

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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

and

03-CB-168560

CHRISTOPHER KARLIS, an Individual

Jessica L. Noto, Esq. and
Eric D. Duryea, Esq.,
for the General Counsel.
William H. Haller, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Buffalo, New York, on August 8, 2016. Christopher Karlis, an Individual (the Charging Party) filed the instant charge on January 28, 2016,¹ and an amended charge on April 12, 2016. The General Counsel issued the complaint on May 26, 2016, alleging that International Association of Machinists and Aerospace Workers, District 65, Local 330 (the Respondent) has violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (the Act).²

The complaint specifically alleges that Respondent violated Section 8(b)(1)(A) of the Act by coercing and restraining employees, and Section 8(b)(2) of the Act by causing the Employer (Ingersoll-Rand Company) to discriminate against employees in violation of Section 8(a)(3) of

¹ All dates are in 2016 unless otherwise indicated.

² Consistent with its “Notice of Intention to Amend the Complaint and Notice of Hearing” issued on July 29, 2016, at trial the General Counsel amended complaint paragraph V to add Richard Tatarski (Steward) and Ronald Frier (Union President) as agents of the Respondent. In addition, complaint paragraph VII(a) was amended to allege: “About January 25, 2016, the Employer and Respondent applied the collective-bargaining agreement so that Respondent’s steward, Fred Fineour, could remain in a specific position in the pipefitter classification on the third shift.” (Tr. 13–14; GC Exh. 1(l)) At trial the General Counsel also amended complaint paragraph VI(a) to allege that Respondent maintained collective-bargaining agreement provisions art. VII, par. 40(a) (shift preference) and art. IX, par. 54(b) (shift equalization) in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. (Tr. 73–74.)

the Act, by maintaining article VII, paragraph 40(a) shift preference and article IX, paragraph 54(b) shift equalization provisions in the collective-bargaining agreement to protect union stewards in their job classifications, on their shifts, rather than retaining those stewards in a limited fashion on their shifts solely for the purpose of representation. In addition, the complaint alleges that Respondent also violated 8(b)(1)(A) and 8(b)(2) by applying those provisions to bump the Charging Party from his position on the third shift so that its steward could remain in a specific position in the pipefitter classification on the third shift, thereby causing the Employer to discriminate against employees who are not stewards.³ In its answer, the Respondent denies that it violated the Act as alleged.⁴

On the entire record,⁵ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation with an office and place of business in Cheektowaga, New York, the Employer's facility, has been engaged in the manufacture of centrifuge air and gas compressors. Annually, the Employer, in conducting its operations, purchased and received at its facility, goods valued in excess of \$50,000 directly from points outside the State of New York.

The Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

³ The charge filed in Case 03-CA-170370 alleges that the Employer violated Sec. 8(a)(3) and (1) of the Act by maintaining article VII in its collective-bargaining agreement with Respondent. The Employer tentatively agreed to enter into a settlement agreement pursuant to which it agreed to pay 50 percent of the backpay if any is owed the Charging Party as part of its joint and several obligation to make him whole for the loss of pay experienced as a result of any unfair labor practices set forth in the complaint. (GC Exh. 1(e), p. 4, fn. 1.)

⁴ In its answer, the Respondent denied that the collective-bargaining agreement language set forth in the complaint is found at par/ 40(a), stating instead that the correct paragraph is 41(a). It appears this denial was based on the previous collective-bargaining agreement effective from August 6, 2012, to August 8, 2015, under which the quoted shift preference language was in par. 41(a). (GC Exh. 2 at pp. 12-13.) However, the Parties stipulated that the language of par. 40(a) under the current contract and par. 41(a) under the previous contract, are identical. (Tr. 89-90.)

⁵ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's Brief; and "R. Br." for Respondent's Brief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

5 1. The relevant contractual provisions

10 The Employer manufactures centrifuge air and gas compressors at its Cheektowaga, New York facility, where it maintains three work shifts. The Respondent represents a unit of the Employer's production and maintenance employees at that facility. The parties' collective-bargaining relationship has been embodied in successive collective-bargaining agreements, the most recent of which is effective from August 3, 2015, to August 5, 2019. (GC Exh. 3.)

