Wayne Transportation, a Division of Wayne Corporation and Floyd Wesley Johnson and Michael Portanova

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 721 and Floyd Wesley Johnson and Michael Portanova. Cases 25-CA-14198, 25-CA-14267, 25-CB-4787, and 25-CB-4086

30 April 1984

DECISION AND ORDER

By Chairman Dotson and Members ZIMMERMAN AND HUNTER

The issue in this case¹ is whether the instant contractual "Preferential Seniority" clause, which accorded superseniority for purposes of layoff and recall to, inter alia, Respondent Union's recording secretary, trustees, sergeant-at-arms, and guide, is lawful under the standards announced in Gulton Electro-Voice.2

As a result of the application of the "Preferential Seniority" clause in the selection of employees for layoff. Charging Parties Johnson and Portanova were laid off, even though they had greater employment seniority than, inter alia, Respondent Union's recording secretary, trustees, sergeant-atarms, and guide. The parties stipulated that these union officers were retained exclusively because of the superseniority accorded them under the "Preferential Seniority" clause of the collective-bargaining agreement.

The judge, relying in part on the Board's decisions in Limpco Mfg. Co., 3 Otis Elevator Co., 4 and American Can Co., 6 determined that superseniority for layoff and recall may lawfully be granted to individuals performing steward-type functions "as well as other union officers for whom it can be shown are responsible for administration of the local union and the collective bargaining agreement" (emphasis added). The judge found that the union officers in question here did participate, as members of the Union's executive board.6 in the "administration of the Union," and that the executive board has some involvement in "Supervising the collective bargaining agreement." Based on those findings, and notwithstanding his additional finding (to which the Respondents have filed no exceptions) that these union officers do not perform any steward-type functions,7 the judge concluded that the contractual award of superseniority to them, for purposes of layoff and recall, was lawful. Accordingly, he dismissed the complaint in its entirety.

Subsequent to the judge's issuance of his decision in this case, the Board issued its Decision in Gulton Electro-Voice, above, in which it overruled the above-cited Board precedent relied on by the judge here. In Gulton, the Board held that it would no longer find lawful any contractual preferential seniority clauses in which superseniority for layoff and recall is granted to union officers who do not perform steward or steward-like functions, i.e., grievance processing or other on-the-job contract administration responsibilities.

Applying the standards set forth in Gulton to the facts of the instant case, we find the grant of superseniority to the union officers in question to be unlawful.

Operationally, the Company has approximately 32 departments within 4 divisions: assembly, fabrication, service, and parts. In accordance with the collective-bargaining agreement, there is one union steward for each department and shift, except that certain departments are consolidated for purposes of assigning a steward. In addition to these department stewards, there is a division steward for each of the four divisions. Additionally, the contract provides that there shall be a plant bargaining committee, comprised of not more than five members: the union president, vice president, and three committeemen. Finally, the collective-bargaining agreement acknowledges the existence and composition of the Union's executive board which, as seen, is comprised of the union president, vice president, recording secretary, financial secretary, trustees (3), sergeant-at-arms, and guide.

The preferential seniority clause of the collective-bargaining agreement grants superseniority for purposes of layoff and recall to the following union officers, in the order designated:

¹ On 25 October 1982 Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Union filed a cross-exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith.

²⁶⁶ NLRB 406 (1983).

⁵ Electrical Workers UE Local 623 (Limpco Mfg.), 230 NLRB 406 (1977), enfd. sub nom. D'Amico v. NLRB, 582 F.2d 820 (3d Cir. 1978). * 231 NLRB 1128 (1977).

^{6 244} NLRB 736 (1979).

⁶ The Union's executive board is comprised of the president, vice president, recording secretary, financial secretary, trustees (3), sergeantat-arms, and guide.

The Respondents also have not excepted to the judge's finding that Respondent Union agreed that the officers in question do not perform "steward type" functions. In any event, as seen infra, the record fully supports the judge's finding that these officers do not perform any "steward-like" duties.

