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NORTH CAROLINA LAW REVIEW

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Volume 55  
Number 1 *Bicentennial Issue*

Article 18

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9-1-1976

# Labor Law -- Superseniority for Union Stewards Held a Violation of the National Labor Relations Act

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## Recommended Citation

Howard M. Kastrinsky, *Labor Law -- Superseniority for Union Stewards Held a Violation of the National Labor Relations Act*, 55 N.C. L. REV. 289 (1976).

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## Labor Law—Superseniority for Union Stewards Held a Violation of the National Labor Relations Act

Employee seniority has been recognized by Congress and the courts as a legitimate part of the industrial structure,<sup>1</sup> despite its well-publicized abuses.<sup>2</sup> A variation of the practice, commonly labelled superseniority, involves granting additional credits or top seniority to selected employees. When used in an unarbitrary, nondiscriminatory manner and as part of a legitimate employment arrangement, superseniority has been held to be a valid employment practice.<sup>3</sup> In *NLRB v. Milk Drivers & Dairy Employees Local 338 (Dairylea)*<sup>4</sup> the application of superseniority to a selected union representative was found to have unlawfully encouraged union membership and thus violated the National Labor Relations Act (the Act).<sup>5</sup> Theoretically, the analysis and rationale of *Dairylea* could be applied to preclude any job-related benefit granted to union representatives by an employer in the absence of business justifications. Employers<sup>6</sup> and labor organizations,<sup>7</sup> however, can minimize the impact of *Dairylea* with careful drafting of collective bargaining provisions and a modicum of recordkeeping to loosen the unlawful linkage between union membership and job benefits.

1. See, e.g., *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949). See also 42 U.S.C. § 2000e(h) (1970); 50 U.S.C. app. § 459 (1970). Seniority is regularly defined as the length of service that determines the relative equities and claims to jobs and prerogatives related to employment. For a discussion of seniority, see Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 196-99 (1975).

2. For attacks on employee seniority under the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1970), see *Barton Brands Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976); *Monolith Portland Cement Co.*, 94 N.L.R.B. 1358 (1951). For cases arising under the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C.), see *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

3. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

4. 531 F.2d 1162 (2d Cir. 1976). The case is popularly known as *Dairylea*, after the charged employer that did not appeal the Board's decision in 219 N.L.R.B. —, 89 L.R.R.M. 1737 (1975).

5. 29 U.S.C. §§ 141-187 (1970). 531 F.2d at 1166.

6. Section 2(2) of the Act defines an employer to include "any person acting as an agent of an employer, directly or indirectly . . ." 29 U.S.C. § 152(2) (1970).

7. Section 2(5) of the Act defines labor organizations as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1970).

In December, 1972, a highly profitable milk delivery route became vacant in the plant of Dairylea Cooperative, Inc. (the Employer). Rosengrandt, a union steward, and Daniels, an employee with twenty-four more years of service with the Employer than Rosengrandt, both applied for the job. The Employer was required by a collective bargaining agreement<sup>8</sup> to assign the job to the applicant with the greatest seniority. Since another provision of the contract designated the steward the "Senior Employee," the Employer awarded the job to Rosengrandt.

A charge was filed and a complaint issued by the National Labor Relations Board (the Board) against the Employer and Local 338<sup>9</sup> alleging unlawful encouragement of union membership in violation of sections 8(a)(1),<sup>10</sup> 8(a)(3),<sup>11</sup> 8(b)(1)(A),<sup>12</sup> and 8(b)(2)<sup>13</sup> of the Act resulting from the maintenance and enforcement of the collective bargaining agreement. The parties waived an evidentiary hearing and submitted the case on stipulations directly to the Board. The Board, however, refused to accept the stipulations and remanded the case for an evidentiary hearing before an administrative law judge to determine the purpose behind, operation of and justification for the superseniority clause.<sup>14</sup>

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8. The contract provision in question was also contained in collective bargaining agreements with Local 338 and seven other employers. The Employer and Local 338 had originally entered into a contract with this provision in 1937. The contract also contained a valid union security clause. 531 F.2d at 1164-65.