15 The collective-bargaining agreement contains the following provisions that are relevant to this case:

In Article IV, Representation:

20 14. Stewards and Shop Committee. The Union shall be represented by two Stewards on the first shift, two Stewards on the second shift, and one Steward on the third shift. There shall also be a Chief Steward. In the absence of a regular Steward, the Union may appoint an acting Steward. The Chief Steward shall be considered as having top seniority in the Plant. Each Shift Steward will be considered as having top seniority on his shift. However, when any employee ceases to be a Steward, such employee shall take his regular place on the seniority list. When a shift is not operating, such top seniority ceases. Top seniority for purposes of this Paragraph shall apply only in the case of layoffs and rehires. (GC Exh. 3, p. 3)

30 In Article VII, Seniority:

35 40. Shift Preference. (a) An 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. Employees (including Stewards and the Chief Steward) within the same job classification in multi-shift operations shall have the right to work out mutually agreeable shift preferences, subject to approval of the employee's immediate supervisor. (GC Exh. 3, p. 11)

40 In Article IX, Overtime:

45 54. Shift Change. (b) 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. (GC Exh. 3, pp. 17-18)

2. The Employer's layoff of bargaining unit employees in January 2016 and the subsequent shift equalization

5 During the week of January 11-15, 2016, the Employer laid off some of its bargaining unit employees. A third shift test lab position held by employee Hoyt Jones was eliminated and Jones was laid off on January 8, 2016. (Tr. 31; R. Exh. 2.) On that same day, due to his high seniority and the fact that he had previously held the position of pipefitter, Jones avoided layoff and bumped into the pipefitter classification on the third shift. At that time, the Employer had allocated 3 pipefitters on the third shift. When Jones bumped into that classification it raised the number of pipefitters on that shift to 4. (Tr. 32-33, 53, 77-78.)

15 Several weeks after the layoff, the Employer implemented a shift equalization (also referred to as "shift realignment"), by which it chose to restore the number of pipefitters on third shift to 3. (Tr. 53-54, 98.) Under the shift equalization or realignment process, the Employer evaluates all the classifications where the layoffs and subsequent bumping has occurred, and it decides how many employees it wants in those classifications on its shifts. (Tr. 52.) The affected employees are then notified that they must move. Chief Union Steward James Neureuther testified that in addition to layoff situations, the Employer can implement shift equalization at its discretion to deal with the workload, and that there are no contractual limitations on the number of times the Employer can institute shift equalizations. (Tr. 54.) As a result, one of the existing third-shift pipefitters had to move from that classification on that shift. (Tr. 33, 98.)

25 3. The Employer and the Respondent inform Karlis that he would be bumped from his third shift pipefitter position based on Union Steward Fineour's exercise of superseniority under the collective-bargaining agreement

30 Fred Fineour, the union steward on third shift, was the pipefitter with the least natural seniority on that shift. Karlis was the next third-shift pipefitter with the least natural seniority. (Tr. 33-34; GC Exh. 4.) The record establishes that with regard to all the employees on the third shift, Matthew Shaw, who held the janitor position, was the only employee with less natural seniority than Fineour. (Tr. 40, 63.) Neureuther testified that under the contract, the janitor position was a "group one" position that did not require prior experience, so any employee could bump into and fill that position. (Tr. 40.)

35 In late January, Karlis' supervisor informed him that he would be the pipefitter bumped from the third shift and he was given the option of moving to the first or the second shift. (Tr. 77-79.) He testified that he did not want to leave the third shift because he had oriented his life around that schedule and that shift paid a \$0.75 per hour shift differential. (Tr. 79.) In that conversation with his supervisor, Karlis stated that he disagreed with the decision to move him from third shift rather than Fineour, because he had more natural seniority than Fineour. (Tr. 80.) Karlis then stated that he would talk to the Respondent and the Employer's human resources personnel. (Tr. 80.)

45 Karlis thereafter talked to Fineour about being bumped. In that conversation, Karlis expressed his disagreement over the decision to bump him from the third shift. (Tr. 81.) Karlis referenced paragraph 14 of the contract which he believed provided that Fineour's superseniority as a steward only allowed him to stay on his shift, and not necessarily in his job classification.