- 1. President
- 2. Vice President
- 3. Committeemen (3)
- 4. Recording Secretary
- 5. Financial Secretary
- 6. Trustees (3)
- 7. Sergeant-At-Arms
- 8. Guide
- 9. Timestudy Stewards⁸

Although not set forth in the above listing, departmental and divisional stewards are also expressly granted superseniority under the contract.⁹

With regard to the processing of grievances, the collective-bargaining agreement provides that the union committeemen, timestudy stewards, and departmental and divisional stewards shall be allowed necessary time off, with pay, in order to properly process and service grievances under the contractual grievance procedure. These officers, and the union president, are the only union officers who are assigned duties under the contractual grievance procedure. No mention is made of any participation or involvement of the recording secretary, trustees, sergeant-at-arms, or guide in any aspect of the grievance processing. 10 The collective-bargaining agreement makes no reference whatsoever to any duties of these officers. Rather, the duties of these officers are established by the International Union's constitution.

Under the International Union's constitution, the recording secretary is responsible, generally, for keeping a record of the proceedings of the Local Union, conducting the general correspondence of the Local Union, and bringing to the attention of the general membership any correspondence upon which the membership must take action. The trustees have general supervision over all funds and property of the Local Union. 11 They are required, semiannually, to audit (or cause to be audited by a certified public accountant) the financial records of the Local Union. The sergeant-at-arms is responsible for taking charge of all Local Union property not otherwise provided for, and for introducing all new members and visitors and assisting the president in preserving order when called upon to do so. The guide is responsible for maintaining order, inspecting the membership receipts, and satisfying himself that all present are entitled to remain in Local Union meetings.

We find that none of the duties set forth under the International's constitution for the officers in question involve the performance of steward-like functions; they do not entail on-the-job administration of the collective-bargaining agreement.

We also find that the testimonial evidence does not show that the officers in question have the type of steward-like or on-the-job contract administration responsibilities that would legitimize their superseniority under the standards set forth in Gulton, above.

Michael Burton, the recording secretary, testified that it was his duty to take the minutes of the union executive board and general membership meetings, and to make those minutes available to the membership. 12 Union President Michael Rinehart testified that the recording secretary corresponds with the International Union to "keep them updated as far as what's going on in our plant and our contracts," and also posts notices of union meetings in the plant. Also, Rinehart testified that while the recording secretary frequently types grievances, his role "generally" does not include the processing of grievances.

Rinehart did testify that the recording secretary occasionally substituted for, and performed certain duties of, the union president and vice president, when both of those officers were absent from the plant at the same time (approximately a half dozen times during the past year, according to Rinehart). On one such occasion, the recording secretary "represented an employee on absenteeism" in a disciplinary proceeding. The Board has long held that an employee's occasional or sporadic substitution for a supervisor does not render that employee a supervisor. 18 Similarly, we hold that an intermittent, occasional performance of a steward-like duty, on a substitute basis, by an individual whose primary union duties do not involve the performance of steward-like duties or on-the-job contract administration functions, does not warrant a finding that such an individual has steward-like duties sufficient to legitimize an award of superseniority under the standards set forth in Gulton, above.

With regard to the trustees, sergeant-at-arms, and guide, Rinehart testified that the trustees do not "generally" participate in the processing of griev-

⁸ The parties have stipulated that only the contractual superseniority accorded the recording secretary, trustees, sergeant-at-arms, and guide is at issue here.

Thus, the judge is incorrect in finding that "All the officers named in the preferential seniority clause are members of the Union's Executive Board." As seen, the union bargaining committeemen, timestudy stewards, and departmental and divisional stewards are all named in the preferential seniority clause, although they are not members of the Union's executive board.

¹⁰ Respondent Union, in its post-hearing brief to the judge, concedes that these officers "do not perform direct grievance handling function."

¹¹ The property referred to in this regard includes athletic and office equipment and furniture.

¹² None of the union trustees, nor the sergeant-at-arms or guide, testified

fied.

18 Sec, e.g., Spector Freight System, 216 NLRB 551, 554 (1975); Boston Store, 221 NLRB 1126 fn. 2 (1975); Canonsburg General Hospital Assn., 244 NLRB 899, 900 (1979).

ances. Otherwise, the duties of the trustees, as well as those of the sergeant-at-arms and guide, as described by Rinehart and International official William Osos, are essentially those set forth in the International constitution, as referred to above. Rinehart further testified that none of these officers perform any union duties during work hours.