The agreement provided that the union steward be selected by Local 338 from the employees at the plant location and that "[t]he steward shall be considered the Senior employee in the craft in which he is employed." Dairylea Coop., Inc., 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1737 (1975). The parties conceded that this clause gave a steward top seniority with respect to layoff and recall and such contractual benefits as assignment of overtime, selection of vacation period and assignment of driver routes and other positions. 531 F.2d at 1164.

9. Milk Drivers and Dairy Employees, Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 531 F.2d at 1162.

10. 29 U.S.C. § 158(a)(1) (1970). This section states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of the Code] . . . ."

11. 29 U.S.C. § 158(a)(3) (1970). This section states in relevant part that "[i]t shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

12. 29 U.S.C. § 158(b)(1)(A) (1970). This section states in part that "[i]t shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of the Code] . . . ."

13. 29 U.S.C. § 158(b)(2) (1970). This section states in relevant part that "[i]t shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . ."

14. "The purpose of the remand . . . was, inter alia, to accord Respondent Union

Once again, the parties waived a hearing, stipulating that no evidence was available regarding the intent of the framers of the provision and resubmitted the case to the Board.

The Board en banc found that by maintaining and enforcing the superseniority clause and awarding the route to the steward instead of to the otherwise senior employee, the Employer had violated sections 8(a)(1) and 8(a)(3) of the Act and that Local 338 was guilty of violations of sections 8(b)(1)(A) and 8(b)(2).<sup>15</sup> It ordered both to refrain from enforcing such clauses in the future and to reimburse Daniels for sustained losses.<sup>16</sup> The Board determined that the clause gave unions a wide range of on-the-job benefits that could only be achieved by an employee who was a "good, enthusiastic unionist"<sup>17</sup> and thus illegally tied job rights and benefits to union activities. Therefore, the Board held that superseniority not limited on its face to layoff and recall was presumptively unlawful, with the party asserting its legality assuming the burden of proof.<sup>18</sup>

The Second Circuit Court of Appeals enforced the Board's order, finding violations of only sections 8(a)(1), 8(a)(3) and 8(b)(2) of the Act.<sup>19</sup> Recognizing the power of the Board as trier of fact to draw reasonable inferences from the evidence before it, the court sustained the conclusion that the disparate treatment accorded stewards and non-stewards as to on-the-job benefits aside from layoff and recall resulted in unlawful encouragement of union membership. Such activity fell within the prohibition of section 8(a)(3) whose scope encompasses not only actual discrimination that induces workers to join a union, but also conduct that encourages employees to become enthusiastic union members or merely to decide to support it, assist it or participate in

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or any of the other parties a full opportunity to establish a proper justification for the super seniority clauses here under attack." *Dairylya Coop., Inc.*, 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1739 n.9 (1975).

15. *Id.* at —, 89 L.R.R.M. at 1740. See notes 10-13 *supra* for the relevant text of these sections.

16. 219 N.L.R.B. at —, 89 L.R.R.M. at 1739.

17. *Id.* at —, 89 L.R.R.M. at 1738.

18. *Id.* at —, 89 L.R.R.M. at 1739. Member Fanning dissented and would have dismissed the complaint on the basis of *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521 (1949). He stated that the provision did encourage union stewardship, but he equated that with encouraging a public service. He believed that the general counsel had not met his burden of proof since the evidence in the case did not show that stewards were selected on any basis other than ability. *Dairylya Coop., Inc.*, 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1741 (1975).