(Tr. 81-82.) Fineour in turn referred Karlis to the shift preference language in paragraph 41 of the previous collective-bargaining agreement (par. 40 in the current contract) as the provision that allowed him, as a steward, to exercise his superseniority and to “hold his classification and his shift.” (Tr. 81-83.) According to Karlis, Fineour never made reference to the shift equalization provision in paragraph 54(b) or any other provision of the contract to support his assertion that he could bump Karlis from his pipefitter position on third shift. (Tr. 83.) Several days after talking to Fineour, Karlis discussed the matter with Neureuther in the presence of Ron Frier (Respondent’s local president) and Rick Tetarski (Respondent’s first-shift steward). (Tr. 83-84.) Karlis again protested being bumped from third shift, citing paragraph 14 and because he had more natural seniority than Fineour. Like Fineour, Neureuther referred Karlis to the shift preference provision of paragraph 41 of the previous contract as support for his assertion that stewards are protected by superseniority both in their shift and their job classifications. (Tr. 84.) Frier stated that the Respondent’s officials needed to “figure out what [they’re] doing,” and they kept reading back and forth between paragraphs 14 and 41. (Tr. 85.) However, Frier and Tetarski both ended up supporting Neureuther’s position that Fineour’s superseniority allowed him to retain his pipefitter position on third shift, and that Karlis would have to be displaced. (Tr. 85.)

Thereafter, Karlis spoke to the Employer’s human resources personnel and protested his displacement from third shift. Despite his protests, Karlis was bumped from third shift to first shift, so that Fineour, as the steward, could remain in his classification as a pipefitter on that shift. (Tr. 86.)⁶ However, in or around July 2016, the Employer moved Karlis back from first shift to the third shift.⁷ (Tr. 87.)

4. The credibility resolutions

The operative facts of this case are essentially undisputed. Karlis protested the fact that he was bumped from the third shift, and he argued to Respondent’s officials that pursuant to paragraph 14, Fineour’s superseniority would allow him to stay on third shift, but not in his pipefitter classification. Karlis testified that Fineour, Neureuther, Frier, and Tetarski all disagreed with him and they specifically informed him that pursuant to the shift preference language of paragraph 41 under the previous contract (and 40 under the current contract), Fineour was able to stay on third shift and retain his pipefitter classification. While Frier and Tetarski failed to testify in the hearing to rebut that evidence, both Fineour and Neureuther did testify, but they nevertheless failed to deny or rebut Karlis’ assertions. Karlis’ testimony was therefore undisputed.

However, besides undisputedly informing Karlis that the steward, by virtue of his superseniority and pursuant to paragraph 41/40, was able to stay on third shift and retain his pipefitter classification, both Fineour and Neureuther contradicted themselves by testifying that paragraph 41/40 was not even applicable to Karlis’ removal from his third-shift pipefitter position. Instead of testifying consistent with what they told Karlis, both of those witnesses

⁶ Karlis was given the option of being bumped to either first or second shift, and he chose the first shift.

⁷ The record does not reflect the job classification Karlis was moved to, the reason the Employer moved him back to the third shift, or whether that move was temporary or permanent.

5 testified that the shift equalization language of paragraph 54(b) was applicable to, and mandated, Karlis' bumping from third shift. That testimony understandably resulted in the General Counsel's motion at trial to amend the complaint to also allege that Respondent's maintenance of 54(b) and its application to bump Karlis from the third shift, also constituted a violation of the
5 Act. Critically, the Respondent failed to offer any evidence to explain why its witnesses offered testimony that conflicted with what they had told Karlis. If the Respondent's witnesses, by offering such conflicting testimony, were somehow inferring or suggesting that they never conveyed to Karlis that he was being bumped pursuant to 41/40, as Karlis in fact testified they had, such testimony would present a conflicting view, albeit inferred, as to what was conveyed to
10 Karlis regarding the basis for his being removed. Such a conflict or inference of conflict on this issue would thus require a determination regarding the credibility of these witnesses.

15 Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction/ Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003).⁸ My observation during the
20 trial was that Karlis was very credible in his demeanor and testimony, and that he testified in a consistent, convincing, truthful, and straight forward manner. In particular, I find that his assertions that the Respondent's officials conveyed that he was being bumped from his position and shift on the basis of the shift preference provision was clear and convincing, and as mentioned above, was never rebutted or contradicted by Respondent's witnesses.