Thus, the evidence fully establishes that the duties of the union recording secretary, trustees, sergeant-at-arms, and guide do not materially relate to the on-the-job enforcement and administration of the collective-bargaining agreement at the plant level. Therefore, under the standards set forth in Gulton Electro-Voice, above, the contractual superseniority accorded these officers cannot be justified on the basis of the nature of their primary union duties.

Nor is such preferential seniority justified for these officers on the basis of their additional capacities as members of the Union's executive board. The record establishes that the duties of the executive board do not involve on-the-job enforcement and administration of the collective-bargaining agreement at the plant level.¹⁴

Consequently, we conclude that by maintaining and implementing the instant preferential seniority clause with respect to the Union's recording secretary, trustees, sergeant-at-arms, and guide, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Employer has violated Section 8(a)(1) and (3) of the Act. Furthermore, by according the above-specified officers superseniority under the instant preferential seniority clause with respect to layoffs on or about 23 December 1981 and 16 January 1982 and thereby affecting employees who would not have been affected absent the implementation of that preferential seniority clause, Respondent Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act, and Respondent Union thereby violated Section 8(b)(2) and (1)(A).

THE REMEDY

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

We have found that the superseniority clause here in dispute is unlawful and we shall therefore order that the Respondents cease and desist from maintaining and enforcing such clause in their collective-bargaining agreement. We have also found that the unlawful superseniority clause was so applied as to result in the lavoff of employees, on or about 23 December 1981 and 16 January 1982, who would not have been laid off but for illegal discrimination depriving them of seniority. Consequently, we shall order that Respondent Employer offer to reinstate any employees who would not have been laid off but for the unlawful assignment of superseniority to the recording secretary, trustees, sergeant-at-arms, and guide. Also, we shall order that Respondent Union notify Respondent Employer, in writing, that it has no objection to the reinstatement of the employees who would not have been laid off but for the unlawful assignment of superseniority to the union officers in question here. Additionally, we shall order that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them. We shall also order that Respondent Employer expunge from its files any reference to the unlawful layoffs, and notify the affected employees that this has been done and that the unlawful layoffs will not be used as a basis for future personnel actions against them. Backpay shall be computed in the manner established by the Board in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as provided in Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962). Also, in order to remedy in full the effects of the Respondents' unlawful conduct. Respondent Employer's backpay obligation shall run from the effective date of the discrimination against affected unit employees to the time it makes such recall offers, while Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to Respondent Employer that it has no objection to the recall of unit employees affected by the unlawful grant of superseniority to union officers. Finally, we shall order that Respondent Employer cease and desist in any like or related manner from interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, and that Respondent Union likewise cease and desist from restraining or coercing employees it represents in the exercise of those same rights.

CONCLUSIONS OF LAW

- 1. Wayne Transportation, a Division of Wayne Corporation is engaged in commerce within the meaning of Section 2(2) of the Act.
- 2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

¹⁶ We note in this regard that the judge found that the executive board determines whether to pursue a denied grievance to arbitration. Contrary to this finding of the judge, the record establishes that the executive board only makes recommendations to the general union membership about whether to pursue grievances to arbitration, and the membership then votes on that question.

- 3. By maintaining and enforcing a seniority clause in their collective-bargaining agreement according superseniority to Respondent Union's recording secretary, trustees, sergeant-at-arms, and guide, Respondent Employer and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively; and by discriminating against unit employees when Respondent Employer laid off employees who would not have been affected if the collective-bargaining agreement had not accorded such superseniority, the Respondents engaged in further violations of the foregoing sections of the Act.
- 4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board hereby orders that

- A. Respondent Employer, Wayne Transportation, a Division of Wayne Corporation, Richmond, Indiana, its officers, agents, successors, and assigns, shall
 - 1. Cease and desist from
- (a) Maintaining and enforcing collective-bargaining provisions with Respondent Union, International Union, Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. Local 721, according superseniority to the Union's recording secretary, trustees, sergeant-at-arms, and guide.
- (b) Discriminating against any employees by laying them off instead of the Union's recording secretary, trustees, sergeant-at-arms, or guide when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.
- (a) Jointly and severally with Respondent Union make Floyd Wesley Johnson, Michael Portanova, and any other unit employees, whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy," and offer to reinstate Floyd Wesley Johnson, Michael Portanova, and any other employees who would not have

been laid off but for the unlawful assignment of superseniority to the recording secretary, trustees, sergeant-at-arms, or guide.

