This is the law on Superseniority

The Developing Labor Law

The Board, the Courts, and the National Labor Relations Act

Third Edition

Volume I

Editor in Chief
Patrick Hardin
Professor of Law
The University of Tennessee
Knoxville

Editors

James R. LaVaute
Attorney at Law
Syracuse, NY

Timothy P. O'Reilly
Attorney at Law
Philadelphia, PA

Editor in Chief, First and Second Editions
Charles J. Morris
Committee on the Development of the Law
Under the National Labor Relations Act

Section of Labor and Employment Law
American Bar Association

The Bureau of National Affairs, Inc., Washington, D.C.

list and instead negotiated a list on which employees of the more recently organized facility were "endtailed". The Board reasoned that the employees at the more recently organized facility were endtailed solely because the employees at the other facility had been union members longer and the union's action thus penalized the endtailed employees because they had exercised their section 7 right to refrain from union activity.[438]

In companion cases, *Teamsters Local 869 (Anheuser-Busch, Inc.)*[439] and *Teamsters Local 896 (Miller Brewing Co.)*,[440] the Board addressed the legality under sections 8(b)(1)(A) and (2) of a bumping-rights provision of a collective bargaining agreement that gave so-called permanent employees, bumped by other employers in the industry who were also signatory to contracts with the same union, a preferential seniority right to work over so-called temporary employees. The provision was developed in the context of multi-employer bargaining and its application continued even after the dissolution of the multi-employer unit. Initially, the Board noted that the provision was not unlawful on its face and that there had been no evidence presented that it actually resulted in any discrimination against an employee on the basis of nonunion status. The Board concluded that the preferential provision was arguably skill-based, designed to furnish the industry with a pool of experienced workers, and susceptible of a nondiscriminatory interpretation. Absent evidence of actual discrimination, the Board found the contract clause to be lawful.[441]

A second area of concern relating to seniority involves agreements calling for "superseniority" for employees who hold union office. In *Dairylea Cooperative*,[442] the Board held that while contractual provisions granting superseniority to union stewards with respect to layoff and recall were lawful, more expansive clauses granting superseniority to stewards for all purposes,

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[438] *See also* Papcin v. Dichello Distribs., 697 FSupp 73 (D Conn), *aff'd*, 862 F2d 304 (CA 2, 1988) (union did not breach duty of fair representation when two units, each represented by separate local unions, were merged into one facility and employees of one unit were "endtailed" behind others).

[439] 296 NLRB No. 132, 132 LRRM 1212 (1989).

[440] 296 NLRB No. 133, 132 LRRM 1217 (1989).

[441] *But see* Mine Workers Dist. 23 (Peabody Coal Co.), 293 NLRB 77, 130 LRRM 1393 (1989) (union violated §8(b)(2) by maintaining and enforcing contract provision that did not credit employees with seniority, for recall purposes, with time worked for nonunion companies).

[442] 219 NLRB 656, 89 LRRM 1737 (1975), *enforced sub nom.* NLRB v. Teamsters Local 338, 531 F2d 1162, 91 LRRM 2929 (CA 2, 1976).

including job-bidding preference, were a violation of section 8(b)(2).[443] Superseniority clauses are thus to be permitted only to the extent that they are necessary to the collective bargaining process.

Where superseniority for stewards is limited to layoffs, the Board has sustained the provision, finding a legitimate purpose in the retention of an official to process grievances. That purpose was held sufficient to outweigh the obvious tendency of such provisions to encourage union membership, that is, to encourage one to become an "active" union member in order to achieve a steward's position and its superseniority emoluments. Originally the Board limited its approval of superseniority only to stewards, and only with respect to layoffs and recall. Later, however, it approved the extension of superseniority for purposes of layoff and recall to union officials other than stewards.[444] Indeed, this occurred even where the written description of the officer's duties appeared to have little or no relationship to the collective bargaining process; the Board reasoned that it did not desire to "second guess" the union regarding which officers were actually necessary "in effectively representing the unit."[445]

In *Gulton Electro-Voice*,[446] the Board modified and again narrowed the standards under which it will allow a grant of superseniority to union officials in layoff and recall situations. In *Gulton*, the Board found that section 8(b)(2) had been violated by the union's application of a superseniority clause to certain union officials (the union's recording secretary and its financial secretary-treasurer) who were not involved in grievance process-

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[443] A seniority clause giving a union the right to veto the discharge of a union steward is presumptively illegal. Perma-Line Corp. v. Painters Local 230, 639 F2d 890, 106 LRRM 2483 (CA 2, 1981). However, an arbitrator's award upholding a contract provision giving a bonus to a union steward may be affirmed where the bonus is to offset losses the steward might incur by missing his hourly job duties to attend union activities. General Battery Int'l v. Union de Servicios, 678 FSupp. 33, 127 LRRM 2715 (D PR, 1988).