19. *NLRB v. Milk Drivers & Dairy Employees Local 338*, 531 F.2d 1162, 1165 & n.3 (2d Cir. 1976).

its activities.<sup>20</sup> Noting the failure of Local 338 to present legitimate and substantial business justifications for superseniority,<sup>21</sup> the Second Circuit rejected the union's abandoned claim that these provisions encourage the service of qualified persons and suggested that alternatives to superseniority in the form of a union-paid salary or other non-job benefits be used to recruit able stewards.<sup>22</sup>

The launching point for cases arising under the Act is section 7, the heart of the Act, which recognizes the right of employees to "form, join, or assist labor organizations, . . . [or] refrain from any or all of such activities . . . ."<sup>23</sup> It is an unfair labor practice for an employer or labor organization to restrain or coerce employees in the exercise of their section 7 rights to engage or not to engage in concerted activities.<sup>24</sup>

A provision contained in a collective bargaining agreement is not sacrosanct simply because it has been included in the contract. If it concerns a condition of employment, such as seniority, it is required to conform to the provisions of the Act.<sup>25</sup>

In *Radio Officers' Union v. NLRB*,<sup>26</sup> the Supreme Court heard three cases dealing with the issue of unlawful encouragement of union activity. In the first instance, the union had caused an employer to reduce an employee's seniority for delinquency in paying dues. In the second, the union had suspended an employee for "bumping" a fellow employee and taking a job without its clearance. The third case involved an employer who granted retroactive wage increases and vacation payments solely to members of the union. Finding violations of the Act in all three cases, the Supreme Court recognized that "[i]t is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for purposes of violations of § 8(a)(3)."<sup>27</sup> The Court further observed that no specific proof of unlawful intent need be shown so long as the natural and foreseeable conse-

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20. *Id.* at 1165; see *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-42 (1954).

21. 531 F.2d at 1166 (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

22. 531 F.2d at 1166.

23. 29 U.S.C. § 157 (1970).

24. *Id.* §§ 158(a)(1), (b)(1)(A).

25. *E.g.*, *United Steelworkers Local 1070*, 171 N.L.R.B. 945, 946 (1968).

26. 347 U.S. 17 (1954).

27. *Id.* at 51.

quences of discriminatory conduct serve to encourage or discourage union membership.<sup>28</sup>

In *Local 357, International Brotherhood of Teamsters v. NLRB*,<sup>29</sup> the Supreme Court limited *Radio Officers'* by rejecting the Board's contention that union hiring halls were per se unlawful. Although the very existence of hiring halls might encourage union membership, the Court determined that the Act was intended to ban only specific encouragement brought about by discrimination and not the encouragement offered by a negotiated plan that was nondiscriminatory on its face.<sup>30</sup>

Thereafter, in cases applying *Radio Officers'* as modified by *Local 357*, it was held that the insistence of a union that an employer reduce the seniority of an employee-union member because he had been delinquent in paying his dues unlawfully strengthened the union's control of its members and encouraged nonmembers to join, in violation of sections 8(a)(3) and 8(b)(2).<sup>31</sup> In other cases, the union's insistence that the employer discharge all of its employees and hire new ones through the union's hiring hall as a precondition to signing a contract<sup>32</sup> and the refusal to refer a member<sup>33</sup> were found to be violations of the Act because they involved the union's influence over employees and its power to affect their livelihood. Such influence, in the absence of any union contention that its actions were necessary to represent its members effectively violated the Act.<sup>34</sup>

*Local 357* indicated that not all encouragement of union membership constitutes a violation of sections 8(a)(3) and 8(b)(2).<sup>35</sup> Furthermore, in *NLRB v. Great Dane Trailers*,<sup>36</sup> the Supreme Court's holding indicated that presumptive invalidity or unlawfulness under the Act could be rebutted with evidence of a legitimate and substantial

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28. *Id.* at 45; see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1944).

29. 365 U.S. 667 (1961).

30. *Id.* at 675-76.

31. *E.g.*, *Seafarers Int'l Union*, 202 N.L.R.B. 657, 659 n.13 (1973), *enforced*, 496 F.2d 1363 (5th Cir. 1974).

32. *Austin & Wolfe Refrig., Air Cond. & Heating, Inc.*, 202 N.L.R.B. 135 (1973). *Local 357* did not sanction this use of hiring halls.

