

**International Harvester Company and Edward Roberts and Carroll Childress**

**United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO, and its affiliated Local Union No. 988 and Edward Roberts and Carroll Childress.** Cases 26-CA-9174, 26-CA-9312, 26-CB-1773, and 26-CB-1799

16 February 1984

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND DENNIS

On 30 August 1982 Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent Unions filed cross-exceptions and a supporting brief, the General Counsel filed a brief in answer to the Respondent Unions' cross-exceptions, and the General Counsel moved that the Board reopen the record to receive a stipulation from the Respondent Unions and the Respondent Employer concerning certain events which transpired since the conclusion of the hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent Employer violated Section 8(a)(3) and (1) of the Act and that the Respondent Unions violated Section 8(b)(1)(A) and (2) of the Act by enforcing a provision in their collective-bargaining agreement, and supplements thereto, which accords preferred seniority status for layoff purposes to certain local union officers who do not perform steward-like functions in their official capacities. As set forth in the judge's decision, the disputed union officers—the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees—perform a variety of functions relating to the internal affairs of the Local. Each of these officers performs his official duties outside the workplace during nonworking hours. None of them is involved with the administration of the collective-bargaining agreement or grievance handling.

Based on these findings, and applying the tests set forth in *American Can Co. (II)*<sup>1</sup> and *McQuay-*

<sup>1</sup> 244 NLRB 736 (1979).

*Norris, Inc.*,<sup>2</sup> the judge concluded that, by permitting certain of these officers to bump other employees having greater length of service with the Employer, the Respondents unlawfully encouraged union activity. Specifically, the judge determined that the financial secretary, Hutchins, the guide, Howard, and three trustees, Skinner, Lee, and Houpt, each exercised superseniority resulting in the displacement of certain fellow employees from their jobs. He found no evidence that either the recording secretary or the sergeant-at-arms exercised superseniority and, therefore, excluded them from further findings and conclusions. He limited his findings of violations to the application or enforcement of the preferred seniority agreements and only insofar as such application or enforcement inured to the benefit of the officers identified above to the detriment of certain named fellow employees.

The General Counsel has excepted to the judge's failure to find that the Respondents' maintenance of such preferred seniority agreements violates the Act, as well as to his restriction of the application or enforcement violations to identified persons occupying union offices. The General Counsel also excepts to certain deficiencies in the remedial portion of the decision. We find merit in the General Counsel's position.

In our recent decision in *Gulton Electro-Voice*<sup>3</sup> we reviewed the *Dairylea*<sup>4</sup> line of cases and concluded that "[w]e will find unlawful those grants of superseniority extending beyond those employees responsible for grievance processing and on-the-job contract administration. We will find lawful only those superseniority provisions limited to employees who, as agents of the union, must be on the job to accomplish their duties directly related to administering the collective-bargaining agreement."<sup>5</sup> We find that it is not only the application of overly inclusive superseniority provisions which contravenes the Act, but also the very existence of such agreements which discriminates against employees and infringes upon their right to refrain from union activities. Accordingly, in view of the judge's findings that all five disputed local union officers deal only with internal union matters and not with contract administration, we conclude that the maintenance of such preferred seniority provisions as to all five disputed officers also violates the Act.

Further, we find that the judge unduly restricted his findings to the exercise of superseniority by cer-

<sup>2</sup> 258 NLRB 1397 (1981).

<sup>3</sup> 266 NLRB 406 (1983).

<sup>4</sup> *Dairylea Cooperative*, 219 NLRB 656 (1975), *enfd. sub nom. NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976).

<sup>5</sup> *Gulton Electro-Voice*, *supra* at 409.

tain officeholders and limited the remedial portion of his decision to persons laid off or displaced by those specific individuals. While we do not dispute the accuracy of his findings, we believe that the violation extends to any individual occupying any of the disputed positions during the relevant 10(b) period and that the identification of such individuals as well as those who suffered displacement as a result of their superseniority is a matter more appropriately resolved during the compliance phase of this proceeding. We have modified the conclusions, recommended Order, and notice in accordance with our findings.

