Union Carbide Corporation Chemical and Plastics Operations Division *and* Local 8–891, Oil, Chemical and Atomic Workers International Union, AFL–CIO. Case 22–CA–6837

April 5, 1977

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND JENKINS

Upon a charge filed on March 7, 1976, by Local 8–891, Oil, Chemical and Atomic Workers International Union, AFL–CIO, herein called the Union, the Regional Director for Region 22 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued a complaint against the Respondent, Union Carbide Corporation Chemical and Plastics Operations Division alleging that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by unilaterally modifying the collective-bargaining agreement then in effect between Respondent and the Union. A hearing before an Administrative Law Judge was scheduled for June 14, 1976, and was subsequently postponed. On April 30, 1976, Respondent filed its answer, admitting certain allegations of the complaint, and denying others, including those charging them with the commission of unfair labor practices.

On June 30, 1976, prior to the hearing, the Union, the Respondent, and the General Counsel entered into a stipulation, whereby it was agreed that the facts contained therein and the exhibits attached thereto, including the charge, complaint and notice of hearing, and answer, shall constitute the entire record in this case. The parties agreed to waive the making of the findings of fact, conclusions of law, and the issuance of a decision by the Administrative Law Judge. The parties petitioned the Board to exercise its power under Section 102.50 of the Board's Rules and Regulations and transfer these proceedings to the Board for further action. On August 3, 1976, the Board issued an Order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and Respondent filed briefs with Board.

Pursuant to the provisions of 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 entire record in this case, including the parties' briefs, and makes the following findings and conclusions:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT COMPANY

The Respondent Company is and has been at all times material, a corporation organized under the laws of the State of New York, with its principal office and place of business in New York and a plant in Bound Brook, New Jersey. Respondent is now and has at all material times been engaged in the manufacture, sale, and distribution of plastics at the Bound Brook plant, which is the only facility involved in this proceeding. During recent annual periods of business, the Company has grossed annual revenues in excess of $50,000, of which products valued in excess of $50,000 were shipped from said Bound Brook plant in interstate commerce directly to States of the United States other than the State of New Jersey. Accordingly, we find that Respondent Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

At all times material herein, Respondent and the Union have been parties to a collective-bargaining agreement, which contains, *inter alia,* the following provision:

> 7.07 (A) In case of layoff on account of reduction in force, elected Union officials (not to exceed twelve in number) and Union Stewards with one (1) year or more of Company Service Credit shall be the last to be laid off.
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> (B) No member of the Executive Board or other elected officials (not to exceed twelve in number as in (A) above) or Union Stewards shall be transferred, out of their department or craft group or reassigned off their shift during their term in office, except with their consent.
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> (C) A steward who declines an upgrading to a vacant job on another shift will not incur delay in consideration for future upgrading.
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> (D) Seniority provisions as set forth in this agreement will be waived in the event the Local Union President (or the Vice-President in the event the Local Union President is granted a year's leave of absence), the Chief Steward and the Recording Secretary who are permanently assigned to shifts, makes application for a vacant day job during his/her current term of office. The

above employee must possess the necessary qualifications and skills and meet fully all job requirements to be eligible for the vacancy. One such application may be made during the current term of office, and if such application is made and the job refused, the rights of that individual regarding this clause will be forfeited for the balance of the existing labor agreement.

Within fourteen (14) days of the date of expiration of office, the employee must make known his/her desire to return to his/her former job. He/she will then be assigned to the first available vacancy in his/her former job and shift and the rights of other individuals to that vacancy will be waived. If no indication is given to return to his/her former job within fourteen (14) days, the employee will be retained in his/her present position.

On February 26, 1976, and at all times material since that date, without bargaining with the Union, Respondent unilaterally refused, and continues to refuse, to enforce section 7.07(B) of the contractual provision set forth above,[1] on the ground that said provision is in conflict with the Board's decision in *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975). Respondent argues that section 7.07 (B), which grants union stewards superseniority for the purpose of maintaining their department or shift when they would otherwise be transferred, is the type of job-related preference prohibited under *Dairylea.* General Counsel, however, contends that this contractual provision furthers the effective administration of the bargaining agreement and is permissible under *Dairylea.*

Although the contractual provision provides that neither elected officials nor stewards are to be transferred or reassigned without their consent, it appears, and the complaint, stipulation, and briefs indicate, that the section is applied only to elected union stewards.