[444] Industrial Workers (AIW) Local 148 (Allen Group, Inc.), 236 NLRB 1368, 98 LRRM 1574 (1978); American Can Co., 235 NLRB 704, 98 LRRM 1012 (1978). Superseniority could also be given to employees who performed several functions that further the collective bargaining interests of the bargaining unit. Electrical Workers (UE) Local 623 (Limpco Mfg.), 230 NLRB 406, 95 LRRM 1343 (1977), *enforced sub nom.* D'Amico v. NLRB, 582 F2d 820, 99 LRRM 2350 (CA 3, 1978). "[C]redible proof that the individual in question was officially assigned duties which helped to implement the collective bargaining agreement in a meaningful way" is required. *Id.*, 582 F2d at 825.

[445] American Can Co., *supra* note 444, at 704–5. The Third Circuit would place the burden on the union to demonstrate the need for superseniority for a union official other than a steward. D'Amico v. NLRB, 582 F2d 820, 99 LRRM 2350 (CA 3, 1978).

[446] 266 NLRB 406, 112 LRRM 1361 (1983), *enforced sub nom.* Electrical Workers (IUE) Local 900 v. NLRB, 727 F2d 1184, 115 LRRM 2760 (CA DC, 1984).

ing or other on-the-job bargaining-agreement administration duties. Applying the *Gulton* rule, the Board and the courts have found section 8(b)(2) violations in cases where unions have maintained and enforced contract provisions that grant superseniority to union officials who are not involved in the administration of the collective bargaining agreement or grievance handling.[447]

Even though the rule in *Dairylea* makes superseniority clauses extending benefits beyond layoff and recall preference presumptively invalid, it does not purport to make them invalid per se. The legality of the parties' inclusion of such a clause in the contract depends upon the existence of an adequate justification at the time of execution.[448] Since the line of cases culminating in *Gulton*, however, the Board has taken a restrictive view of what may constitute adequate justification. In finding a section 8(b)(2) violation in *Complete Auto Transit*,[449] the Board rejected the assertion that greater access to employees by a steward justified the use of superseniority to deny a bid position to a more senior employee. Likewise, the maintenance and enforcement of a contract provision that protected a steward against any bumping was found to violate sections 8(b)(1) and (2) when such protection was not needed to keep the steward on the job in his area of representation.[450] Explicitly overruling a contrary decision,[451] the Board reasoned that a steward may be

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[447] *See, e.g.*, United States Steel Corp., 288 NLRB 1074, 130 LRRM 1280 (1988) (recording secretary, financial secretary, and treasurer); Goodyear Tire & Rubber Co., 278 NLRB 650, 122 LRRM 1238 (1986) (treasurer, executive board members); NLRB v. Auto Workers Locals 1131 & 1161 (Houdaille Indus.), 777 F2d 1131, 121 LRRM 2080 (CA 6, 1985), *enforcing* 268 NLRB 1468, 115 LRRM 1248 and 271 NLRB 1411, 117 LRRM 1373 (1984) (financial secretary); NLRB v. Harvey Hubble, Inc., Ensign Elec. Div., 767 F2d 1100, 119 LRRM 3460 (CA 4, 1985), *cert. denied*, 479 US 984, 123 LRRM 3128 (1986), *enforcing* 268 NLRB 620, 115 LRRM 1090 (1984) (treasurer and recording secretary); Auto Workers Local 1384 v. NLRB (Ex-Cell-O Corp.), 756 F2d 482, 118 LRRM 2753 (CA 7, 1985), *enforcing* 267 NLRB 1303, 114 LRRM 1198 (1983) (recording secretary and financial secretary-treasurer); NLRB v. Niagara Mach. & Tool Works, 746 F2d 143, 117 LRRM 2689 (CA 2, 1984), *enforcing* 267 NLRB 661, 114 LRRM 1076 (1983) (executive board members); Cooper Indus., Wiss Div., 271 NLRB 810, 117 LRRM 1188 (1984) (executive board members); Ford Motor Co., 269 NLRB 250, 115 LRRM 1229 (1984) (financial secretary and treasurer); Inmont Corp., 268 NLRB 1442, 116 LRRM 1009 (1984) (union trustees and sergeant-at-arms); United States Steel Corp., 268 NLRB 1187, 115 LRRM 1275 (1984) (financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees). *See also* NLRB v. Wayne Corp., Wayne Transp. Div., 776 F2d 745, 120 LRRM 3321 (CA 7, 1985), *enforcing* 270 NLRB 162, 116 LRRM 1049 (1984) (grant of superseniority to recording secretary unlawful even though officer occasionally handled grievances for absent steward).

