union's designation of September 26, 1975, and its reaffirmation of March 1976.

On May 20, 1976, Local 5490 dissolved.

⁷ Burton testified Miller displaced Thompson as grievance committee chairman prior to the December 5, 1975, plant closure Thompson was so listed in the September 26, 1975, letter.

⁸ Only Howard was employed by virtue of his superseniority status asserted by Local 5490 on the basis of his union office as trustee.

⁹ No evidence was produced that Thompson performed any services on behalf of his fellow employee-members during the period he was employed by virtue of the Union's assertion of his superseniority status under the contract subsequent to the December 5, 1976, general layoff. The alleged performance of union duties by Howard subsequent to December 5, 1975, will be developed hereafter.

¹⁰ No evidence was produced that Schneider performed any services on behalf of his fellow employee-members during the period he was employed by virtue of Local 5490's assertion of his superseniority status under the agreement subsequent to the December 5, 1976, general layoff.

On May 26, 1976, Anzick formally notified the Company of Local 5490's dissolution and advised the Company that since Local 5490 no longer had any officers or committeemen, the superseniority provision was no longer effective. At the time, Burton, Dodson, and Howard were actively employed. The Company made no changes in their work status.⁸

In September 1976, all operations at the plant ceased and Burton, Dodson, and Howard were terminated.

The duties of Howard and Thompson as trustees of Local 5490 at times pertinent were "to have charge of the hall and the property of Local 5490."⁹

The duties of Schneider as a guard of Local 5490 at times pertinent were "to take charge of the door and see that no one enters who is not entitled to do so."¹⁰

Anzick testified negotiations over the procedures to be followed in matters affecting the unit employees arising out of the plant closure were concluded at the national level prior to the cessation of production at the Denver plant.

Burton testified the few grievances which arose during the December 5, 1975-September 1976 period while the plant machinery was dismantled, crated, and either stored or shipped were handled by Local 5490's grievance committeemen.¹¹

Robert Petris, administrative assistant to the director of district 38 of the International Union, which district encompasses the Western United States, testified the superseniority provision in question is common in the industry; that it has been invoked to assure the continued employment of local union officers and/or committeemen in three plant closures in the industry in the Western States within the recent past; and that it was used to assure the continued employment of four such officers or committeemen after one of the units had been reduced to 10-12 employees.¹²

B. Positions of the Parties

1. The General Counsel and the Charging Parties

The General Counsel and the Charging Parties concede the superseniority provision is valid on its face,¹³ but assert its application runs afoul of the Act when it is extended to assure preferential treatment of union officers in layoff or recall situations when their presence is neither necessary nor warranted by their offices.¹⁴

They contend the retention of trustees Howard and Thompson on December 5, 1975, the recall of guard Schneider on January 5, 1976, the recall of trustee Howard on April 25, 1976, and the retention of trustee Howard

¹¹ Between December 5, 1976, and February 20, 1976, a maximum of 13 unit employees were working; grievance committeemen Burton, Bugh, and Schaefer were employed during that period. Miller, the grievance committee chairman, worked between January 15 and February 13, 1976. Between February 13, 1976, and the date all operations ceased (September 1976), a maximum of three employees were working; grievance committeeman Burton was employed over that period.

¹² The original unit size in that instance was 500-600 employee-members. The other closures involved units of 350-400 and 100.

¹³ *Aeronautical Industrial District Lodge 727 v. Campbell, et al.*, 337 U.S. 521 (1949).

¹⁴ Citing *Dairyalea Cooperative, Inc.*, 219 NLRB 656 (1975).

between May–September 1976, after Howard ceased to function as a local union trustee constitute a clear abuse of the limited exception permitted under the Act in lay-off/recall situations and a manipulation of the superseniority provision to assure employment to those officers despite the fact their offices did not involve the performance of any representational duties on behalf of their fellow employees.¹⁵

2. The Union and the Company

The Union and the Company note the presumptive validity of the superseniority provision of the agreement and contend the retention or recall of Howard, Thompson, and Schneider was a valid and lawful application thereof.¹⁶

They further contend Howard made inspections and filed complaints during the period he exercised his superseniority rights as a trustee to remain on the job in discharge of another Local 5490 officer — chairman of Local 5490's Health & Safety Committee — and therefore performed valuable representational services for his fellow employees.

They next argue the complaint should be dismissed because, even assuming, *arguendo*, the utilization of the superseniority provision of the agreement to assure the employment of Howard, Thompson, and Schneider violated the Act, the two Charging Parties would not have been the persons entitled to retention or recall in their stead.