33. *Local 1437, United Bhd. of Carpenters*, 210 N.L.R.B. 359 (1974) (other employees' perception of the union's arbitrary exercise of power necessarily encouraged their union membership).

34. *Operating Eng'rs Local 18*, 204 N.L.R.B. 681 (1973), *remanded per curiam*, 496 F.2d 1308 (6th Cir. 1974), *aff'd on rehearing*, 90 L.R.R.M. 1478 (1975) (members' failure to pay a fine imposed for disrupting a hiring hall and internal election did not justify removal from seniority list).

35. 365 U.S. at 675-76.

36. 388 U.S. 26 (1967).

business justification in the absence of unlawful intent.<sup>37</sup> In *Great Dane* the Court held that the actions of an employer who had refused to pay accrued vacation benefits to striking employees under a terminated collective bargaining agreement while paying them to replacement workers, returning strikers and nonstrikers violated section 8(a)(3).<sup>38</sup> *Great Dane* is equally applicable to a situation that involves violations of both sections 8(a)(3) and 8(b)(2). It merely restates the Board's earlier policy of accepting union "interference" with the employment relationship, if the union had a business or collective bargaining purpose for all represented employees.<sup>39</sup>

On the authority of *Great Dane*, the Supreme Court recognized the union's traditional function of serving the economic interests of the bargaining unit as a whole and upheld a union fine levelled against a member who had exceeded a piecework ceiling.<sup>40</sup> Similarly, in another case, the Board found that the need for a union to perform its tasks more effectively for the benefit of all permitted an employer to compensate union members for time spent on union work.<sup>41</sup>

The Second Circuit's insistence that unions reward prospective stewards with only non-job incentives leaves the door open for future attacks on superseniority clauses that are in any manner job-related. The seniority concept,<sup>42</sup> recognized by Congress,<sup>43</sup> is a legitimate union interest that ought not hastily be deemed discriminatory. Not even clauses that offer stewards protection from layoff, however, are immune from attack on the basis of *Dairylea*. But these clauses have a justifiable use.<sup>44</sup> As a term or condition of employment, seniority

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37. *Id.* at 27. Prior to *Great Dane*, the Board had upheld a union's solicitation of the discharge of an employee who had refused a night job in violation of the contract. *Houston Typographical Union No. 87*, 145 N.L.R.B. 1657 (1964). It also upheld the fine of a union member who had not accepted a contractual subsistence allowance. *Millwrights' Local 1102*, 144 N.L.R.B. 798 (1964).

38. 388 U.S. at 27.

39. *Austin & Wolfe Refrig., Air Cond. & Heating, Inc.*, 202 N.L.R.B. 135, 137 (1973) (Miller, Chairman, dissenting).

40. *Scofield v. NLRB*, 394 U.S. 423, 431-36 (1969).

41. *Sunnen Prod., Inc.*, 189 N.L.R.B. 826 (1971); see *IBEW Local 592*, 92 L.R.R.M. 1159 (1976) (union refused to refer member who had not passed union-administered test); *International Ass'n of Machinists Lodge 68*, 205 N.L.R.B. 132 (1973), *vacated*, 503 F.2d 1044 (9th Cir. 1975) (union reduced seniority standing of employee on extended leave of absence); *Millwright Local 1080*, 201 N.L.R.B. 882 (1973) (union refused to refer self-employed member).

42. See note 1 *supra*.

43. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339-41 (1953); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 527 (1949).

44. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 528 (1949); accord, *Dairylea Coop., Inc.*, 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1738 (1973).

is tailored to each shop and it is only reasonable to assume that variations in seniority practices will develop in individual plants.<sup>45</sup> The union, meanwhile, has a duty of fair representation of all unit employees.<sup>46</sup> It also has the obligation to see that the contract is preserved as part of the continuous collective bargaining process.<sup>47</sup>

In order to preserve its vitality, the union needs continuity of its officials within their jobs. Without the assurance that its elected representatives will be present to maintain the collective bargaining agreement as a living document and to see that grievances are promptly and properly adjusted at their source,<sup>48</sup> the union loses legitimacy in the eyes of the employer and the support of employees who question the validity of their representation. The Supreme Court recognized the validity of this union interest in *Aeronautical Industrial District Lodge 727 v. Campbell*<sup>49</sup> and *Ford Motor Co. v. Huffman*<sup>50</sup> and allowed specific superseniority for union chairmen and stewards despite a provision of the Selective Service Act that mandated restoration of seniority for returning veterans of World War II.<sup>51</sup> While neither of these cases arose under the Act, the Board has sanctioned seniority variations in other cases, including "superseniority" for stewards as an exercise of a union's discretion.<sup>52</sup>

45. See, e.g., *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953).

46. *Id.* at 337; see *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-99 (1944). See also IATSE Local 659, 197 N.L.R.B. 1187 (1972), *enforced per curiam*, 83 L.R.R.M. 2527 (D.C. Cir. 1973); *Miranda Fuel Co.*, 140 N.L.R.B. 181, *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

47. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 528 (1949).

48. See *id.* at 527.

49. 337 U.S. 521, 528 (1949); see text accompanying notes 1, 43 & 44 *supra*.

50. 345 U.S. 330 (1953).

51. *Id.* at 342; *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. at 529 (1949). The Act provided:

SEC. 8. . . .

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [of satisfactory completion of his period of training and service], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . . .

Selective Training and Service Act of 1940, ch. 720, § 8, 54 Stat. 890 (current version at 50 U.S.C. app. § 459(b) (1970)).

52. See, e.g., *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962), *enforcement denied on other grounds*, 320 F.2d 615 (3d Cir. 1963). See generally *Barton Brands*

Although *Ford* and *Campbell* involved limited exceptions to plant-wide seniority rules for the limited purpose of protection against layoff and are therefore distinguishable from the more general clauses seen in *Dairylea*, their absence from the Second Circuit's consideration can be read to put into question the concept of limited superseniority for union stewards. Provision of employment is the foremost job-related benefit. Protection against layoff and the right of first recall are essential to maintain the steward's representation of the bargaining unit.

The Second Circuit implied that non-job benefits and union-paid salaries to attract qualified stewards constitute the only permissible alternatives not violative of the Act.<sup>53</sup> The suggestion that the union pay its stewards a salary in lieu of contractual benefits may prove to be unrealistic. Smaller locals are often financially pressed and the burden of paying stewards could possibly bankrupt them. In larger employment situations, the sheer number of stewards and the cost of a union salary for each of these workers could be prohibitive. On the other hand, the employer, with greater resources and control over terms and conditions of employment, receives benefits from the service of union stewards.<sup>54</sup> It would be more in keeping with the purpose of the Act to maintain industrial stability<sup>55</sup> to allow employees and labor organizations to devise their own ways of rewarding stewards, since in theory, at least, stewards aid both parties.<sup>56</sup>

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Ltd., 213 N.L.R.B. 640, 645 (1974) (Jenkins dissenting); *Campbell Sixty Six Express, Inc.*, 200 N.L.R.B. 1126 (1972); *Wanzer Dairy Co.*, 154 N.L.R.B. 782 (1965); *Armored Car Chauffeurs & Guards Local 820*, 145 N.L.R.B. 225 (1963); *Florida Power & Light Co.*, 126 N.L.R.B. 967 (1960); *Armour & Co.*, 123 N.L.R.B. 1157 (1959).  
53. 531 F.2d at 1166.

54. These employees, commonly labelled grievance chairmen or shop stewards, provide a service to the bargaining unit, as well as to the employer and to the upholding of national labor policies, by promoting industrial stability and certainty and the speedy resolution of disputes that might otherwise cause work delays. Therefore, for them, superseniority should not be denied. See *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 528-29 n.5 (1949).