25 On the other hand, Respondent officials Neureuther and Fineour testified in a less convincing manner. I found their testimonies less than forthright, particularly when they both asserted that 41/40 was not applicable to Karlis' bumping, when in fact they both told Karlis that provision of the contract was the basis for his removal. Despite the fact that Fineour testified that paragraph 54(b) shift equalization applied to Karlis' bumping, and not paragraph 41 shift
30 preference, he was somewhat vague when it came to what he actually conveyed to Karlis regarding the basis for his being moved from third shift. While Fineour admitted that he had discussions with Karlis, when questioned at trial as to what he informed Karlis about the basis for his being bumped, he only vaguely testified that he "probably explained the difference" between shift preference and shift equalization. (Tr. 100.) On cross-examination, when pressed
35 about what he specifically told Karlis about his being bumped, he further testified that he did not remember what he specifically told Karlis. (Tr. 106.) Critically, even though Fineour testified that he did not remember the specifics of what he told Karlis, he failed to deny that he informed Karlis that his being bumped was due to the application of the shift preference paragraph.

40 Neureuther also testified that paragraph 41/40 was not relevant to Karlis' removal and that 54(b) supported his determination that Fineour should remain on third shift and in the

⁸ In certain instances, I may have credited some but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd.* on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

pipefitter classification, despite the fact that he also failed to rebut Karlis' testimony that he previously stated that 41/40 warranted Karlis' bumping from third shift. Importantly, Neureuther's testimony at trial also contradicted his sworn affidavit he provided the NLRB Regional Office during the investigation of the charge, where he stated that paragraph 41 meant that a steward could not be bumped, and where he did not cite any other provision of the contract to support that proposition. (Tr. 37, 67-68, 71.)

Besides being contradictory, the testimonies of Neureuther and Fineour appeared to be an attempt to have the record reflect that they never conveyed to Karlis that the shift preference provision was the basis for his removal, while the record clearly and undisputedly showed otherwise. Thus, to the extent that Karlis' testimony differed in any way from that of the Respondent's officials, or to the extent that Respondent's officials inferred that it differed by offering contradictory testimony, I credit Karlis and his testimony over that of the Respondent's officials.

B. Analysis

1. The legal precedent

Superseniority provisions have been bargained for and obtained by unions in collective-bargaining agreements to assure continuity of function and maximum use of a union steward's skill and expertise in representing the bargaining unit employees. Collective-bargaining provisions granting superseniority to union officials in matters relating to layoff and recall have been upheld by the Board where the union official's responsibilities have a direct relationship to the effective and efficient representation of the bargaining unit employees. *Industrial Workers (AIW) Local 148 (Allen Group Inc.)*, 236 NLRB 1368, 1370 (1977). However, in *Dairylea Cooperative Inc.*, 219 NLRB 656 (1975), enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2nd Cir. 1976), the Board determined that superseniority provisions, by their nature, inherently tend to discriminate against employees for union-related reasons, and "thereby . . . restrain and coerce employees with respect to the exercise of their rights protected by Section 7 of the Act." *Id.* at 658. As such, a superseniority clause that is not on its face limited to layoff and recall is presumptively unlawful, and the party that asserts the legality of such a provision has the burden of demonstrating a substantial and legitimate business justification. (*Id.*)

In *Dairylea*, the Board held that the lawfulness of such restricted superseniority provisions is 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." (*Id.* at 658.) Thereby, it not only serves a legitimate statutory purpose, it also "redounds in its effects to the benefit of all unit employees." (*Id.*) The Board has found the application of superseniority lawful only as to those employees who are agents of the union who must be on the job to accomplish duties directly related to contract administration. *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983).

While the exercise of superseniority to protect a union steward from layoff from his or her area of representation has been described as "geographically defensive" and consistent with the principles of *Dairylea*, only the minimal exercise of such protection is permitted. *Mechanics Educational Society of America Local 56 (Revere Copper)*, 287 NLRB 935, 936 (1987). In that

connection, the Board has held that “[p]rotecting a steward against bumping by an employee otherwise entitled to the job is presumptively unlawful as a job-related discrimination based on union activity that goes beyond layoff and recall.” *Revere Cooper*, supra at 937. Only the “minimal exercise” of superseniority protection is permitted, which “means that a steward may be afforded superseniority to keep a job, but not necessarily his job, in his area of representation.” (Id. at 936–937.) See also *Joy Technologies, Inc.*, 306 NLRB 1 (1992). Thus, the application of superseniority to provide protection that goes beyond that which is minimally necessary for the union steward to remain in a job in his or her area of representation will be found to be an overly broad use of superseniority that is unlawful. *Joy Technologies*, supra.