Finally, the General Counsel moved to include in the record a posthearing stipulation by the parties. The motion is hereby granted.

#### CONCLUSIONS OF LAW

1. The Respondent Employer, International Harvester Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Unions, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO and its affiliated Local Union No. 988 are labor organizations within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a seniority clause in their collective-bargaining agreement and supplements thereto according to the Respondent Local Union's financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees superseniority, the Respondent Employer and the Respondent Unions have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2) of the Act, respectively. By discriminating against unit employees when the Respondent Employer laid off or otherwise displaced employees who would not have been affected if the collective-bargaining agreement and supplements thereto had not accorded the above-listed officers superseniority, the Respondents engaged in further violations of the foregoing sections of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the superseniority clauses here in dispute are unlawful and we shall therefore

order that Respondent Unions cease and desist from maintaining and enforcing such clauses in their bargaining agreement and supplements thereto with the Respondent Employer. We shall also order that the Respondent Employer cease and desist from maintaining and enforcing such clauses in its bargaining agreement and supplements thereto with the Respondent Unions. We have also found that the unlawful superseniority provisions were so applied as to lay off and/or displace employees who would not have been laid off or displaced from their jobs but for the illegal discrimination depriving them of seniority. Consequently, we shall order that the Respondent Employer offer to reinstate any employees who would not have been laid off or displaced from their jobs but for the unlawful assignment of superseniority to the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees and that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them.

We shall order that the Respondent Employer expunge from its files any reference to the unlawful layoffs and displacements, and notify in writing the affected employees that this has been done and that the unlawful layoffs and displacements will not be used as a basis for future personnel actions against them. We shall further order that the Respondent Unions notify in writing both the Respondent Employer and the affected employees that they do not object to the employees' reinstatement to the positions they held prior to the enforcement of the superseniority clause against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The Respondent Employer's backpay obligation shall run from the effective date of the discrimination against affected unit employees to the time it makes such recall offers,<sup>6</sup> while the Respondent Unions' obligation shall run from such effective date to 5 days after the date of their notification to the Respondent Employer that they have no objection to the recall of unit employees affected by the unlawful grant of superseniority to union officers.

Finally, we shall order that the Respondent Employer cease and desist from in any like or related manner interfering with, restraining, or coercing its

<sup>6</sup> We note that after the close of the hearing the parties stipulated that the Employer had notified the Unions that it intended to close its Memphis, Tennessee facility. In the event that such closure has occurred we leave the determination of backpay and recall rights for compliance.

employees in the exercise of rights guaranteed by Section 7 of the Act, and that the Respondent Unions likewise cease and desist from restraining or coercing employees they represent exercising those same rights.

### ORDER

The National Labor Relations Board orders that  
 A. The Respondent Employer, International Harvester Company, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing collective-bargaining provisions with the Respondent Unions, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO and its affiliated Local Union No. 988 according to the Local Union's financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees super-seniority.

(b) Discriminating against any employees by laying them off or otherwise displacing them from their jobs instead of the Local Union's above-listed officers when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Unions make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy," and offer to reinstate any employees who would not have been laid off or otherwise displaced from their jobs but for the unlawful assignment of super-seniority to the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the layoff or job displacement of any employees affected by the super-seniority as applied to the Local Union's above-listed officers and notify them in

writing that this has been done and that evidence of the unlawful layoff or displacement will not be used as a basis for future personnel actions against them.

(d) Post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix A."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting by the Respondent Unions.

(g) Notify the Regional Director in writing, within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. The Respondent Unions, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO and its affiliated Local Union No. 988, Memphis, Tennessee, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or otherwise giving effect to those clauses in their collective-bargaining agreement and supplements thereto with Respondent Employer, International Harvester Company, according to the Local Union's financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees super-seniority with respect to layoff and recall.

(b) Causing or attempting to cause the Respondent Employer to discriminate against employees in violation of Section 8(a)(3) and (1) of the Act.

(c) In any like or related manner restraining or coercing the employees of the Respondent Employer in the exercise of their rights protected by Section 7 of the Act.