55. See *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960).

56. In *Dairylea*, the collective bargaining agreement contained a lawful union-security clause that required all employees, after a period of time, to become union members. There still exists, however, the possibility in situations without such a clause that there may be senior non-union employees who will suffer in comparison to "super-senior" stewards. In those instances, the argument can be made that even the presence of superseniority for union stewards limited to layoff and recall is violative of the Act since it would discriminate against non-union employees.

This disingenuous argument is appealing, no doubt, but in balance, superseniority would still prevail. The damage to the interests of employees who exercise their statutorily protected right to refrain from union membership is outweighed by the benefits to the unit, the employer and the national economy provided by collective bargaining that were recognized initially by the framers of the National Labor Relations Act

Employers and labor organizations should again note that Local 338 "was accorded ample opportunity to introduce evidence of its steward selection policies to rebut the Board's conclusion"<sup>57</sup> of presumptive invalidity of the contract clause but waived opportunities for evidentiary hearings. On appeal, it asserted its collective bargaining agreement as the sole justification for the superseniority clause and presented no evidence of any other legitimate or substantial business reason.<sup>58</sup> Thus, the Second Circuit merely enforced an order based on prima facie violations of the Act.<sup>59</sup>

In the face of the Board's persistent refusal to exercise its rule-making powers,<sup>60</sup> the application of *Dairylea* and with it, the fate of superseniority, will rest largely in the hands of the Board's general counsel. He is given the statutory authority to decide whether to issue a complaint following the filing of each charge with the Board.<sup>61</sup> In unionized industries, seniority is most likely to be a deeply ingrained practice, so that when employer and union representatives sit down to negotiate or renegotiate an agreement, they should be mindful of the general counsel's interpretation of superseniority in order to diminish the likelihood of costly future proceedings. This vigilance in adjusting superseniority clauses should insulate them from future attack by the Board.

Thus, the practical impact of *Dairylea* is greatest at the contract negotiation level.<sup>62</sup> The parties will seek to have seniority arrangements conform to the bounds of the law, with the slightest possible disruption of established practices. In drafting a superseniority clause the parties will have to stay within two basic strictures. First, a nexus between collective bargaining and the employee receiving the rewards

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and the courts for 40 years thereafter. If the benefit afforded stewards is necessary for the proper carrying out of their responsibilities as stewards, which in turn is necessary in the application of the collective bargaining agreements, then this countervailing consideration should prevail.

57. 531 F.2d at 1166.

58. See generally text accompanying note 25 *supra*.

59. 531 F.2d at 1167.

60. The Board has continuously refrained from exercising its rulemaking powers under section 6 of the Act, 29 U.S.C. § 156 (1970). See, e.g., *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

61. 29 U.S.C. § 153(d) (1970). This section provides that the general counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160, and in respect of the prosecution of such complaints before the Board . . . ."

62. If the Supreme Court hears *Dairylea*, its standard of review may be limited to whether or not the Board could reasonably have inferred that the superseniority clause spurred workers to become good unionists and was thus a violation of the Act.

should initially be established. While *Campbell* spoke of a "benefit to the whole Union,"<sup>63</sup> decisions under the Act emphasize that a labor organization, as the representative of all employees, union and non-union, must make its benefits available to every member of the bargaining unit.<sup>64</sup> The employee favorably affected by additional seniority must be in a position to aid the entire unit. Such employees include primarily officials who see that grievances are promptly heard and adjusted, or those who have the duty to see that the collective bargaining agreement is upheld. These individuals provide services to both the bargaining unit and the employer as well as promote national labor policies. Therefore, superseniority for them should not be denied.<sup>65</sup>

To withstand attack, the benefits that are provided appropriate officials must also be limited in scope. Top seniority for all benefits connected to the job cannot be upheld in most instances since it attaches union membership to the terms and conditions of employment in too forceful a manner.<sup>66</sup> In the extraordinary instance where it can be documented that superseniority for unlimited purposes is the only means available to attract qualified personnel, and then, only after repeated failure with other inducements, the Board will probably give its approval to the arrangement.<sup>67</sup> Despite the Second Circuit's oblique reference to layoff and recall provisions, it must be noted that the general counsel and Board share the position that such limited superseniority for similar purposes is not contrary to the policies of the Act.<sup>68</sup> Thirty years of precedent appear to support that proposition and it would unfairly disrupt most industrial settings to rule now that this benefit violates the Act.<sup>69</sup>

If charges are filed, the burden on employers and unions to justify superseniority is not heavy. A minimum of notes and records need

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63. 337 U.S. at 527 (emphasis added).

