

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT 65, LOCAL 330
(INGERSOLL-RAND COMPANY)**

Case 03-CB-168560

and

CHRISTOPHER KARLIS, an Individual

**POST-HEARING BRIEF OF RESPONDENTS
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT 65 and LOCAL 330**

INTRODUCTION

In this case, the General Counsel challenges the lawfulness of a provision in the collective bargaining agreement which protects stewards from displacement during “shift equalizations” initiated by the Employer. The challenge should be rejected, for two reasons: First, because the provision enhances the Union’s legitimate interest in providing representation to unit employees; and Second, because the alternative proposed by the General Counsel (that the steward be bumped to the lowest-paid position in the bargaining unit) is patently unreasonable.

STATEMENT OF THE CASE

The Charged Parties, District Lodge 65 and Local Lodge 330 of the International Association of Machinists and Aerospace Workers (hereinafter collectively referred to as the “Union”) represent a unit of employees of Ingersoll Rand (hereinafter “Employer”) at its facility in Cheektowaga, New York. (GC Ex. 3, p. 1.) The Union has negotiated a collective bargaining

agreement (“CBA”) with the Employer – the current version of which was introduced into evidence as General Counsel Exhibit 3.

The CBA provides that there are to be a chief steward as well as two shift stewards each for the first and second shifts, and a single steward for the third shift. (Tr.62:2-5). Stewards are elected, and shift stewards are elected by the employees on the shift for which they serve. (Tr.62:7-10.) The third-shift steward since November of 2013 has been Fred Fineour. (Tr.94-20-25.) As part of his duties as shift steward, Mr. Fineour initiates grievances and attends grievance meetings and layoff announcements – all of which take place during the third shift. (Tr.62:21-63:17.)

Paragraph 54(b) of the CBA provides

Shift Equalization. When the Company changes the number of people between shifts in a classification, the shift changes will be on a seniority basis without completing a Shift Preference Form, however, a shift steward cannot be displaced from the shift to which he was elected.

Union Chief Steward James Neureuther testified that “shift equalization” (also referred to as “shift realignment”) is utilized by the Employer after a reduction in force to adjust manpower between shifts after layoffs and bumping caused by a reduction in force. (Tr.51:24-52:13.) This process is necessary because no shift assignments are changed as a result of the actual reduction-and-bumping process itself. (Tr.51:14-19.) Shift equalizations are not limited to situations involving reductions in force, however; the process may be initiated at the unilateral discretion of the Employer whenever it desires to reallocate personnel in a particular classification between shifts. (Tr.54:10-22) In practice, the Employer initiates shift equalizations approximately two to four times per year. *Id.*

The CBA exempts stewards from displacement during shift equalizations because of the frequency of those displacements, and because the procedure, which is initiated at the unilateral discretion of the Employer, would readily be subject to abuse by the Employer, which otherwise could use the procedure to eliminate any steward it so desired if the steward exemption were not in place. (Tr.61:11-24, 102:11-103:13.)

The CBA also has a provision, which appears at Paragraph 40(a), entitled “shift preference,” which provides that “[a]n employee may exercise his seniority to displace the junior employee (who is not a Steward) on a different shift within the same classification on Monday and no more frequently than at three (3) month intervals thereafter.” (GC Ex.3, p.11.) While this provision is cited in the Complaint, testimony at the hearing of this matter established unequivocally that this provision actually played no role in the events at issue in this case.

(Tr.41:13-41, 43:25-44:2, 99-4-14.)

In addition, the CBA has another provision, appearing at Paragraph 39, which governs layoffs and recalls, and provides bumping rights for employees whose positions are eliminated. (GC Ex. 3, p.9-11.). Nothing in these provisions provide any superseniority protections for stewards. *Id.*

In early January 2016, the Employer exercised its discretion to adjust its staff levels. It added positions to certain classifications while reducing the number of personnel in others, resulting in a net reduction facility-wide of 28 positions. (Tr.45:3-25, R.Ex 1.) The Employer

implemented this decision by advising employees of layoffs. (Tr.31:2-5.) On or about January 8, 2016, Hoyt Jones, a test mechanic on the 3rd shift, was notified by management that his position was being eliminated and, in accordance with the CBA, he was given two hours to decide whether he wanted to bump into one of two other available positions, or accept a layoff. (Tr.46:10-48:25; R.Ex. 2.) Hoyt chose to accept a bump to pipefitter. *Id.* The January layoff process did not result in the immediate displacement of any personnel from one shift to another. (Tr.51:10-19.)