2. The Respondent’s maintenance of Paragraphs 40(a) and 54(b) in the collective-bargaining agreement.

In this case, the third-shift steward performed duties that insure union representation for the third-shift unit employees. Fineour initiated grievances for employees, attended initial and subsequent grievance meetings with supervisors on third shift, and when layoffs occurred, he conducted meetings with the affected employees. (Tr. 63.) Fineour’s union responsibilities therefore had a direct relationship to the effective and efficient representation of the third-shift bargaining unit employees. *Industrial Workers (AIW) Local 148 (Allen Group Inc.)*, 236 NLRB 1368, 1370 (1977).

The shift preference provision in paragraph 40(a) (formerly 41) of the collective-bargaining agreement 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 Exh. 3, p. 11.) This provision clearly protects union stewards from displacement by more senior employees in both their shifts and job classifications in a situation that does not involve layoff or recall. While it is not unlawful to extend superseniority protection to stewards to protect them from being removed from their shifts, it is unlawful to extend such protection in this case to the steward’s job classification or position because it exceeds the minimal exercise of superseniority necessary to allow a steward to carry out his or her representational duties. *Revere Copper*, supra at 936–937. As mentioned above, the Board has held that “a steward may be afforded superseniority to keep a job, but not necessarily his job, in his area of representation.” Id. This paragraph therefore contains an overly broad superseniority provision that is presumptively unlawful. Id.; see also *Perfection Automotive Products Corp.*, 232 NLRB 690, 690 fn. 1 (1977). This presumption could be rebutted by the Respondent, but in this case the Respondent failed to offer any evidence to establish that the provision is justified by a legitimate statutory basis. Therefore, the Respondent failed to rebut this presumption, and its maintenance of the unlawful provision in paragraph 40(a) constitutes a violation of Section 8(b)(1)(A) and 8(b)(2) of the Act.

The collective-bargaining agreement’s shift equalization provision in paragraph 54(b) provides that when the Employer changes the number of employees between shifts in a classification, the shift changes will be on a seniority basis, but that “a shift steward cannot be displaced from the shift to which he was elected.” (GC Exh. 3, pp. 17–18.) While this provision does not allow the application of superseniority to union stewards to prevent them from being removed from their classification or jobs, as paragraph 40(a) mandates, it nevertheless prevents

them from being removed from their shifts under conditions not limited to layoff or recall, so it also is presumptively unlawful.

5 In regard to the maintenance of paragraph 54(b), however, the Respondent offered
evidence to rebut that presumption by showing a legitimate and justifiable reason for maintaining
a provision that provides stewards superseniority to remain on their respective shifts when shift
equalization occurs. It is undisputed that if paragraph 54(b) did not protect stewards from being
removed from their shifts during a shift equalization, the Employer could use that action to
10 remove low-seniority stewards whom it might not care for, or it might not want to see hold a
position representing the employees in that particular shop, from the shift. (Tr. 61, 103.) As
such, without allowing the stewards to remain on their shifts, the Employer could disrupt the
ability of the Respondent to effectively represent its members. This is especially true for the
third shift, where only one union steward is assigned. Thus, contrary to the General Counsel's
15 assertions, the evidence does not establish that the Respondent's maintenance of paragraph 54(b)
is unlawful, and I will therefore dismiss that allegation. However, for the reasons mentioned
below, I find that the Respondent's application of paragraph 54(b) to provide superseniority
protection for Fineour on his shift and in his job classification, violated the Act.

- 20 3. The Respondent's application of Paragraphs 40(a) and 54(b) coerced and restrained
Karlis and caused or attempted to cause the Employer to bump Karlis from his shift in
violation of the Act.

25 The record establishes that the Employer conducted a "shift equalization" in January
2016, that resulted in one pipefitter being bumped from the third shift. The Respondent
determined that Fineour, by virtue of the contractual superseniority attributed to his position as
third-shift union steward, could not be bumped by Jones from his shift or from his pipefitter
classification on that shift. The Respondent's officials informed Karlis that paragraph 40(a)
(formerly 41(a)) had been applied to give Fineour superseniority and, as a result, bump him from
third shift. The Respondent's officials testified, however, that it was actually the application of
30 paragraph 54(b) that warranted Fineour's retention of his shift and job classification, and which
required Karlis' bumping. In any event, paragraphs 40(a) and 54(b) were applied by the
Respondent to determine that, despite the fact that Fineour had less natural seniority than Karlis
among the third-shift pipefitters, Karlis would be bumped from the third shift. The Employer, in
accordance with the Respondent's position, shortly thereafter bumped Karlis from third to first
35 shift over his objection.