[448] NLRB v. Auto Warehousers, 571 F2d 860, 98 LRRM 2238 (CA 5, 1978).

[449] 257 NLRB 630, 107 LRRM 1549 (1981).

[450] Mechanics Local 56 (Revere Copper Prods.), 287 NLRB 935, 127 LRRM 1163 (1987).

[451] Parker-Hannifin Corp., 231 NLRB 884, 96 LRRM 1130 (1977).

afforded superseniority to keep a job, but not necessarily his or her job, in the steward's area of representation.[452] On the other hand, the Board found no violation in a union's enforcement of a provision which allowed employees to leave the bargaining unit to take full-time union jobs and then return to their jobs with the same seniority they had been holding when they left.[453] The Board stressed the fact that union officials were not given any advantage over other employees because a former union official returned to his old job no better off than when he left. As a result, the Board concluded that the provision did not create any incentive to engage in union activity.

In contrast, the Board held unlawful a contractual provision that permitted employees who have been transferred or promoted to nonbargaining-unit positions to return to the unit with full seniority provided they obtained a withdrawal card from the union or maintained their membership in the union.[454] The Board determined that this seniority provision treated employees returning to the unit differently depending on their fulfillment of union obligations and, consequently, the provision encouraged employees to participate in union activities in which they otherwise would not be inclined or required to engage.[455] The disparate effect of the provision was not justified because the provision in no way furthered the effective administration of the collective bargaining agreement.[456] The Board distinguished *Radio & Television Broadcast Engineers Local 1212 (WPIX)*[457] on the ground that the union-leave provision in that case did not encourage union participation but simply removed a condition (the inability to accrue seniority) that would have discouraged employees from taking part in those activities.

The Board also has refused to permit the extension of superseniority of union officials for purposes other than layoff or recall, absent a showing of business necessity for such extension.

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[452]Mechanics Local 56 (Revere Copper Prods.), *supra* note 450.

[453]Theatrical Stage Employees Local 695 (Twentieth Century Fox), 261 NLRB 590, 110 LRRM 1078 (1982). *See also* Radio & Television Broadcast Eng'rs Local 1212 (WPIX), 288 NLRB 374, 128 LRRM 1219 (1988), *review denied*, 870 F2d 858, 131 LRRM 2075 (CA 2, 1989).

[454]Manitowoc Eng'g Co., 291 NLRB 915, 130 LRRM 1072 (1988).

[455]*Id.*, 130 LRRM at 1075–76.

[456]*Id.* at 1076. The Board expressly overruled its decision in Brown & Williamson Tobacco Co., 227 NLRB 2005, 94 LRRM 1337 (1977), which held that such seniority provisions were lawful.

[457]*Supra* note 453.

In *Laborers Local 380 (Mantz & Oren)*,[458] the Board found presumptively unlawful a clause granting superseniority to union stewards for weekend and holiday work. Because the union failed to show a legitimate business purpose for the extension of superseniority to weekend and holiday work, the clause was held unlawful.

C. Violations Relating to Union-Security Provisions

Although the Board presumes that a union's attempt to cause an employer to discharge an employee is unlawful, this presumption may be rebutted by evidence demonstrating that the union's conduct was based on permissible considerations.[459] Under section 8(b)(2), a union may lawfully cause the discharge of an employee working under a union- or agency-shop agreement pursuant to the union-shop proviso to section 8(a)(3) for failing, in the language of the Act, "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[460]

In *NLRB v. General Motors*[461] the Supreme Court held that the term "membership" as used in the proviso to section 8(a)(3) embodies only a financial obligation limited to the payment of fees and dues. Thus, a union violates section 8(b)(2) of the Act if it causes the discharge of former members for failing to rescind their resignation because section 8(a)(3) does not permit a union to compel active membership.[462] Similarly, a union violates sec-

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[458]275 NLRB 1049, 120 LRRM 1023 (1985). *See also* Gulton Electro-Voice, 266 NLRB 406, 112 LRRM 1361 (1983), *enforced sub nom.* Electrical Workers (IUE) Local 900 v. NLRB, 727 F2d 1184, 115 LRRM 2760 (CA DC, 1984) (job-specific protection against bumping not warranted); Cronin v. Oscar Mayer Corp., 633 FSupp 159 (ED Pa, 1986) (superseniority not applicable in permanent force reduction).