<sup>7</sup> 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."

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Employer make any unit employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, such lost earnings to be determined in the manner set forth in the section of this decision entitled "The Remedy."

(b) Notify the Respondent Employer and the affected employees in writing that they have no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off or displaced from their jobs.

(c) Post at their offices and meeting halls used by or frequented by their members and employees they represent at the Respondent Employer's Memphis, Tennessee, facility copies of the attached notice marked "Appendix B."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, shall be posted by the Respondent Unions, after being signed by the Respondent Unions' authorized representatives, immediately upon receipt. The notices shall be maintained by the Respondent Unions for 60 consecutive days after posting in conspicuous places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by the Respondent Unions to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in paragraph B,2 (c), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(e) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for posting by the Respondent Employer.

(f) Notify the Regional Director in writing, within 20 days from the date of this Order what steps the Respondent Unions have taken to comply.

<sup>8</sup> See fn. 8, supra.

#### APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with United

Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO and its affiliated Local Union No. 988 according to the Local Union's financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees superseniority with respect to layoff and recall.

WE WILL NOT discriminate against any employees by laying them off or otherwise displacing them from their jobs instead of the Local Union's financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees when such union officials do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL offer to those employees who were discriminatorily laid off or displaced from their jobs instead of the Local Union's above-listed officers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL expunge from our files any references to the layoff or displacement of any employees affected by the superseniority as applied to the Local Union's above-listed officers, and WE WILL notify them in writing that this has been done and that evidence of the unlawful layoff or displacement will not be used as a basis for future personnel actions against them.

WE WILL jointly and severally with the Unions make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

#### INTERNATIONAL HARVESTER COMPANY

#### APPENDIX B

NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement or supplements thereto with International Harvester Company according to the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and trustees superseniority with respect to layoff and recall.

WE WILL NOT cause or attempt to cause International Harvester Company to discriminate against any employees by requiring that the collective-bar-

gaining agreement or supplements thereto be enforced so as to lay them off or otherwise displace them from their jobs instead of the above-listed officers when such officers do not in fact have top seniority in terms of length of employment.

WE WILL notify International Harvester Company and the affected employees that we have no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off or displaced from their jobs.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL jointly and severally with International Harvester Company make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

UNITED AUTOMOBILE, AEROSPACE &  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, UAW, AFL-CIO,  
LOCAL 988

UNITED AUTOMOBILE, AEROSPACE &  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, UAW, AFL-CIO  
AND ITS AFFILIATED LOCAL UNION  
No. 988

## DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge: These consolidated cases were heard by me on April 19 and 20, 1982, in Memphis, Tennessee. The hearing was held pursuant to complaints consolidated by the Regional Director for Region 26 of the National Labor Relations Board on February 18, 1982. The complaint as amended in Cases 26-CA-9174 and 26-CB-1773 is based on charges filed by Edward Roberts, an individual, on July 2, 1981. The complaint as amended in Case 26-CA-9312 is based on a charge filed by Carroll Childress, an individual, on September 14, 1981. The complaint as amended in Case 26-CB-1799 is based on a charge filed by Carroll Childress, an individual, on September 15, 1981, and on a first amended charge filed by Childress on February 16, 1982. The consolidated complaint as amended alleges violations of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter referred to as the Act) by Respondent International Harvester Company (hereinafter referred to as the Employer) and alleges violations of Section 8(b)(1)(A) and (2) of the Act by Respondent United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO (hereinafter referred to as the International Union) and by Respondent Local Union No. 988. The International Union and Local Union No. 988 are separately alleged as the Respondents in this case. The consolidated com-

plaints as amended are joined by the answer of the Employer and by the separate answers of the International Union and Local Union No. 988 wherein each Respondent denies the commission of the alleged unfair labor practices.