40 The record further establishes that on third shift, the janitor position was held by Matt
Shaw, an employee with less seniority than Fineour. Karlis credibly testified that anyone can
bump into the janitor position. (Tr. 86-87.) Fineour's testimony that if he had been displaced
from his pipefitter classification he could not choose to bump into another classification, is
simply not credible. (Tr. 104-105.) His assertion is also without support in the record, as none
of the Respondent's witnesses were able to identify any provision in the contract that stated an
employee was restricted from bumping into another classification on his shift if he must move
45 from his original classification as a result of shift equalization. The Respondent also failed to
identify any provision of the collective-bargaining agreement where such a restriction is set
forth, and critically, that assertion is belied by Neureuther's testimony that under the contract the
janitor position is a "group one" position that any unit member could bump into and fill, without

having any prior experience in that position. (Tr. 40.) Furthermore, that assertion at trial was inconsistent with Respondent's affirmative defense where it asserted that "had superseniority not been exercised, the third-shift steward (Fineour) would not have been able to retain his position without undergoing a severe and unreasonable pay cut," referring to his bumping into the janitor position that paid approximately \$5 an hour less than what he was earning.⁹ Thus, the record establishes that Fineour could have bumped into the janitor classification and remained on third shift where he could have continued to provide representation services to the unit employees.

The Board has held that the policy of the Act is to insulate job benefits from union activities, but it finds superseniority clauses lawful based on the ground that they further the effective administration of collective-bargaining agreements by encouraging the continuity of union representation on the job, and thereby serve a legitimate statutory purpose to the benefit of all unit employees. *Electronic Workers Local 221 (Kidder, Inc.)*, 333 NLRB 1149, 1151 (2001). However, superseniority clauses that are not on their face limited to layoff and recall, such as the ones applied by the Respondent in this case, are presumptively unlawful. *Dairlea Cooperative*, at 656.

In this case, the Respondent asserts that the collective-bargaining agreement allowed Fineour to retain his shift *and* job classification so that he could properly provide representation to the third-shift employees, and that Karlis was to be bumped, which is the action the Employer followed in this matter. The Board has found, however, that it is an overly broad use of superseniority to provide that a steward retain a particular job, not merely any job, on the relevant shift. *Revere Cooper*, supra at 936. As mentioned above, in that regard the Board specifically stated that "a steward may be afforded superseniority to keep a job, but not necessarily his job, in his area of representation." (Id. at 936-937.) Fineour could have remained on the third shift by bumping into the janitor position, and by doing that, he could have remained in his area representing the third-shift employees and Karlis could have remained on his shift as his natural seniority provided. I find that the Respondent's actions in this case are exactly the type which the Board has found to be an unlawful use of superseniority. It applied paragraph 40(a) (which is unlawful on its face) and paragraph 54(b) (which is not unlawful on its face) to protect a steward against bumping by an employee otherwise entitled to the job, which is presumptively unlawful as a job-related discrimination based on union activity that goes beyond layoff and recall, and it caused and/or attempted to cause the Employer to bump Karlis from the third shift despite his natural seniority over Finehour. Although these actions are presumptively unlawful, the presumption is nevertheless subject to the Respondent's rebuttal. *Revere Copper*, supra at 937.

4. The evidence does not establish that Respondent had legitimate and justifiable reasons for applying superseniority to Fineour to allow him to remain in his pipefitter classification on the third shift.

I find that the Respondent failed to establish that it had legitimate and justifiable reasons for applying superseniority to Fineour to allow him to remain in his pipefitter classification on the third shift. In its answer to the complaint, the Respondent asserted that Karlis' removal from

⁹ I further note that Respondent never asserted as an affirmative defense that Fineour was restricted or precluded from moving or bumping into the janitor position on third shift.

third shift “was required in order to ensure that the Union maintained effective representation for unit employees on the third shift.” (GC Exh. 1(i).) That assertion, however, is without merit because Fineour could have bumped into the third-shift janitor position, where he could have continued his representational duties for the third-shift employees.