[459]Teamsters Local 170 (Consolidated Beverages), 282 NLRB 812, 125 LRRM 1007 (1987); Glaziers Local 558 (PPG Indus.), 271 NLRB 583, 116 LRRM 1489 (1984), *enforcement denied*, 787 F2d 1406, 122 LRRM 2008 (CA 10, 1986).

[460]For a detailed consideration of the requirements for and applications of lawful union-security arrangements, *see generally* Chapter 27, "Union Security." *See also* Beck v. Communications Workers, 487 US 735, 128 LRRM 2729 (1988); Electrical Workers (IUE) Local 441 (Phelps Dodge Indus., Phelps Dodge Copper Prods. Co. Div.), 281 NLRB 1008, 123 LRRM 1204 (1986); Pattern Makers League v. NLRB (Rockford-Beloit Pattern Jobbers), 473 US 95, 119 LRRM 2928, 2933 n.16 (1985); Machinists Local Lodge 1414 (Neufeld Porsche-Audi), 270 NLRB 1330, 1333 n.15, 116 LRRM 1257, 1260 n.15 (1984).

[461]373 US 734, 53 LRRM 2313 (1963).

[462]Hershey Foods Corp., 207 NLRB 897, 85 LRRM 1004 (1973), *enforced*, 513 F2d 1083, 89 LRRM 2126 (CA 9, 1975). *Accord* Service Employees Local 680 (Leland Stanford, Jr. Univ.), 232 NLRB 326, 97 LRRM 1186 (1977), *enforced*, 601 F2d 980, 101 LRRM 2212 (CA 9, 1979); Communications Workers Locals 1101 & 1104 (New York Tel. Co.), 211 NLRB 114, 87 LRRM 1253 (1974), *enforced*, 520 F2d 411, 89 LRRM 3028 (CA 2, 1975), *cert. denied*, 423 US 1051, 91 LRRM 2099 (1976).

exercised their section 7 rights by working behind the picket line with a nonunion company aiding their original employer during a strike called by the union.

In *Teamsters Local 293 (R.L. Lipton Distributing Co.)*,[128] a superseniority clause providing that shop stewards were to be paid a 45¢ per hour premium in addition to their regular pay rate was held presumptively unlawful under *Dairylea Cooperative*[129] and in violation of section 8(b)(1)(A) and 8(b)(2). Application of superseniority provisions to overtime equalization rules and preferences provided to union committeepersons was found not to violate section 8(b)(1)(A) or 8(b)(2) in *Auto Workers Local 235, (General Motors Corp.)*.[130]

C. Violations Relating to Union-Security Provisions

In *Electronic Workers (IUE) Local 444 (Paramax Systems Corp.)*,[131] the Board reexamined a union's obligations to employees under section 8(b)(1)(A) and 8(b)(2) when enforcing a union-security clause requiring employees to be "members in good standing." Distinguishing between "membership" and "membership in good standing," the Board found that a provision mandating the latter is ambiguous because it might be understood to require more than the payment of dues and initiation fees.[132] Thus, under a union-security clause requiring employees to have membership in good standing, the Board held that the union had a fiduciary duty to inform employees of their need to satisfy only the payment of financial obligations and by failing to do so had represented the employees in "bad faith," thereby breaching its duty of fair representation and violating section 8(b)(1)(A) of the Act.[133] However, the District of Columbia Circuit found no factual basis for the Board's finding the union acted in bad faith simply by concluding and maintaining a union-security agreement that had been lawful under long-settled standards.[134] On that ground alone, the court

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[128] 311 NLRB 538, 143 LRRM 1237 (1993).
[129] 219 NLRB 656, 89 LRRM 1737 (1975), *enforced sub nom.* NLRB v. Teamsters Local 338, 531 F2d 1162, 91 LRRM 2929 (CA 2, 1976).
[130] *Supra* note 112. *See also* Chapter 27, "Union Security."
[131] 311 NLRB 1031, 143 LRRM 1161 (1993), *enforcement denied sub nom.* Electronic Workers (IUE) v. NLRB, 148 LRRM 2070 (CA DC, 1994).
[132] *Id.* at 1037.
[133] *Id.* at 1040.
[134] *Id.*, 148 LRRM at 2072. *See also* Bloom v. NLRB, 30 F3d 1001, 146 LRRM 2986 (CA 8, 1994); Friedman, *The NLRB Suffers Institutional Amnesia: The* Paramax *Decision*, 44 LAB. L.J. 651 (1993).