Upon the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by the General Counsel and the Respondent International Union, I make the following

### FINDINGS OF FACT AND ANALYSIS<sup>1</sup>

#### I. JURISDICTION

The complaint alleges, the Respondents admit, and I find that the Respondent Employer is a corporation with an office and place of business in Memphis, Tennessee, and has been engaged in the manufacture of agricultural equipment, that it annually in the course and conduct of its business operations sold and shipped from its Memphis, Tennessee facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Tennessee and annually purchased and received at said facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Tennessee and that said Respondent Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. STATUS OF LABOR ORGANIZATION

The complaint alleges, the Respondents admit, and I find that the Unions are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background and Statement of Facts and Issues

This case involves the maintenance and enforcement of a preferred seniority clause (also referred to as superseniority) in a collective-bargaining agreement between the Respondent Employer, the Respondent International Union, and Respondent Local Union No. 988 for the period from May 2, 1980, to October 1, 1982 (hereinafter referred to as the MLC, the main labor contract—G.C. Exh. 2(a)) covering a production and maintenance unit of employees.<sup>2</sup> The agreement provides with respect to the operation of preferred seniority in article XVI, section 14, subsections (a), (b), and (c) as follows:

<sup>1</sup> The following includes a composite of the testimony of the witnesses at the hearing which testimony is credited, except insofar as specific credibility resolutions are made.

<sup>2</sup> The admitted appropriate unit is "All production and maintenance employees of the Respondent Employer at its Memphis, Tennessee, Works, but excluding pattern makers, pattern makers apprentices and pattern repairmen (flaskmen), and also excluding all salaried employees, factory clerical employees, office clerical employees, plant protection employees, professional employees, foremen, assistant foremen, and all other supervisors as defined in Section 2(11) of the Act, as amended, and as certified by the National Labor Relations Board."

## Section 14.

(a) It is agreed that thirteen (13) designated Local Union Officers, the recognized Committeemen and the recognized Stewards shall be accorded a preferred seniority status subject to the provisions hereinafter stated. In the event the working force increases or decreases substantially from its present level, the number of Local Union Officers, Committeemen and Stewards who shall have preferred seniority status may be increased or decreased by agreement of the Company and the Local Union.

(b) The right to designate the persons who shall have such preferred seniority status shall be vested in the Union, provided that the list at all times shall include only employes in office and whose services are reasonably necessary for the conduct of the Local Union's business. Whenever the Local Union desires to substitute another person for one then having preferred seniority, it shall notify the Company in writing and thereafter the person whose preferred seniority has ceased shall resume his regular seniority. Preferred seniority status for Stewards shall be restricted to the area he represents.

(c) Preferred seniority shall not be used for transfer or promotion to an open job. In case of request for transfer or promotion only actual seniority shall be taken into consideration, except that preferred seniority shall be used in re-transferring to a former job so that a Local Union official may return to this status after a curtailment in force has taken place.

Additionally, there is a "Supplemental Agreement On Seniority" (G.C. Exh. 2(b)) and a September 25, 1956, letter of agreement (G.C. Exh. 2(c)) which sets out a "Procedure For Placing Union Officers, Committeemen Or Stewards In Skilled Trades Department At Time Of Curtailment." Similar clauses and agreements between the Respondent Employer and the Respondent Unions have been in force since at least 1950. These agreements provide for preferred or superseniority status to be accorded to local union officers, committeemen, and stewards. Preferred seniority status is restricted to situations involving reduction in force or curtailment of employees by the Employer and may not be utilized for transfers or promotional bidding purposes. In January 1981 there were approximately 1760 employees in the production and maintenance operation of the Employer's Memphis facility. This number had been reduced to 670 employees by the date of this hearing (April 19, 1982) and several of Local No. 988's union officers had utilized their preferred seniority to avoid their own displacement or layoff, thus bumping other employees with greater "natural seniority" (length of service with the Employer). Union officers are entitled to exercise preferred seniority plantwide whereas committeemen are restricted to zones made up of arbitrarily selected departments and stewards are restricted to departments. In the course of this process a number of employees, many of whom were not yet determined at the time of the hearing, had been displaced as a result of the chain of events initiated therefrom and the Employer had made layoffs, demotions, and effected

the displacements of employees who had greater natural seniority than those of certain of the union officers who exercised their preferred seniority in accordance with the preferred (superseniority) provisions (G.C. Exh. 4).