Hoyt's bump from test mechanic to pipefitter resulted in an increase in the number of pipefitters on the third shift from three to four. (Tr.77:22-78:11.) Some time thereafter (Christopher Karlis, the Charging Party, estimated the time as "a couple of weeks" (Tr.78:1)), the Employer exercised its "shift equalization" discretion to reduce the number of pipefitters on the third shift back to three. (Tr.33:15-18.) While Mr. Fineour was the pipefitter with the least seniority on the third shift, Paragraph 54(b) of the CBA exempted him from being displaced as part of the shift equalization. Consequently, the next-junior pipefitter, Mr. Karlis, was displaced. (Tr.35:4-11.) At the time of his displacement, Mr. Karlis was given the choice of moving either to the first or 2nd shifts; he chose to accept a move to first shift. (Tr.55:2-13.) Had he chosen to move to 2nd shift, he would have continued to receive the 75-cent-per-hour shift differential he had received on 3rd shift; since he chose to move to first shift instead, he stopped receiving the differential. (Tr.55:19-56:17; 88:1-14.)

During 2014, Mr. Fineour was subjected to a reduction in force (rather a shift equalization) which resulted in his being bumped from gearbox assembler to pipefitter, with an

accompanying reduction in pay. (95:1-25.) No provision in the CBA protected Mr. Fineour from the bump and pay cut even though he was serving as third-shift steward at the time of the reduction in force. *Id.*

By contrast, Mr. Fineour was not displaced as a result of the January 2016 force reduction because the Employer chose to increase, rather than decrease, the number of pipefitters. Had the Employer chosen to permanently reduce number of pipefitter positions on the third shift, Mr. Fineour, as the least-senior pipefitters on that shift, would have been subject to layoff and/or displacement. (Tr.58:20-25, 60:10-25.)

At the hearing of this matter, Counsel for the General Counsel suggested that the Union could have avoided displacing Mr. Karlis while retaining Mr. Fineour as third-shift steward by allowing Mr. Fineour to bump down to a janitor position on the third shift. While it is undisputed that the current incumbent in the third-shift janitor position has less seniority than Mr. Fineour, it is also undisputed that if Mr. Fineour had somehow been permitted to displace the janitor, he would have been subjected to a pay cut of \$5.34 per hour. (Tr.64:7-24, 104:14-19.)

ARGUMENT

I. The “Shift Equalization” Provision of the CBA Lawfully Enhances the Union’s Ability Represent Unit Employees.

Properly understood, the Complaint issued in this matter challenges the lawfulness of the “shift equalization” provision at Paragraph 54(b) of the CBA, which exempts stewards from being displaced from their shift as a result of that process.¹ This provision provides:

When the Company changes the number of people between shifts in a classification, the shift changes will be on a seniority basis without completing a Shift Preference Form, however, a shift steward cannot be displaced from the shift to which he was elected.

(GC Ex. 3, p.18.) The General Counsel contends that Paragraph 54(b) constitutes an unlawful exercise of superseniority.

The lead case defining the permissible scope of superseniority provisions is *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975). The superseniority provision at issue in *Dairylea* simply provided that “[t]he steward shall be considered the Senior employee in the craft in which he is employed[,]” and the union conceded that the provision

gives the steward, regardless of his length of service, top seniority not only with respect to layoff and recall, but also with respect to all contractual benefits where seniority is a consideration. Thus . . . the steward is, among other things, given preference in the assignment of overtime, in the selection of vacation period, and in the assignment of driver routes and other positions, with the preference extending to the selection of shift, hours, and day off.

¹ In both the Complaint and at the hearing, the General Counsel asserted that contractual provision in question is the “shift preference” language at Paragraph 40(a) of the CBA. The testimony at the hearing, as well as review of the plain language of the CBA, however, establish unequivocally that the “shift equalization” provision at Paragraph 54(b), rather than the “shift preference” language of Paragraph 40(a), controlled the matters in dispute. (Tr.41:13-41, 43:25-44:2, 99-4-14.)