According to the stipulation, the Union maintains 26 elected and 52 appointed shop stewards at the Bound Brook plant. Their major responsibility is to process grievances and the Union attempts to maintain a steward for each shift in each department. Section 8.0 (B) of the collective-bargaining agreement provides in relevant part:

The number of such stewards shall not exceed 1 for every 30 employees in the plant, but not more than 1 steward for every 35 employees or less per shift in any one department. Stewards shall handle grievances only within their respective jurisdictions.

Because the collective-bargaining agreement limits the number of stewards the Union may maintain at one time, departments and shifts have been combined into a single jurisdiction, although the Union generally attempts to maintain a steward in each department on each shift. The Union alone decides which departments and shifts to combine.

As section 8.01(B) provides, stewards are to handle grievances only within their department and shift.[3] Because of a longstanding union practice, which requires that stewards forfeit their positions when they are transferred, the ability to maintain their jurisdictions is necessary if they are to continue to represent the employees in their jurisdictions.

In *Dairylea Cooperative, Inc.*, 219 NLRB 656, enfd. *sub nom. N.L.R.B.* v. *Milk Drivers & Dairy Employees, Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 531 F.2d 1162 (C.A. 2, 1976), the Board held, *inter alia,* that an employer violated Section 8(a)(1) and (3) of the Act by according union stewards superseniority for purposes other than layoff and recall. The clause in *Dairylea* gave stewards seniority with respect to "all contractual benefits where seniority is a consideration," including preference in the assignment of overtime, in the selection of vacations, and in the assignment of routes and other positions.

The Board reasoned that job rights and benefits which do not further the administration of the bargaining agreement may not be tied to union activities without impermissibly joining that which the Act seeks to separate.

In finding the clause unlawful in *Dairylea,* the Board stated that:

> it is well established that steward super seniority limited to layoff and recall is proper . . . . it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. [219 NLRB at 658.]

As regards superseniority for purposes other than layoff and recall, the Board in *Dairylea* said:

> there is no occasion here for finding super seniority—even that going beyond layoff and recall—to be *per se* unlawful. The issue ultimately is one of justification. [219 NLRB at 658.]

[1] The other subsections of clause 7.07 are not in issue in this case.

[2] These five are not covered by sec. 7.07(B).

[3] According to the stipulation, as a matter of practice, stewards have processed grievances from outside their department and shift when the Union and Respondent find it more convenient.

Thus the Board recognized superseniority for layoff and recall to be proper, even though it may create a benefit for certain employees. The burden of establishing the justification to rebut the presumption of illegality pertaining to benefits beyond layoff and recall "rests on the party asserting their legality." (The General Counsel, in this case.)

Here the General Counsel has established justification for the provision at issue, sufficient to rebut the *Dairylea* presumption of illegality. We find, therefore, that Respondent's failure to enforce the provision violated Section 8(a)(5) and (1) of the Act.[4]

General Counsel argues that the provision granting union stewards superseniority in order to maintain their departments and shifts is justified, particularly when considered in light of the union rule requiring stewards who leave their jurisdiction to forfeit their stewardship and in view of the contractual restrictions contained in section 8.01(B) of the collective-bargaining agreement. We agree with this argument and find support for our position in the stipulation itself, wherein three different ways in which the provision provides for more effective representation of all employees are set out:

> (a) . . . the incumbent stewards are more familiar with the collective bargaining contract, both substantially and procedurally, than are non-steward employees.
>
> (b) . . . the incumbent stewards are more familiar with pending grievances, differing departmental operations, and with certain procedures that vary per department, e.g. overtime, in effect in particular departments than are stewards from different departments or non-steward employees.
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> (c) . . . the vacancy created by the loss of an elected steward may go unfilled and therefore mean that employees in a particular department and shift, not having a steward in that department and shift, must utilize a steward from a different department or shift.