The complaint alleges and the General Counsel contends that the maintenance of the preferred seniority clause in these agreements and the enforcement thereof by the Respondents International and Local Union No. 988 are violative of Section 8(b)(1)(A) and (2) of the Act and that the maintenance of the clause and granting of preferred seniority by the Respondent Employer are violative of Section 8(a)(1) and (3) of the Act. The General Counsel challenges the granting of preferred seniority to specific Local Union No. 988 officers: the financial secretary-treasurer, the recording secretary, the guide, the sergeant-at-arms, and three trustees, but does not contend that the granting of preferred seniority to committeemen, stewards, or the president and vice president of the Local by the maintenance and operation of these clauses is unlawful. The General Counsel relies on Board cases which it contends hold that preferred seniority must be restricted to those union officers and representatives who represent employees and deal directly with management on plant property during working hours in the presentation of grievances to employers and who are involved in the day-to-day administration of the labor agreement. The General Counsel contends that the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and the three trustees do not meet this test but rather deal with internal union matters. The Respondent Unions contend that the complaint is barred by Section 10(b) of the Act as the agreements were executed prior to 6 months preceding the filing of the charge and are presumptively lawful on their face, and that subsequent events (the reduction in force) do not make a presumptively lawful contract clause and/or the exercise thereof unlawful. The Respondent Unions also contend that the disputed officers are essential to the effective representation of the union members, that, although they may not be designated to deal directly with the employer on plant property during working hours in the processing of grievances and/or the administration of the labor agreement between the Unions and the Employer, they are called upon by employees in the plant to answer questions concerning grievances and other matters and keep them advised of contract negotiations and other union related business, and that their participation in internal union affairs is essential to the effective and fair representation of the employees. The union officers and their tenure as such in question are:

Jack Hutchins—Fin Sec-Treas—1/1/81 and continuing

Larry Smith—Sgt-at-Arms—1/1/81 to 6/10/81

Gary Reddin—Sgt-at-Arms—6/10/81 and continuing

A. A. Shankle—Guide—1/1/81 to 6/10/81

Ricky D. Howard—Guide—6/10/81 and continuing

Don Carter—Trustee—1/1/81 to 6/10/81

Wm. A. Carl Lee—Trustee—6/10/81 and continuing

Ross W. Houpt—Trustee—1/1/81 and continuing

Earl Skinner—Trustee—1/1/81 and continuing  
C. A. Hill—Recording Sec—1/1/81 and continuing

The evidence as developed at the hearing demonstrated and I find that the disputed officers are engaged in their official capacities in the internal affairs of Local Union No. 988 and do not serve as stewards or engage in the administration of the labor agreement at the Employer's premises during the hours of their employment. In some instances, individual officers served as stewards as well and engaged in the processing of grievances in their role as stewards. Their duties are outlined in the International Union's constitution (G.C. Exh. 5). Thus, although these officers serve an important role in the internal affairs of the Unions, they do not serve as stewards in their capacity as union officers and do not deal directly with the Employer in the administration of the collective-bargaining agreement. Each of these officers performs his official union duties away from the plant and during non-working hours. Although there is some minimal contact with the employer (i.e., Financial Secretary-Treasurer Jack Hutchins picked up a listing of employees for union dues-deduction purposes from the Employer's premises), these union officers did not perform their official duties on the Employer's property during working hours or otherwise directly represent employees before the Employer. Although there was considerable testimony that these officers were asked questions by their fellow employees concerning grievances, contract interpretations, the status of negotiations, and the like by reason of their identification as union officers, they had no official role in doing so and were in fact prohibited from doing so during working hours on the job by the terms of the labor agreement between the Employer and the Union. Likewise their role in dealing with the Employer on behalf of the employees during strikes was minimal.