- (b) Preserve and, on 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) Expunge from its files any reference to the layoffs of any employees affected by the superseniority as applied to the Union's recording secretary, trustees, sergeant-at-arms, or guide, including the 23 December 1981 and 16 January 1982 layoffs, and notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.
- (d) Post at its establishment in Richmond, Indiana, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.
- (e) Post at the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix B."
- (f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 25 for posting by Respondent Union.
- (g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Employer has taken to comply.
- B. Respondent Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 721, its officers, agents, and representatives, shall
 - 1. Cease and desist from
- (a) Maintaining, enforcing, or otherwise giving effect to those clauses in its collective-bargaining agreement with Respondent Employer, Wayne

¹⁶ If 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."

Transportation, a Division of Wayne Corporation, according the Union's recording secretary, trustees, sergeant-at-arms, and guide superseniority with respect to layoff and recall.

- (b) Causing or attempting to cause Respondent Employer to discriminate against employees in violation of Section 8(a)(3) of the Act.
- (c) In any like or related manner restraining or coercing employees of Respondent Employer in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.
- (a) Jointly and severally with Respondent Employer make Floyd Wesley Johnson, Michael Portanova, and any other unit employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, such lost earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy."
- (b) Notify Respondent Employer in writing that it has no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.
- (c) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Employer's Richmond, Indiana facility copies of the attached notice marked "Appendix B."18 Copies of said notice, on forms provided by the Regional Director for Region 25, shall be posted by Respondent Union after being duly signed by Respondent Union's representative. immediately upon receipt thereof. The foregoing notice shall be maintained by Respondent Union for 60 consecutive days after posting in conspicuous places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.
- (d) Post at the same places and under the same conditions as set forth in paragraph B,2,(c), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix A."
- (e) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 25 for posting by Respondent Employer.
- (f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Union has taken to comply.

APPENDIX A

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 721, according the Union's recording secretary, trustees, sergeant-at-arms, and guide superseniority with respect to layoff and recall.

WE WILL NOT discriminate against any employees by laying them off instead of the Union's recording secretary, trustees, sergeant-at-arms, and guide when such union officers do not in fact have more seniority in terms of length of employment than the employees actually laid off.

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

WE WILL offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, to Floyd Wesley Johnson, Michael Portanova, or any other employees who had more seniority in terms of length of employment than the Union's recording secretary, trustees, sergeant-at-arms, and guide but who were nevertheless laid off during layoffs implemented on or about 23 December 1981 and 16 January 1982, and WE WILL do so without prejudice to those who were discriminatorily laid off in this manner.

WE WILL jointly and severally with the Union make whole Floyd Wesley Johnson, Michael Portanova, or any other employees for any loss of earnings they may have suffered as a result of the discrimination practiced against them and in favor of the Union's recording secretary, trustees, sergeant-at-arms, and guide, by paying each such employee a sum equal to what they would have earned had they not been discriminatorily laid off, less any interim earnings, plus interest.

WE WILL expunge from our files any reference to the layoffs of Floyd Wesley Johnson, Michael Portanova, or any other employees who were laid off as a result of the application of superseniority to the Union's recording secretary, trustees, sergeant-at-arms, and guide, and WE WILL notify such employees in writing that this has been done, and

¹⁶ See fn. 15 above.

that evidence of their unlawful layoff will not be used as a basis for future personnel actions against them.

WAYNE TRANSPORTATION, A DIVISION OF WAYNE CORPORATION

APPENDIX B

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with Wayne Transportation, a Division of Wayne Corporation according our recording secretary, trustees, sergeant-at-arms, and guide superseniority with respect to layoff and recall.

WE WILL NOT cause or attempt to cause the Employer to discriminate against any employees by requiring that the collective-bargaining agreement be enforced so as to lay them off instead of the recording secretary, trustees, sergeant-at-arms, or guide, when these officials do not in fact have more seniority in terms of length of employment than the employees chosen for layoff.