The Company also advances a separate defense that, since the superseniority provision is not unlawful, it would be inequitable to place it under a duty to ascertain whether the retention or recall of union officers requested by the Unions was necessary or warranted by their offices; further contending that, in any event, assuming it had such a duty, it discharged that duty in March 1976 when it asked Anzick if the Union's superseniority designations of September 1975 were still effective and was advised they were.

In addition, the Company set out a *Collyer*¹⁷ defense in its answer to complaint filed against it, though it neither presented evidence during the hearing nor advanced any argument in its posthearing brief in support of that contention.¹⁸

¹⁵ The General Counsel and the Charging Parties did not challenge the retention of Bugh and Schaefer between December 5, 1975, and February 13, 1976, apparently because the duties of their offices involved such representation (financial secretary-grievance committeeman and treasurer-grievance committeeman) nor the recall of Miller between January 5, 1976, and February 13, 1976, apparently because his duties also involved such representation (grievance committee chairman).

¹⁶ Citing *Dairyalea Cooperative, Inc.*, *supra*; *United Electrical Workers Local 623 (Limco Mfg., Inc.)*, 230 NLRB 406 (1977) and *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 1331 (Chrysler Corporation)*, 228 NLRB 1446 (1977).

¹⁷ *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

¹⁸ The Company filed a posthearing motion to reopen the record to include an arbitration award, wherein it was asserted S. Egan's rights under the contract were violated by the retention and/or recall of all of Local 5490 officers from and after December 5, 1975, on the ground Local 5490 had no officers after the Local was placed under the administratorship of Anzick,

C. Analysis and Conclusions

Section 8(b)(2) of the Act prohibits the Unions from attempting to cause or causing the Company to discriminate against its employees in violation of Section 8(a)(3) of the Act, and Section 8(a)(3) of the Act prohibits the Company from discriminating against its employees in a manner which encourages their membership¹⁹ in the Unions.²⁰

Section 8(b)(1)(A) and Section 8(a)(1) of the Act prohibit the Company and the Unions from interfering with, restraining, or coercing the unit employees in the exercise of their right to refrain from supporting or assisting the Unions or participating in their activities (except to the extent of requiring their paying the requisite initiation fees and dues required of all members pursuant to the union-security provision of the company-union agreement).

In the lead decision cited by all the parties on the question of legitimate application of a superseniority provision contained in a collective-bargaining agreement, *Dairyalea Cooperative, Inc.*, *supra*, the Board, with court approval, held a superseniority provision necessarily encourages union participation and activity in the sense it grants the employee who receives superseniority a benefit based upon his union activities and participation which is not available to other employees who chose not to support or assist the union or participate in its affairs.

In the *Dairyalea* and other cases dealing with the subject, the Board and the courts made it clear they were permitting preferential treatment for employees active within their union only when the presence of the preferred unionist on the job was necessary and/or warranted for the purpose of representing his fellow employees *vis-a-vis* the employer in overall administration of the collective-bargaining agreement²¹ or grievance processing.²²

In this case the five principal officers of Local 5490 doubled as grievance committeemen (Burton, president; Ramirez, vice president; Bugh, treasurer; Schaefer, financial secretary; and Carson, recording secretary). Miller, who was not an officer of Local 5490, served as chairman of the grievance committee.

and the Local's officers were removed by order of the International Union, arguing essentially the reappointment of the officers by Anzick on the latter date was ineffective in restoring them to office and permitting their exercise of superseniority under the agreement. I denied the motion.

¹⁹ The encouraging of union membership has been defined as much more than inducement to acquire or maintain membership; it also encompasses actions which encourage employees to support and assist a union and to participate in its activities. *The Radio Officers' Union of the Commercial Telegraphers Union, A.F.L. [Bull Steamship Co.] v. N.L.R.B.*, 347 U.S. 17 (1954).

²⁰ The collective-bargaining agreement between the Union and Company parties to this proceeding contains a valid provision requiring unit employees to acquire and maintain membership in the Unions for the term of the agreement.

²¹ *United Electrical Workers Local 623 (Limco Mfg., Inc.)*, *supra*.

²² *Aeronautical Industrial District Lodge 727 v. Campbell*, *supra*; *Dairyalea Cooperative, Inc.*, *supra*; *Automobile Workers, Local 1331 (Chrysler Corporation)*, *supra*.