General Counsel contends that the importance of maintaining the same union steward has been consistently recognized as a legitimate justification for superseniority. The Second Circuit, in enforcing *Dairylea,* characterized the General Counsel's position therein thusly:

> The General Counsel did not challenge that portion of the "superseniority" provisions protecting stewards from layoff because, in his opinion, that preference had a legitimate and substantial justification: a union may find itself powerless to maintain the same steward on the job. . . . [*N.L.R.B.* v. *Milk Drivers & Dairy Employees Local 338,* 531 F.2d 1162 at fn. 7.]

This need for continuity on the job was recognized by the Supreme Court in *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.,* 337 U.S. 521 (1949):

> One of the safeguards insisted upon by unions for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. . . . A labor agreement is a code for the government of an industrial enterprise and, like all government, ultimately depends for its effectiveness on the quality of enforcement of its code. Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairmen play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office. A provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be deemed arbitrary or discriminatory. [337 U.S. at 527–528.]

We believe that the continuous presence of the steward on the job "redounds in its effect to the benefit of all," particularly in view of the fact that the Union generally attempts to maintain a steward in each department on each shift. The fact that some job-related benefits may accrue to stewards must be weighed against the advantages flowing to all employees. The clause at issue in *Dairylea* purported to give stewards seniority with respect to "all contractual benefits," while here the provision concerns only the steward's ability to maintain his or her present position.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent Company's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[4] For the reasons cited in his dissenting opinion in *Dairylea,* Member Fanning agrees that sec. 7.07(B) of the collective-bargaining agreement is lawful and that Respondent violated the Act by failing to enforce the provision. However, since he does not agree with the principles enunciated in *Dairylea,* Member Fanning finds it unnecessary to distinguish *Dairylea* or to find that the *Dairylea* presumption of illegality has been rebutted herein.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the steward superseniority clause here in dispute is lawful and we shall therefore order that Respondent cease and desist from refusing to enforce the clause in its bargaining agreement with the Union.

CONCLUSIONS OF LAW

1. The Respondent, Union Carbide Corporation Chemical Plastics Operations Division, is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Local 8–891, Oil, Chemical and Atomic Workers International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Commencing on about February 26, 1976, and at all times material since that date, the Respondent, in violation of Section 8(a)(5) of the Act, has refused to bargain collectively with the Union by unilaterally refusing to enforce section 7.07(B) of its collective-bargaining agreement with the Union.

4. Because of the aforesaid conduct, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Company, Union Carbide Corporation Chemical and Plastics Operations Division, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union, Local 8–891, Oil, Chemical and Atomic Workers International Union, AFL–CIO, by refusing to enforce section 7.07(B) of its collective-bargaining agreement with the Union.

(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 which the Board finds will effectuate the policies of the Act:

(a) Maintain and enforce all provisions of the collective-bargaining agreement with the Union.

(b) Post at its Bound Brook, New Jersey, plant copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent'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 employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

CHAIRMAN MURPHY, concurring:

I agree that the decision herein is correct under the holding of *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975). However, in addition to the provisions in issue in *Dairylea*, I would find presumptively lawful job retention superseniority clauses for union stewards or officers whose functions relate in general to furthering the bargaining relationship. Job retention clauses include layoff, recall, shift assignment, or retention of the same job or same category of job during incumbency in such position. Cf. *Hospital Service Plan of New Jersey and Medical-Surgical Plan of New Jersey*, 227 NLRB No. 88 (1977), and *Motion Picture Laboratory Technicians, Local 780, International Alliance of Theatrical Stage Employees, etc., AFL–CIO (McGregor-Werner, Inc.)*, 227 NLRB No. 79 (1977).

[5] 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."

APPENDIX

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

WE WILL bargain collectively with Local 8–891, Oil, Chemical and Atomic Workers International Union, AFL–CIO.

WE WILL no longer refuse to enforce provisions of the collective-bargaining agreement with said Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

UNION CARBIDE CORPORATION CHEMICAL AND PLASTIC OPERATIONS DIVISION