WE WILL notify the Employer that we have no objection to reinstating the affected unit employees who but for the unlawful assignment or superseniority would not have been laid off.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with the Employer make whole Floyd Wesley Johnson, Michael Portanova, or any other employees for any loss of earnings they may have suffered as a result of the discrimination practiced against them and in favor of the Union's recording secretary, trustees, sergeant-at-arms, and guide, by paying each such employee a sum equal to what they would have earned had they not been discriminatorily laid off, less any interim earnings, plus interest.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, U.A.W., LOCAL 721

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This consolidated matter is one of a series of cases calling into question the legality of a standard preferential seniority clause negotiated into collective-bargaining agreements by locals of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (UAW). The General Counsel has alleged that by implementing the preferential seniority clause as to certain of the local union officers in connection with a layoff in late 1981 and early 1982, the Respondent Company and the Respondent Union have violated, respectively, Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the National Labor Relations Act.

Both Respondents deny that they have engaged in any unlawful activity. The Respondent Union specifically contends that a clause which grants preferential seniority to union officers, even though they do not participate in the handling of grievances, is nevertheless permissible where it can be shown that such is necessary to preserve the organizational integrity of the Union. In addition, the Respondent Company argues that in the event a violation is found, since the superseniority clause was entered into at the insistence of the Union, the Company should be held only secondarily liable and that any backpay should first be the responsibility of the Union.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent Employer, Wayne Transportation, a Division of Wayne Corporation (the Respondent Company or Company) is engaged at Richmond, Indiana, in the manufacture, sale, and distribution of school buses and annually, in the course and conduct of this business, sells and ships directly to points outside the State of Indiana finished products, goods, and materials valued in excess of \$50,000 and annually receives directly from points outside the State of Indiana goods, products, and materials valued in excess of \$50,000. It is admitted, and 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

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 721 (the Respondent Union or Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The material facts giving rise to this matter are undisputed. For many years the Union has represented a basic

production and maintenance bargaining unit of the Company's employees, which prior to the layoff numbered in the range of 1000. The Union is coextensive with the bargaining unit and all the union officers are employees of the Company.

The Union and the Company have negotiated a series of collective-bargaining agreements, the most recent of which is effective from March 1, 1981, until March 1, 1984. Among other things, the collective-bargaining agreement includes a clause entitled "Preferential Seniority" and in pertinent part reads as follows:

- A. Bargaining Committee members, Executive Board members, and Time Study Stewards shall exercise day shift preference during their term in office.
- B. The Bargaining Committeemen, Executive Board members and Time Study Stewards shall rank above all other employees in their respective classifications on a departmental basis.
 - E. Order of Preferred Seniority:
 - 1. President
 - 2. Vice President
 - 3. Committeemen (3)
 - 4. Recording Secretary
 - 5. Financial Secretary
 - 6. Trustees (3)
 - 7. Sergeant-At-Arms
 - 8. Guide
 - 9. Time Study Stewards

In December 1981 and January 1982 the Company had a mass layoff, which reached substantially all its bargaining unit employees. In selecting employees for layoff, consideration was given to the preferential seniority clause of the contract. As a result, the two Charging Parties herein, Floyd Wesley Johnson and Michael Portanova, were laid off, both of whom had greater natural seniority than some employees retained including one or more of the following: recording secretary, sergeant-atarms, guide, and trustees. (The parties stipulated that only the entitlement of these officers to superseniority is at issue.) Thus it was stipulated that but for the existence and implementation of the preferential seniority clause in the collective-bargaining agreement, the two Charging Parties, by virtue of their natural seniority, would have maintained their jobs, or at least some job in the bargaining unit.1

The UAW constitution, as well as the Union's bylaws, defines the duties of the officers, including recording secretary, sergeant-at-arms, guide, and trustees. In brief, the recording secretary keeps minutes of membership and executive board meetings. The sergeant-at-arms assists the president and preserves order at membership meetings, as does the guide, who is also charged with making sure that all present at the meeting are entitled to be there. The trustees have general supervision over the funds and

property of the Union and twice a year conduct an audit of the Union's funds. They are charged with other related duties

All the officers named in the preferential seniority clause are members of the Union's executive board. Article 38, section 7 of the UAW constitution reads:

The Executive Board shall be empowered to represent the Local Union between meetings of the Local Union when urgent business requires prompt and decisive action. In no case, however, shall the Executive Board transact any business that may affect the vital interests of the Local Union until the approval of the membership is secured, or of the shop organization in the case of an Amalgamated Local Union.