Id. at 657.

The Board observed that “there can be no question but that the super seniority clause ties job rights and benefits to union activities, a dependent relationship essentially at odds with the policy of the Act, which is to insulate the one from the other.” *Id.* at 658 (footnote omitted). It then went to note, however, 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. It thereby not only serves a legitimate statutory purpose but also redounds in its effects to the benefit of all unit employees.' Thus, super seniority for layoff and recall has a proper aim and such discrimination as it may create is simply an incidental side effect of a more general benefit accorded all employees. It has not, however, been established in this case or elsewhere that super seniority going beyond layoff and recall serves any aim other than the impermissible one of giving union stewards special economic or other on-the-job benefits solely because of their position in the Union.

Id. (footnote omitted). The Board held that the sweeping *superseniority* provision at issue in *Dairylea* to be unlawful. But seeking to provide guidance in closer cases, the Board went on to suggest the possibility that “proper justification may . . . be forthcoming in some future case involving particular circumstances calling for steward super seniority with respect to terms and conditions of employment other than layoff and recall. Consequently, 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.” *Id.* It then declared a prospective rule that,

in view of the inherent tendency of super seniority clauses to discriminate against employees for union-related reasons, and thereby to restrain and coerce employees with respect to the exercise of their rights protected by Section 7 of the Act, we do find that super seniority clauses which are not on their face limited to

layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality.

Id.

Dairylea thus establishes a rebuttable presumption of unlawfulness for superseniority provisions that extend beyond layoff and recall. The party seeking to defend such a provision bears the burden of showing some legitimate reason (beyond mere benefit to union officials) for the application of superseniority in a particular circumstance.

In the decades following *Dairylea*, the Board has applied its formula to find superseniority provisions lawful in various circumstances. In *Int'l Union, UAW (Chrysler Corp.)*, 228 NLRB 1446 (1977), the Board found a superseniority clause to be lawful which extended beyond layoff and recall. The clause gave both union stewards & committee persons preference to take overtime assignments (to the disadvantage of unit employees who would otherwise be able to bid for such assignments), but it was nevertheless deemed lawful because the union demonstrated that the clause served the legitimate purpose of making sure that union representatives would be present to represent employees after regular shift hours.

In *Consolidated Freightways*, 302 NLRB 984 (1991), the Board again found the *Dairylea* presumption to be rebutted, this time with regard to a superseniority clause that permitted a steward preference in selecting his shift – a provision that the Board found to be justified inasmuch as it permitted the steward to select a shift in which he would be available to represent as many employees as possible.

Finally, the Board issued a particularly instructive decision in *Goodyear Tire & Rubber Co.*, 322 NLRB 1007 (1997). In that case, the union and the employer had negotiated a provision that granted top seniority to the union representative except for layoffs. *Id.* at 1011. The facility in which the issue arose was quite large and bumping was frequent. *Id.* The Board, reversing the administrative law judge below, found that the parties had used the provision lawfully to protect a steward from being bumped from his position. The Board initially noted that, under *Dairylea*, “the continuous presence of the same steward on the job is legitimate justification for superseniority.” *Id.* at 1007 (citing *Union Carbide Corp.*, 228 NLRB 1152 (1977)). It then cited the number of bumps at the facility and the fact that each instance of bumping can take up to two weeks before being finalized, and opined that, “[a]lthough the steward might return to the same shift and department after the bumping process was completed, he might not, and even if he were ultimately to return as a steward, his uncertain status in the interim would lead to confusion about whether a temporary steward needed to be appointed or a new election was necessary.” *Id.* at 1007-1008. It then concluded that the disruption that would result thereby was sufficient to meet the *Dairylea* burden and justify the application of superseniority. It summarized its holding by stating that “it is sufficient, for *Dairylea* purposes, that superseniority was used to enhance the Union’s ability to represent employees.” *Id.* at 1009 (quoting *Consolidated Freightways*, 302 NLRB at 985).