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The Respondent also asserted as an affirmative defense that had Karlis remained in his pipefitter classification on third shift as his natural seniority dictated, Fineour would have been forced to change job classifications to stay in his third shift area of representation, and that the “third-shift Steward would not have been able to retain his position without undergoing a severe and unreasonable pay cut.” (GC Exh. 1(i).) Because the janitor position into which Fineour could have bumped paid approximately \$5 an hour less than what he earned as a pipefitter, the Respondent argues that it would have been “unreasonable” to require or expect Fineour to bump into that position. (R. Br. at p. 11.) Thus, the Respondent’s defense is that Fineour could not have bumped into the janitor position and stayed on third shift because requiring him to do so would require a diminishment in his wages, which would be “unreasonable.” (GC Exh. 1(i) p. 3; R. Br. at p. 11.)

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That defense, however, has been found by the Board to be insufficient. The fact that Fineour would have experienced a diminishment in wages, and that such a diminishment could be characterized as “unreasonable,” has not been found by the Board to constitute legitimate and justifiable reasons for applying superseniority. In fact, the Board has specifically held to the contrary, that diminishment of wages is an insufficient basis for a defense for using superseniority to prevent downgrading of a union steward’s position within his area of representation. *Joy Technologies*, supra at 1-2; *Gulton Electro Voice*, 276 NLRB at 1044; *Kidder, Inc.*, supra at 1152. Such actions extend well beyond the minimum extent necessary for the union representative to carry out his or her representational duties, and it clear that those “benefits” (wage protection and job classification protection) would not exist for unit employees who are not union officials. Accordingly, such additional benefits, available only to union officials, are discriminatory and unlawful.

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In addition to finding that diminishment of wages was not a valid defense, the Board has further held that where a union is in a position that requires it to persuade an employee to remain a steward for the available wage (on the basis of his natural seniority) to keep him on the shift, that is something properly remedied only by the union. *Dairylea*, supra at 659. In *Gulton Electro Voice*, supra, the Board stated that “it nevertheless remains the union’s task to build and maintain its own organization, and where the immediate problem is simply a matter of encouraging employees to [serve as a union representative] a union can alone handle the situation simply by paying employees or by giving them other nonjob benefits.” 276 NLRB at 1044.

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Accordingly, based on the well-established case law discussed above, the Respondent’s maintenance of paragraph 40(a) coerced and restrained employees in violation of Section 8(b)(1)(A), and it caused the Employer to discriminate against employees who did not hold union office in violation of Section 8(b)(2) of the Act. In addition, the Respondent’s application of paragraphs 40(a) and 54(b) to provide superseniority protection to union steward Fineour, so that he could remain in his job classification on his shift, and which resulted in or caused Karlis’ bumping from the third shift where he should have remained by virtue of his natural seniority, unlawfully restrained and coerced Karlis in violation of Section 8(b)(1)(A) and caused the

Employer to unlawfully discriminate against him because he, unlike Fineour, did not hold union office, in violation of Section 8(b)(2) of the Act.

CONCLUSIONS OF LAW

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1. Ingersoll-Rand Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10 2. Respondent, International Association of Machinists and Aerospace Workers, District 65, Local 330, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by maintaining paragraph 40(a) of the parties' collective-bargaining agreement has violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

15 4. Respondent, by applying paragraphs 40(a) and 54(b) of the collective-bargaining agreement so that Respondent's steward, Fred Fineour, could remain in a specific job classification or position on the third shift, thereby causing and/or attempting to cause the Employer to discriminate against employees who are not union stewards by bumping Christopher Karlis from his position on the third shift, has violated Section 8(b)(1)(A) and
20 8(b)(2) of the Act.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

25 6. Respondent has not otherwise violated the Act.