The Union's bylaws track this language in article 18, section 2:

Between membership meetings, the Executive Board shall be the highest authority of the Local Union and shall be empowered to act on behalf of the membership, to the extent that urgent business requires prompt and decisive action, subject to subsequent membership approval, but the Executive Board may not take action affecting the vital interests of the Local Union without prior membership approval.

An interpretation of article 38, section 7 in the UAW constitution reads:

The decision as to what is "urgent business" which "requires prompt and decisive action" is one which the Local Executive Board must make for itself, subject to the right of the membership to question the soundness of the Board's decision in each case (citation omitted).

It is undisputed that the executive board of the Union meets monthly at the Union's in-plant office and makes a variety of decisions concerning the interests of the membership. The executive board, however, does not become directly involved in the grievance procedure, such being handled by the stewards or the bargaining committee depending on the step. The executive board does determine whether or not to pursue a denied grievance to arbitration. As to this, as well as other matters before the executive board, each member has an equal vote and voice.

Finally, there is testimony that each member of the executive board is in daily contact with rank-and-file members of the Union. These contacts generate informal complaints and suggestions which are then taken up with the executive board. Such cover a wide variety of matters affecting the membership.

Thus the evidence shows that the direct administration of the contract "on the plant level" is performed by stewards, area stewards, and ultimately the bargaining committee (comprised of the president, vice president, and three members). However, the executive board does meet regularly, and does make decisions concerning the administration of the Union as well as discussing and

¹ The Company's employment manager was unable to say precisely who would have been retained but for application of the preferential seniority clause because of the effect of the domino effect of bumping.

making decisions concerning many matters brought to their attention by the membership.

On these facts, the General Counsel contends that the grant of superseniority to the recording secretary, sergeant-at-arms, guide, and trustees is unlawful since they are not at all involved in the handling of grievances under the collective-bargaining agreement. The Union, though agreeing that these individuals do not perform "steward type" functions, maintains that giving them preferential seniority for layoff and recall is justified in order to preserve the organizational continuity of the Union.

B. Analysis and Concluding Findings

The principal case in this area is Dairylea Cooperative, 219 NLRB 656 (1975), where the Board (Member Fanning dissenting) held that a contractual grant of superseniority to a shop steward going beyond layoff and recall is unlawful. To link the grant of a working condition benefit to union activism necessarily tends to discriminate against those who choose to exercise their Section 7 right to refrain from engaging in union activity.

The Board, however, recognized in Dairylea Cooperative, supra at 658:

. . . that it is well established that steward super seniority limited to layoff and recall is proper even though it, too, can be described as tying to some extent an on-the-job benefit to union status. The lawfulness of such restricted super seniority is, however, based on the ground that it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job. [Citing Aeronautical Industrial District Lodge 727 v. Campbell, 337 U.S. 521 (1949), a case arising under the Selective Service Act of 1940 but which had been recognized by the Board as applicable to proceedings under the National Labor Relations Act.]

The apparent assumption on which this exclusion rests is that if a steward is laid off there is no guarantee he would continue to be active on behalf of the bargaining unit or that the union would be able to replace him. In short, there is recognized a reasonable chance that the unit would be unrepresented in the event of layoff of the job steward; hence, any objection to superseniority for such an employee is outweighed by his general usefulness to the bargaining unit as a whole. Such, however, would not apply with regard to other on-the-job benefits where seniority is a consideration. Thus the Board held that to reward a steward with improved working conditions was necessarily to the detriment of others who choose, for whatever reasons, not to become stewards and is unlawful.

Member Fanning dissented and has consistently rejected this conclusion as set forth most recently in *American Can Co.*, 244 NLRB 736, 740 (1979), (*American Can II*), where he and Member Truesdale wrote:

. . . 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.