In the instant matter the superseniority protection under attack (the “shift equalization language of CBA paragraph 54(b)) only comes into play when the Employer exercises its unilateral discretion to reallocate the number of positions within a classification between shifts. That procedure is not only utilized in connection with layoffs and other reductions in force; it

also comes into play whenever the Employer exercises its discretion to reallocate personnel between shifts. (Tr.54:10-22) In practice, such shift equalizations have occurred, on average, two to four times per year. *Id.*

Because the stewards are elected by the membership and are designated to serve on certain shifts, subjecting the stewards to displacement during shift equalizations would likely cause severe disruptions in the Union's ability to provide uninterrupted representation to unit members. In addition, because shift equalization is utilized at the Employer's unilateral discretion, failure to exempt the stewards from the procedure could be used improperly by the Employer to get rid of any steward it disliked. (Tr.61:11-24, 102:11-103:13.)

Because the superseniority protection in Paragraph 54(b) is limited to "shift equalizations," it is properly limited so as to preserve the Union's representational interests. It is important to note that Paragraph 54(b) does *not* protect stewards from all displacements that occur as a result of reductions in force. To the contrary, third-shift steward Fred Fineour testified without contradiction that he was displaced to a lower-paying position as a result of a reduction in force and that this displacement occurred *during his term at steward*. (95:1-25.) Rather than providing a blanket exemption from displacement, the shift equalization provision is narrowly tailored so that it only protect stewards from displacements that arise from Employer-initiated shift equalizations, rather than from actual reductions in the number of jobs available in the steward's classification. As such, the protection was clearly designed to "enhance the Union's ability to represent employees," Consolidated *Freightways*, 302 NLRB at 985, rather than to

provide unfair and superfluous benefits to the stewards, and is clearly lawful. The Complaint, therefore, should be dismissed.

II. The Application of the Superseniority Protection of CBA Paragraph 54(b) Was Lawfully Applied to Prevent the Displacement of Steward Fineour in January of 2016.

As previously noted, the limited superseniority protection afforded to stewards by Paragraph 54(b) of the CBA is lawful because it is narrowly tailored to protect stewards from displacement only during Employer-initiated shift equalizations. Furthermore, that provision was lawfully applied in January 2016 to protect third-shift steward Fred Fineour from displacement. Counsel for the General Counsel argues that this application was unlawful because the Union *could have* arranged to have Mr. Fineour bump down to the position of janitor, which would have avoided the displacement of Mr. Karlis, the Charging Party, from third shift.² Even if such a bump had been contractually possible, however, it would have meant that Mr. Fineour would have been reduced to one of the lowest-paying classifications in the bargaining unit, with a permanent loss of pay of \$5.34 per hour. (Tr.64:7-24, 104:14-19.)

In effect, the General Counsel argues that the Union, in order to preserve a steward on the third shift, must be willing to ask that steward to accept a draconian pay cut and demotion. This is clearly unreasonable. No steward would willingly accept such a cut simply to preserve his or

² It remains a mystery, however, how such a “bump” could have occurred under the provisions of the current CBA, since Mr. Fineour would not have had the right to “bump” into another classification if he had, in fact, been subject to displacement from third shift as a result of the shift equalization. (Tr.103:15-104:13.)

her right to continue in an essentially unpaid Union position. Imposition of such a requirement would effectively render the Union's right to negotiate any superseniority protections for its stewards a practical nullity. Avoidance of such an absurd result surely lies within the scope of the justification for superseniority allowed by the Board in *Dairylea*. The Complaint, therefore, should be dismissed for this reason as well.

CONCLUSION

The limited exemption from displacement from their shifts afforded to the Union's stewards by Paragraph 54(b) of the CBA is a lawful exercise of superseniority which enhances the Union's ability to represent unit members without providing unwarranted benefits to the stewards. Furthermore, its application to protect third-shift steward Fred Fineour from shift displacement in January of 2016 was reasonable and lawful. For these reasons, and for all of the reasons stated above, the Complaint in this matter should be dismissed.³

Respectfully submitted,

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Dated: September 12, 2016

³ Even if the Complaint is sustained, the General Counsel's request for monetary relief should be denied, since the unrebutted testimony of Mr. Karlis demonstrates that he incurred a loss of shift-differential pay (his only alleged monetary loss) as a result of his choosing to move to first shift, rather than second shift (where he would have retained the same differential that he had received on third shift). (88:1-14.)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via the means indicated below, true and correct copies of the foregoing Brief upon:

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