REMEDY

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

35 Having found that paragraph 40(a) of the parties' collective bargaining is unlawful, the Respondent shall be ordered to cease and desist from maintaining and applying/enforcing that provision or clause. Having also found that paragraphs 40(a) and 54(b) were unlawfully applied, it shall be ordered that Respondent cease and desist from unlawfully applying those provisions of the contract to allow superseniority protection for stewards in their job classifications beyond what is needed to keep them on their shifts for the purpose of representation. Having found that
40 Respondent caused and/or attempted to cause Christopher Karlis to be bumped from his position on third shift, Respondent shall be ordered to jointly and severally with the Employer, make Karlis and any other unit employees affected by that action whole, with interest, for any loss of earnings suffered as a result of the discrimination against Karlis. Because these violations found do not involve a cessation of employment, the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987),
45 compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In its posthearing brief, the Respondent argues that even if the complaint is sustained, monetary relief for Karlis should be denied since he incurred a loss of shift differential pay 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).” (R. Br. p. 13 at fn. 3.) This assertion is unsupported by Board precedent, and I find it lacks merit. The Respondent, as the wrongdoer in this case, coerced and restrained Karlis, and caused the Employer to discriminate against him, thus causing any monetary losses he may have incurred. After being unlawfully bumped from his shift, I find it is immaterial that he chose to move to the shift that lacked the pay differential. The Respondent has failed to identify any case law which would require Karlis to have taken such action after being unlawfully discriminated against. In this case, where I have found that the Respondent has caused Karlis to be discriminated against, and that the discrimination has resulted in a loss in pay, I find it appropriate to order a full remedy for Karlis, and any other employee who may have suffered a loss in pay as a result of the discrimination against Karlis. I further find that ordering a full remedy in this case is consistent with the Board’s holding that where there is uncertainty about a remedy, “doubt should generally be resolved in favor of the wronged party rather than the wrongdoer.” *Oil Capital Sheet Metal*, 349 NLRB 1348, 1351 (2007); see also *United Aircraft Corp.*, 204 NLRB 1068, 1068 (1973).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, International Association of Machinists and Aerospace Workers, District 65, Local 330, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining paragraph 40(a) or any provision in its collective-bargaining agreement with Ingersoll-Rand Company (“the Employer”) that protects stewards in their job classification beyond what is needed to keep them on their shifts for the purpose of representation.

(b) Applying paragraphs 40(a) or 54(b), or any other provision in its collective-bargaining agreement with the Employer, so that it allows or results in protection of stewards in their job classification beyond what is needed to keep them on their shifts for the purpose of representation.

(c) Causing or attempting to cause the Employer to discriminate against Christopher Karlis or any other employees by requiring that the collective-bargaining agreement be applied or enforced to preclude the bumping of stewards for any purpose other than layoff and recall unless it is necessary to do so to keep them on their shifts for the purpose of representation.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 (a) Notify the Employer and Christopher Karlis in writing that it has no objection to reinstating Christopher Karlis to his shift and position, and any other affected unit employees, who but for the unlawful assignment of superseniority would not have been displaced from their shift.

10 (b) Jointly and severally with the Employer make Christopher Karlis and any other unit employees whole, with interest, for any loss of earnings suffered as a result of the discrimination against Karlis in the manner set forth in the remedy section of this decision.

15 (c) Within 14 days after service by the Region, post at its business office and meeting places copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director of Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted, including on bulletin boards maintained at the Employer's plant/facility where the unfair labor practices occurred. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

20 (d) Sign and return to the Regional Director sufficient copies of this notice for posting by the Employer, if it is willing, at all places where notices to employees are customarily posted.

25 (e) Within 20 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

30 Dated, Washington, D.C. December 19, 2016

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Thomas M. Randazzo
Administrative Law Judge

¹¹ 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."

APPENDIX

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 Federal labor law and has ordered us to post and abide by this notice.

WE WILL NOT maintain and/or apply any superseniority provision or clause in our collective-bargaining agreement with Ingersoll-Rand Company (“the Employer”), that protects stewards in their job classification beyond what is needed to keep them on their shifts for the purpose of representation.

WE WILL NOT coerce or restrain Christopher Karlis or any other employees by granting superseniority job protection to steward Fred Fineour or any other steward when such protection is not required to keep the steward in his or her area of representation.

WE WILL NOT cause or attempt to cause the Employer to discriminate against Christopher Karlis or any other employees by requiring that the collective-bargaining agreement be applied or enforced to preclude the bumping of stewards for any purpose other than layoff and recall unless it is necessary to do so to keep them on their shifts for the purpose of representation.

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 Christopher Karlis and any other unit employees whole, with interest, for any loss of earnings suffered as a result of the discrimination against Christopher Karlis.

WE WILL, within 14 days from the date of this Order, notify the Employer and Christopher Karlis in writing that we have no objection to reinstating Christopher Karlis to his shift and classification, and any other affected unit employees, who but for the unlawful assignment of superseniority would not have been displaced from their shift.

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT 65, LOCAL 330

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, NY 14202-2387
(716) 551-4931
Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/03-CB-168560 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4931.