The majority of the then-sitting Board has been just as consistent in rejecting this argument in the many superseniority cases which have come up since 1975. The various members have had different opinions concerning the nature and scope of permissible superseniority, but generally a majority of the Board has concluded that to reward one employee with job tenure necessarily is to punish some other employee where the basis of the reward and the punishment is union activism or conversely the lack of it.

From Dairylea forward, the Board has found unlawful superseniority going beyond layoff and recall (absent proof of justification) and has generally limited protection to those employees whose duties as union officers involved the effective administration of the collective-bargaining agreement.

Thus in Electrical Workers IU Local 623 (Limpco Mfg.), 230 NLRB 406 (1977), enfd. sub nom. Anna D'Amico v. NLRB, 582 F.2d 820 (3d Cir. 1978), the Board concluded that superseniority for layoff and recall for the recording secretary of the union (who happened to be the only union officer working at the facility in question) was permissible in view of her role in the overall administrative of the collective-bargaining agreement.

And in Otis Elevator Co., 231 NLRB 1128 (1977), the Board concluded it was not unlawful to grant superseniority for layoff and recall to the sergeant-at-arms because he was an ex officio member "of the executive board and therefore responsible for administration of the local, including the latter's collective-bargaining agreement."²

In dismissing Limpco and Otis Elevator, the Board broadened the permissible limits of those who might be given superseniority to any union officer for whom it could be demonstrated was involved in the responsible administration of the collective-bargaining agreement. Superseniority for layoff and recall does not have to be limited to those who perform steward-type duties.

In American Can Co., 235 NLRB 704 (1978) (American Can I), the Board has found permissible the grant of superseniority to a trustee and a guard. Upon reconsideration (American Can II, supra), the Board concluded that superseniority as to these two union officers was in fact violative of the Act with Members Jenkins and Penello

⁸ In Otis Elevator the Board also noted, in an apparent departure from Dairylea, that the burden was on the General Counsel to prove that the superseniority for layoff and recall was invalid rather than on the union to justify its application. As noted in Limpco, however, the party relying on a clause going beyond layoff and recall has the burden of justifying its validity.

concluding, as they had previously, that superseniority for any officer who does not also serve as a steward is impermissible. Member Murphy concluded that the superseniority clause was lawful on its face; however, the facts showed that neither of the two individuals in question had duties relating to the general furthering of the collective-bargaining relationship. Their duties were just "too remote to justify super seniority for such positions." As noted above, then Chairman Fanning and Member Truesdale dissented.

Thus, the precedent which I am bound to follow is: Superseniority limited to layoff and recall (and for other purposes if justification can be established) may lawfully be granted to individuals performing steward-type functions as well as other union officers for whom it can be shown are responsible for administration of the local union and the collective-bargaining agreement. Here the recording secretary, sergeant-at-arms, guide, and trustees in fact do participate as members of the executive board in the administration of the Union. They have equal standing with other members of the executive board. And the executive board has some involvement in supervising the collective-bargaining agreement. Accordingly, notwithstanding that they do not perform any steward-type function, they meet the test for allowable supersen-

iority. Therefore I conclude that seniority preference for purposes of layoff and recall is not unlawful as to these officers.³

However, it should be noted that I find unpersuasive the Union's contention that its viability as an institution is dependent on continuity of its officers which in turn requires that they all be protected from layoff. If the six officers in question were not given preferential seniority in the event of a layoff, replacements could be elected from those still working, without any necessary loss to the organization. Here, for instance, Portanova had been the financial secretary for 16 years and the recording secretary for 3 years. And there would in any event be continuity with those officers about whose superseniority there is no dispute. At least there is no showing to the contrary. Furthermore, as the Board pointed out in Dairylea, "it remains the union's task to build and maintain its own organization" without using on-the-job benefits.

[Recommended Order for dismissal omitted from publication.]

⁸ Though the contract clause appears broader, the only issue litigated concerns layoff and recall seniority for the named officers. On this issue, I note that different results have been reached involving sister locals of the Union based on the facts of record. McQuay-Norris, Inc., 258 NLRB 1397 (1981); Design & Mfg. Corp., 267 NLRB 440 (1983).