Under the principles set out in the cases just cited, the retention and/or recall of these five employees to assure their continued employment may have been justified,²³ though (1) apparently Local 5490 saw no need for the presence on the job of its vice president/grievance committeeman, Ramirez, and recording secretary/committeeman, Carson, at any time following the December 5, 1975, general layoff or of its grievance committee chairman for a period immediately following the general layoff (December 5, 1975–January 5, 1976) and after February 13, 1976; (2) it is clear the few grievances which arose after December 5, 1975, were handled by President/Grievance Committeeman Burton; (3) any problems over the administration of the agreement during the dismantling of the plant apparently were worked out at the national level and administered by Anzick; and (4) no evidence was developed that any problems of contract administration or grievance processing required the presence on the job of Treasurer Bugh or Financial Secretary Schaefer between December 5, 1975, and February 13, 1976. In the absence of such evidence, one may only speculate that the presence of Miller, Bugh, and Schaefer on the job during the periods of their retention or recall was warranted to assure their availability in the event their services might be required to handle any problems which might arise in the areas of contract administration or grievance processing between December 5, 1975–February 13, 1976.

Even this fails to explain union insistence upon and company acquiescence in the retention and/or recall of the two trustees (Howard and Thompson) and the guard (Schneider) between December 5, 1975–September 1976. Their union offices did not involve them in either contract administration or grievance processing; yet Local 5490 selected them over the chairman of the grievance committee (Miller) and two higher ranking officers and committeemen (Ramirez and Carson) for retention after the December 5, 1975, general layoff through the February 13, 1976, layoff and recalled one of them (Howard) between April 25, 1976, and September 1976, a time when all the principal officers of the Local and all committeemen except its president (Burton) were in layoff status, and continued Howard on the job after the Local ceased to have any officers (May 20, 1976), all with full knowledge by the Company of their union offices and, after May 26, 1976, company knowledge the Local no longer had any officers.

The superseniority provision the Unions and the Company rely upon to justify the request of the former and acquiescence of the latter in the retention and/or recall of Howard, Thompson, and Schneider following the December 5, 1975, general layoff authorizes the exercise of superseniority by not more than 10 local union officers and committeemen; it is obvious the negotiators intended to preserve the employment of whatever number of officers and committeemen was reasonably necessary to assure the

continued representation of employees in the unit affected by a layoff in matters involving the administration of the contract and grievance processing and *not* to assure the continued employment of the *maximum* number of officers and committeemen the agreement permitted when layoffs occurred.

However, the Unions invoked the provision and the Company acquiesced therein to assure the employment of three union officers whose only duties were to safeguard the door of the union hall during meetings or to take charge of its property while unit employees with far greater seniority status under the agreement were on layoff status. The union offices on which the Unions and the Company relied to justify the continued employment of Schneider, Thompson, and Howard between December 5, 1975, and February 13, 1976, while their seniors were laid off did not involve contract administration or grievance processing; four principal union officers and committeemen (Burton, Miller, Bugh, and Schaefer) were among the 13 employees retained on the job along with Howard, Thompson, and Schneider between December 5, 1975–February 13, 1976, and were available for those purposes, and the principal union officer (committeeman Burton) was available for those purposes when only he, Howard, and Dodson were on the job (between April 25, 1976, and September 1976). The record demonstrates, in fact, that Burton performed any necessary representational duties on behalf of unit employees between December 5, 1975 and September 1976.²⁴

With reference to the argument the complaints should be dismissed because the Charging Parties may not benefit by a finding the retention and/or recall of Howard, Thompson, and Schneider was unlawful, the short reply is any "person" may cause an employer and/or a union to be exposed to an appropriate remedial order if it has violated the Act, whether or not the charging party benefits therefrom. It is further obvious the two Eigans are members of a class whose rights they seek to vindicate, and it finally appears the Eigans will benefit under the Decision in this case.

Turning next to the company argument it should be relieved of liability herein, in a unit and local union as small as the one involved here, the Company may reasonably be charged with knowledge of the union offices and duties of Howard, Thompson, and Schneider and the fact the national agreement provision permitting preferential treatment of union officers and committeemen in layoff and recall situations has a top limit of 10 for units ranging in size from thousands to scores, obviously in contemplation of limiting such preferential treatment to a number of officers and/or committeemen whose duties and number are reasonably related to the size of the unit and their representational functions therein. In any event, it is clear the Company retained Howard after May 26, 1976, on the

²³ As noted heretofore, the General Counsel and the Charging Parties did not contest the retention or recall of any of these officers/committeemen.

