

United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 1161 and Pfaudler Company, a Division of Kenecott Corporation. Case 8-CB-5036

31 August 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 23 March 1984 Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 1161, its officers, agents, and representatives, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge. This case was tried before me on January 18 and 19, 1984, at Cleveland, Ohio. The charge was filed by the Charging Party on August 15, 1983.¹ The complaint was issued on September 28.

The complaint alleges that the Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by unlawfully maintaining and seeking to enforce a contractual provision in its collective-bargaining agreement with Pfaudler Company (the Employer) which grants superseniority to the Union's recording secretary.

¹ All dates hereafter are in 1983, unless otherwise specified.

On the entire record, including my observation of the demeanor of the witnesses² and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a New York corporation, at all material times, maintained an office and place of business in Elyria, Ohio, where it was, and is, engaged in the manufacture of process equipment. Annually, the Employer sold and shipped products, goods, and materials in excess of \$50,000 in value directly from that facility to points outside Ohio. The answer admits, the record reflects, and I find, the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The answer admits, the record reflects, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

1. Whether the Union has maintained a superseniority clause which is unlawful under *Gulton Electro-Voice*, 266 NLRB 406 (1983)³

2. Whether the Union violated Section 8(b)(1)(A) and (2) of the Act by unlawfully attempting to apply and enforce a contractual superseniority provision with respect to its recording secretary.

3. Whether the instant proceeding is time-barred by Section 10(b) of the Act.

4. Whether a grievance filed on behalf of the Union's recording secretary should be deferred to arbitration.

B. The Facts

Background

At all material times, the Union has been exclusive contractual collective-bargaining representative for all the Employer's production and maintenance employees. The most recent collective-bargaining agreement, effective July 30, 1981, to July 30, 1984, includes, *inter alia*, the following provisions which, in relevant part, provide

Article III—Representation—The Union shall be represented by a Union Committee of Seven (7) members, including the President, Recording Secretary, and five (5) Zone Committee Members.

Article IX—Seniority. Paragraph 40

Members of the Union Committee . . . shall head the seniority lists in their respective classifications. . . .Such preferential seniority will not be used by the Company or the Committee Members for promotions or transfers. . . .

² Upon the General Counsel's motion, all witnesses were sequestered.
³ *Enfd. sub nom. Electrical Workers Local 900 v. NLRB*, 115 LRRM 2760 (D.C. Cir. 1984).

Pursuant to the above provisions, Pauline Markel, the Union's recording secretary, had been accorded superseniority through the contract's term until August 5. On that date, the Employer terminated Markel's superseniority. This was done as a result of the Employer's receipt of a July 21 letter from Warren Davis, the International UAW's district director. That letter declared "[T]he Union hereby gives notice . . . [it] . . . will not seek enforcement of the superseniority clause . . . for any Local Union executive board officer other than the president and vice president, unless involved in contract administration duties." The letter continued, "The Union does not object to the recall of those affected employees who are currently on lay off as a result of the application of superseniority to the . . . [Union's] . . . Treasurer, Recording Secretary, Financial Secretary, Guide, Trustee, Sergeant-at-Arms, or executive board at large positions." There is no question Davis' letter was provoked by issuance of the Board's *Gulton Electro-Voice* decision.

On August 5, Markel was informed she would be in layoff status effective August 8. Simultaneously, the Employer recalled another employee, Jim Huffman, from layoff. Huffman enjoyed natural seniority superior to Markel.

On August 9, Markel filed a written grievance (Jt. Exh. 5). The grievance charged the Employer with a violation of the superseniority provision, and demanded Markel's recall to work and that she be made whole. The grievance was denied as not comprising a lawful subject. At this writing, the grievance has not been withdrawn, nor has it been submitted to arbitration.⁴

The union committee (defined in art. III, supra) is an integral part of the contractual grievance procedure. (Art. III, par. 7, Jt. Exh. 3.) First- and second-step grievances are processed by individual zone committee persons (art. X, Jt. Exh. 3). Regularly scheduled joint union-management meetings are conducted monthly. Step-three grievances are considered during those meetings. The fourth grievance step is processed by the union committee as a whole with a representative of the International UAW.