#### Analysis

The circumstances giving rise to this case are indeed unfortunate. The Employer has found it necessary to reduce its work force and substantial reductions have in fact taken place. The Board in *Dairylea Cooperative*, 219 NLRB 656 (1975), enf. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976), found that clauses granting superseniority to union stewards for limited purposes of layoff and recall were lawful, but that "super-seniority clauses which are not on their face limited to layoff and recall are presumptively unlawful . . ." (219 NLRB at 658.) The Board has been divided in the past on the issue of superseniority in its attempt to ensure that union activity is not unlawfully encouraged by granting special privileges, or benefits to union representatives to the detriment of their fellow employees, and to also ensure that employees are adequately represented on the job by their lawfully selected collective-bargaining representatives. I have carefully examined the cases and arguments advanced by the General Counsel and the Respondent Unions. The Respondent Employer did not file a brief. My examination leads me to the conclusion that the Board's position on this issue is that set out in *American Can Co. (II)*, 244 NLRB 736 (1979), and more recently in *McQuay-Norris, Inc.*, 258 NLRB 1397 (1981),

wherein Administrative Law Judge Russell M. King, Jr., set out a two-fold test for assessing the validity of preferred seniority clauses and which decision Board Members Jenkins and Zimmerman adopted without comment in their majority decision with Board Member Fanning dissenting in accordance with his prior dissent in *Dairylea Cooperative*, supra, and his dissent in *American Can Company (II)*, supra, and *A.P.A. Transport Corp.*, 239 NLRB 1407 (1979).

The test set out by Administrative Law Judge King in his decision is as follows (258 NLRB at 1401):

First, union officers may not benefit from superseniority clauses except when they serve as stewards or otherwise engage in administration of the union contract at the place and during their hours of employment (Member Jenkins and former Member Penello). Secondly, while superseniority clauses are lawful on their face, if the General Counsel proves, without adequate rebuttal, that the functions of the union officers involved did not relate in general to the furthering of the bargaining relationship, the application of the clause becomes invalid (former Member Murphy).

Under this test I must conclude the application (enforcement) of the aforesaid preferred seniority clauses and agreements in this case constituted violations of the Act as the financial secretary-treasurer, recording secretary, guide, sergeant-at-arms, and three trustees clearly are engaged in the internal affairs of the Union(s) and are not required to handle grievances on behalf of employees or otherwise engage in the day-to-day administration of the collective-bargaining agreement. Accordingly, the application of the superseniority clause granting preferred seniority status to such officials by reason of their aforesaid positions by permitting them to bump and displace their fellow employees with greater natural (length of service) seniority is unlawful. In this case there was no evidence that the recording secretary or the sergeant-at-arms exercised superseniority under the provisions of the labor agreements.

I also find that the complaint was filed within the 10(b) period of the Act and is not barred thereby. Although the current labor agreement (main labor agreement), the seniority agreement for the Memphis facility, and the 1956 letter of agreement regarding preferred seniority were all executed more than 6 months prior to the filing of the charges which have given rise to this consolidated complaint, and are presumptively lawful on their face, the application (enforcement) of the preferred seniority provisions of these agreements occurred within the applicable 10(b) period and said application or act of enforcement operates to bring the above contractual language within the applicable 10(b) period. See *American Can II* and *McQuay-Norris*, supra. I accordingly find that the allegations in the complaint are not barred by the time limitation for the filing of a charge set out in Section 10(b) of the Act. Although the Union(s) made convincing practical arguments for the maintenance and exercise of preferred seniority clauses and agreements in this case on grounds of their necessity in order to ensure

adequate and fair representation of employees represented by the Union, I do not find them determinative of the issues in this case. Although a reduction in membership of a union's officers as a result of their layoff or job displacement may conceivably diminish the effectiveness of the union's ability to represent its members, the Board in seeking to strike a balance between the avoidance of the encouragement of union activity and safeguarding the right of employees to be represented by their lawfully selected collective-bargaining representative, has determined that the maintenance and enforcement of preferred (superseniority) clauses should be limited to those directly involved in the day-to-day representation of employees on the job in meeting with the Employer on their behalf in the administration of the collective-bargaining agreement.