²⁴ I find Burton's testimony supporting the Unions' position Howard conducted safety inspections in his role as chairman of the Local Union's health and safety committee irrelevant to the issue here, inasmuch as the agreement did *not* authorize preferential retention or recall for the chairman or members of the health and safety committee but only the chairman and

members of the *grievance* committee and union officers, and it is claimed Howard's preferential treatment over his seniors is not violative of the Act because of his status and exercise of superseniority as a *local union officer* (trustee). In addition, I find Burton's testimony in this area unconvincing when viewed with his testimony for much of the period when he, Dodson, and Howard were the only employees on the job because he was not in the plant. Further, it is hard to visualize how much inspection would be required to assure the safety of three employees.

basis of his superseniority as a union trustee despite formal notice Howard ceased to hold *any* union office after May 20, 1976. On these grounds I find the Company's contention it should not be held jointly liable with the Unions for violating the Act untenable.

As to the *Collyer* defense, I rejected the Company's motion to reopen the record to accept an arbitration award in a contract grievance involving Stanley Egan (see fn. 14), because the issue before me cannot be fully resolved before an arbitrator appointed pursuant to the agreement,²⁵ and therefore this is not a case for deferral to arbitration.

On the basis of the foregoing, I find and conclude the Unions violated Section 8(b)(1)(A) and (2) of the Act by asking the Company to retain and/or recall Local 5490 officers (Howard, Thompson, and Schneider) whose union duties did not involve the representation of unit employees in matters involving administration of the agreement or grievance processing while senior unit employees were laid off or not recalled between December 5, 1975, and September 1976, and the Company violated Section 8(a)(1) and (3) of the Act by complying with that request.

CONCLUSIONS OF LAW

1. At all times pertinent the Company was an employer engaged in commerce and the Unions were labor organizations within the meaning of Section 2(2), (5), (6), and (7) of the Act.

2. The Unions violated Section 8(b)(1)(A) and (2) of the Act by asking the Company to retain and/or recall Local 5490 trustee Howard, Local 5490 trustee Thompson, and Local 5490 guard Schneider while senior employees holding superior retention and/or recall rights under the agreement were either laid off or denied recall, inasmuch as the union duties of those officers did not involve the representation of unit employees in matters involving administration of the agreement or grievance processing.

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

4. The aforesaid unfair labor practices affected commerce within the meaning of the Act.

²⁵ The grievance-arbitration provision of the agreement only covers employee complaints against the Company, and an employee complaint may only be referred to arbitration by the Union; the Union in this instance not only has interests adverse to the Charging Parties *vis-a-vis* the superseniority issue, but it also cannot be brought before the arbitrator as a defendant. Further, an arbitrator appointed under the agreement could only

THE REMEDY

Having found the Company and the Unions engaged in unfair labor practices in violation of the Act, I shall recommend they be directed to cease and desist therefrom, and to take affirmative action designed to effectuate the purposes of the Act.

It shall be recommended the Unions be directed in layoff and recall situations to refrain from invoking the superseniority provision of the agreement to assure the continued employment of local union officers junior to other unit employees in seniority standing under the agreement, other than a reasonable number whose union duties involve the administration of the agreement and/or the processing of employee grievances, and the Company be directed to refrain from granting preferential treatment to local union officers at union request in layoff and recall situations, other than a reasonable number of local union officers whose duties involve the administration of the agreement and/or the processing of employee grievances.

Having found that Local 5490 trustees Howard and Thompson and guard Schneider were retained and/or recalled between December 5, 1975, and September 1976 because of their union offices, even though such offices did not encompass the representation of unit employees in administration of the agreement or grievance processing, in derogation of the rights of senior employees under the agreement to retention or recall in their stead, it shall be recommended that the Unions and the Company make whole for any wage losses they may have suffered the senior employees who would have been retained or recalled between December 5, 1975, and September 1976 but for the preferential retention and/or recall of Howard, Thompson, and Schneider, less any net earnings such employees received in the periods they would have been employed but for the retention and/or recall of Howard, Thompson, and Schneider. 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).²⁶

[Recommended Order omitted from publication.]

decide whether Howard, Thompson, and Schneider were union officers entitled to claim superseniority under the contract and would not be able to resolve the issue of whether the exercise of that claim discriminated against unit employees senior to the three within the meaning of the Act.

²⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).