

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 31, 2003

TO : Marta Figueroa, Regional Director
Efrain Rivera-Vega, Regional Attorney
Region 24

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Industria Lechera de Puerto Rico 530-4090-4000
(INDULAC) 530-5400
Case 24-CA-9435 530-8045-1200

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by unilaterally eliminating the superseniority provision in its expired collective-bargaining agreement with its employees' former bargaining representative after the Board certified a new bargaining representative. We conclude that the Employer violated Section 8(a)(5) by failing and refusing to provide the new union an opportunity to bargain over the elimination of the superseniority provision.

FACTS

Industria Lechera de Puerto Rico, INDULAC (Employer) processes and distributes milk and other dairy products. For more than two decades prior to July 2002,¹ Seafarers International Union de Puerto Rico (SIU) represented the Employer's employees. The last bargaining agreement between the Employer and SIU expired on May 19. Article VII, Section 4 of the expired agreement provided superseniority rights for union shop stewards: "[t]he regular shop stewards will enjoy super-seniority above all other employees during their term, such as, in cases of lay-offs and work recalls."

In June, the employees voted to decertify SIU and elected the Congreso de Uniones Industriales de Puerto Rico (Union) to represent them. On July 3, the Board certified the Union. The Employer and the Union are bargaining for an initial agreement.

Employee Arias has worked for the Employer since February 2000, and served as the second shift SIU shop steward for the month prior to the June election.² On July

¹ All dates are in 2002 unless otherwise indicated.

13, employees voted to retain Arias as their second shift steward under the Union. Employees Hernandez and Soto are also Union stewards, serving first shift employees. Union stewards, like those of the SIU previously, are authorized to represent employees and process grievances.

On September 3, the Employer temporarily laid off approximately 30-40 employees. The Employer did not grant the three Union stewards superseniority in accordance with the expired agreement. The layoff included Arias according to his regular seniority, and Arias spent around seven months on layoff.³ Union stewards Hernandez and Soto, who began working for the Employer in 1991, had sufficient regular seniority to avoid the layoff.

ANALYSIS

We conclude that the Employer violated Section 8(a)(5) when it unilaterally eliminated the superseniority provision in the expired collective-bargaining agreement with SIU after the Board certified the Union.

Superseniority provisions limited to layoffs and recalls are lawful under the Act because they further the effective administration of collective-bargaining agreements by encouraging the continued presence of union representatives on the job.⁴ In turn, the continued presence resulting from the application of superseniority provides a general benefit to all unit employees.⁵ The Board has held that superseniority clauses survive the expiration of a collective-bargaining agreement, because superseniority benefits the terms and conditions of employment of union stewards in the form of heightened job security and also benefits unit employees by making available to them better qualified union representatives.⁶

² When SIU lost that election, all shop stewards except Arias resigned.

³ The Region has concluded that the Employer did not violate Section 8(a)(3) in laying off Arias by applying regular seniority.

⁴ See Dairyalea Cooperative, Inc., 219 NLRB 656, 658 (1975), enf. 531 F.2d 1162 (2d Cir. 1976).

⁵ Id. (superseniority "redounds in its effects to the benefit of all unit employees").

⁶ See Bethlehem Steel Co., 136 NLRB 1500, 1503 (1962); Frankline, Inc., 287 NLRB 263, 264 & n.10 (1987)

Thus the Employer's abrogation of Arias' superseniority clearly would have violated Section 8(a)(5) if the predecessor union (SIU) had not been decertified and immediately replaced by the Union. We conclude that the Employer's elimination of superseniority here changed an underlying term or condition of employment that was not privileged by the employees' selection of the Union as their representative.

The Board has held that certain terms and conditions of employment survive not only the expiration of a contract, but also the employee election and subsequent Board certification of a non-incumbent union. In Arizona Portland Cement Co.,⁷ the employer was negotiating the terms of a new bargaining agreement with the incumbent union after the parties' prior agreement had expired. During bargaining, unit employees elected a new bargaining representative, and the Board certified the new union. The employer then unilaterally eliminated a number of terms and conditions of employment, including its policy of permitting employee representatives to conduct union business during worktime with compensation. The ALJ, affirmed by the Board, concluded that this unilateral change was unlawful because it involved "representation with respect to disputes over those most essential of employee concerns - rates of pay, wages, hours, and terms and conditions of employment."⁸ Such representation, the ALJ found, is part of the employer-employee relationship, and may not be changed without providing the new union with notice and an opportunity to bargain.

We conclude that the result in Arizona Portland essentially controls the instant case. First, superseniority also is a term of employment for stewards, similar to payment for conducting union business. Superseniority arguably is an even more critical employment term because it preserves the steward's employment which otherwise would be lost. Second, just as unit employees benefit from steward compensation for conducting union business, employees also benefit from superseniority by the continued presence of stewards on the job during layoff periods. In fact, the benefits derived from the survival of superseniority are arguably greater than those derived from stewards compensation and time off for engaging in

(discussing why superseniority is mandatory bargaining subject that survives contract expiration).

⁷ 302 NLRB 36 (1991).

⁸ Id. at 44, citing Axelson, Inc., 234 NLRB 414, 415 (1978), enfd. 599 F.2d 91 (5th Cir. 1979).

grievance processing and contract negotiations. Superseniority ensures that employees retain continued steward representation during layoffs and recalls. Steward compensation and time off, although important as "inur[ing] to the benefit of all the members of the bargaining unit by contributing to more effective bargaining representation,"⁹ merely facilitate such representation. As a result of the Employer's elimination of the superseniority provision and refusal to grant Arias preferential layoff and recall rights, employees lost their only second shift Union steward. The instant case aptly demonstrates how the Employer's unilateral change eliminated a benefit inuring to a significant portion of the unit.

We note that the ALJ in Arizona Portland, in dictum, stated that superseniority, along with union-security and dues check-off, are not part of the employer-employee relationship.¹⁰ He thus concluded that superseniority need not be continued following the expiration of a collective-bargaining agreement. However, that dictum is an incorrect statement of Board law. In Frankline, supra, the Board explicitly held that superseniority provisions affect employee rights concerning layoffs and recalls, affect the employer-employee relationship, and survive contract expiration.¹¹

Based on the foregoing, we conclude that the Region should issue a Section 8(a)(5) complaint, absent settlement, alleging that the Employer unilaterally eliminated superseniority after the Union was certified.

B.J.K.

⁹ See Axelson, Inc., 234 NLRB 414, 415 (1978), *enfd.* 599 F.2d 91 (5th Cir. 1979) (adding that more effective representation "vitally affects" relations between an employer and employee).

¹⁰ 302 NLRB at 44.

¹¹ See 287 NLRB at 265, n.10