Under the above factual circumstances as found herein and decisional authority as discussed herein, I find that the Respondents International Union and Local Union 988 have violated Section 8(b)(1)(A) and (2) of the Act and that the Respondent Employer has violated Section 8(a)(1) and (3) of the Act by the application (enforcement) of the collective-bargaining agreements and clauses providing for the granting of preferred seniority (superseniority) to Local Union No. 988 officers in the position of financial secretary-treasurer, guide, and trustee. The evidence presented by the General Counsel (G.C. Exh. 4) showed that as of the date of its preparation (April 2, 1982) Financial Secretary Jack Hutchins had exercised superseniority resulting in the displacement or layoff of employees T. Cassidy, W. James, M. McCoy, C. Childress, and J. Allen. Trustee E. Skinner had exercised superseniority resulting in the displacement or layoff of employees R. Bomar, T. Tines, P. Harris, E. Roberts, M. Brown, and L. Bizzel. Trustee W. Carl Lee had exercised superseniority resulting in the layoff or displacement of employees C. Williams, A. Millican, P. Dorse, A. Nichols, M. Bramlett, G. Case, R. Richardson, F. Newell, F. Jones, C. Faulk, J. Porter, J. Dorsey, J. Maxwell, P. Christopher, B. Harp, C. Douglas, and C. Bond. Trustee R. Houpt had exercised superseniority resulting in the layoff or displacement of W. Morton and J. White. Guide R. Howard had exercised superseniority resulting in the layoff or displacement of C. Bolton.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondents as found in section III, above in connection with the Respondent's operations as found in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to disputes burdening and obstructing the flow of commerce.

#### CONCLUSIONS OF LAW

1. The Respondent, International Harvester Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondents, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW,

AFL-CIO, and its affiliated Local Union No. 988 are labor organizations within the meaning of Section 2(5) of the Act.

3. By the application (enforcement) of the preferred seniority (superseniority) provisions of the "Main Labor Contract," the "Supplemental Agreement On Seniority," and the September 25, 1956 letter of agreement between the parties by the International Union's and Local Union No. 988's request that the Employer retain union officers J. Hutchens, E. Skinner, W. Carl Lee, R. Howard, and R. Houpt with the consequent layoff or displacement of employees T. Cassidy, W. James, M. McCoy, C. Childress, J. Allen, R. Bomar, T. Tines, P. Harris, E. Roberts, M. Brown, L. Bizzel, C. Williams, A. Millican, P. Dorse, A. Nichols, M. Bramlett, G. Case, R. Richardson, F. Newell, F. Jones, C. Faulk, J. Porter, J. Dorsey, J. Maxwell, P. Christopher, B. Harp, C. Douglas, C. Bond, W. Morton, J. White and C. Bolton, and all other employees who were adversely affected by the exercise of superseniority by the aforesaid union officers which employees had greater natural "length of service" seniority with the Employer during periods of layoffs and curtailment of employees by the Employer, the International Union and Local Union No. 988 have violated Section 8(b)(1)(A) and (2) of the Act. By its compliance with said request, the Employer has violated Section 8(a)(1) and (3) of the Act.

4. As a direct result of the above acts, the above identified and an undetermined number of unidentified employees were unlawfully placed on layoff status and/or displaced from their then current positions.

5. The application (enforcement) of the aforementioned superseniority provisions of the labor agreement with respect to the granting of said preferential seniority rights to union officials holding the position of financial secretary-treasurer, guide, and trustees as found herein is violative of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondents have violated the Act by the application of the superseniority provisions of their labor agreement, I shall recommend that they be ordered to cease and desist therefrom and from any future discriminatory application of the superseniority provisions of their collective-bargaining agreement and that they take certain affirmative actions to effectuate the purposes of the Act. Since five union officers were permitted to exercise superseniority, thus causing the layoff or displacement of their fellow employees with greater natural seniority (length of service) by the unlawful application of the superseniority provisions of the collective-bargaining agreement, I shall recommend that Respondents International Union, Local Union 988, and the Respondent Employer make whole those employees who suffered layoffs or displacement thereby. All loss of earnings and other benefits shall be computed with interest in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). I

shall also recommend the posting of the appropriate notices by the Respondent.

[Recommended Order omitted from publication.]