64. *E.g.*, *Radio Officers' Union v. NLRB*, 347 U.S. 17, 47 (1954).

65. *See Dairylea Coop., Inc.*, 219 N.L.R.B. —, 89 L.R.R.M. 1737 (1975). Union officials who do not administer the collective bargaining agreement and those who take part in contract negotiations only at specified intervals will be harder to justify as integral links to the unit. *Id.* at —, 89 L.R.R.M. at 1738.

66. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-42 (1954).

67. *Dairylea Coop., Inc.*, 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1738 (1975) (dictum).

68. *Compare id. with NLRB v. Milk Drivers & Dairy Employees Local 338*, 531 F.2d 1162, 1166 n.7 (1976). Both the general counsel and the Board appear to agree that protection from layoff is justified in a union's need for continuity in order to provide substantive representation to all unit employees.

69. *Dairylea Coop., Inc.*, 219 N.L.R.B. —, —, 89 L.R.R.M. 1737, 1738 n.6 (1975) (citing the "relevance of the Court's reasoning" in *Campbell*).

to be kept to provide the basis to document a *Great Dane* justification. The Board has flexibly examined asserted union justifications in prior 8(b)(1)(A) and 8(b)(2) cases and so long as the union's reasons for a superseniority clause are not to avoid or circumvent the impact of another statute<sup>70</sup> or are not based on suspect classifications such as alienage,<sup>71</sup> race<sup>72</sup> or union membership,<sup>73</sup> they should suffice, if properly documented.

In *Dairyalea*, the Second Circuit held that superseniority clauses for union stewards that apply for unlimited purposes on the job fly in the face of the policy of section 7 of the Act by tying employment benefits to union activity and unlawfully encouraging union membership. The decision involved, however, the unlikely prospect of a union that did not assert any justification for its questioned superseniority clause. If it had asserted that such a clause was necessary to enable it to represent the bargaining unit better, the union would have stood a greater chance of succeeding. The lack of justification for the contractual provision allowed the Second Circuit not only to declare it presumptively unlawful, but also impliedly to threaten even the limited application of superseniority to any union representative. This threat, however, is diminished by the court's failure to deal with prior cases that had sanctioned a limited use of superseniority. This limitation, coupled with the relative ease with which the court's presumption can be rebutted, and buttressed by the practicalities of the Act's enforcement, may mean that *Dairyalea* will provide little, if any, threat to traditional industrial practices.

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70. *Austin & Wolfe Refrig., Air Cond. & Heating, Inc.*, 202 N.L.R.B. 135 (1973); *American News Co.*, 55 N.L.R.B. 1302 (1944).

71. *NLRB v. Local 1581, ILA*, 489 F.2d 635 (5th Cir. 1974), *cert. denied*, 419 U.S. 1040 (1974), *enforcing* 196 N.L.R.B. 1186 (1972).

72. *See Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *NLRB v. Local 1367, ILA*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

73. *See Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967); *Local 631, International Bhd. of Teamsters*, 213 N.L.R.B. 600 (1974); *Boilermakers Local 169*, 209 N.L.R.B. 140 (1974); *Local 167, Progressive Mine Workers*, 173 N.L.R.B. 1237, *enforced*, 422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970); *Local 17, ILA*, 173 N.L.R.B. 594, *enforced per curiam*, 434 F.2d 620 (9th Cir. 1970); *Local 383, Lathers*, 176 N.L.R.B. 410 (1969).