The general duties of the Union's recording secretary derive from the Union's constitution and bylaws. The constitution provides:

Article 40—Duties of Local Union Officers: Recording Secretary

Section 3. It shall be the duty of the Recording secretary to keep a correct record of the proceedings of the Local Union, sign all orders on the treasury authorized by the Local Union, read all documents and conduct the general correspondence received by the Local Union which does not pertain directly to the duties of the other officers of the Local Union and keep same on file for future reference. The Recording Secretary shall bring to the attention of the membership of the Local Union any correspondence upon which the membership must

take action. The Recording Secretary shall comply with the provisions of Article 50, Sec. 2. The Recording Secretary shall furnish to the Research Department of the UAW and to its Regional Director, every six (6) months (January and July): (1) Three (3) copies of the existing contract(s); (2) A complete revised list of all classifications and rate for the plant or plants covered by the contract(s); (3) Any additional information gained through negotiations with the respective plant management that may be useful to other Local Unions in their collective bargaining.

The constitution invests the recording secretary with additional duties. Thus, under article 33, the membership has the right to appeal any action of the local union, including action on grievances. Article 33, section 3(a) provides that a member's appeal be initiated by providing a written statement of the local Union's recording secretary, who then presents the appeal for consideration by the executive board as a whole. The recording secretary is also required to inform the member of any executive board action on his appeal and to advise him of the right to appeal that action.

Also, article 31, section 2 provides that any charges against a UAW member for violations of the constitution or for any conduct "unbecoming a member" be submitted to the local recording secretary. Such charges are then considered by the local union executive board. Because the local recording secretary is a member of the local executive board, he or she is involved in the initial disposition and appeal of a wide variety of disputes under articles 31 and 33. Finally, article 50, section 4 and 5 of the constitution prohibits a local union from engaging in a strike without first obtaining the International's authorization and approval by a majority vote of the local union members voting at a special meeting called for such purpose. The recording secretary is responsible for providing notice to the membership of such special meeting. Also, under article 50, section 2, the recording secretary is also required to prepare a written statement of unresolved contract issues to submit to the International to support a request for strike authorization.

The Union's bylaws provide:

Article XI — Duties of Officers:

Section 3. RECORDING SECRETARY. It shall be the duty of the Recording Secretary to keep a correct record of the proceedings of the Local Union, sign all orders on the Treasurer authorized by the Local Union, keep them on file for future references. He or she shall execute quarterly report to the International Secretary-Treasurer on blanks furnished by the International Union for that purpose. He or she shall perform such duties as are required by the Constitution of the International Union.

Also, article IV, section 3 of the bylaws directs the recording secretary to notify the union membership of the time and place of all special membership meetings.

⁴ Apparently, the grievance was processed only through the third step of a four-step grievance procedure preceding arbitration. The fourth step must be invoked within 1 month from the written step-three response. Markel's grievance was answered, in step three on August 16.

The parties' collective-bargaining agreement, in article III, paragraph 4 designates the recording secretary as a member of the union committee which serves at the monthly union-management meetings.

2. Markel's actual functions⁵

Markel served two terms as recording secretary, for a 6-year total. The parties presented considerable conflicting evidence regarding Markel's actual functions in that capacity. Markel testified. Generally, I found her responses to questions initially vague. Her testimony was conclusionary and generalized, until pressed toward precision. William Reynolds, the Union's president at the time of the hearing and union committeeperson in 1967-1969, presented to testify by the Union, exhibited a tendency to exaggerate. For example he testified he needs the advice of the recording secretary "everyday," though Markel herself had testified she could recall only a single instance of consultation with him. Also, Reynolds testified (to show a need for Markel's in-plant presence) that she was essential to preparing agendas for forthcoming union-management meetings; yet, when pressed, Reynolds admitted he made no effort to contact her to perform that function since her layoff. Union committeeperson Losha Zirkle was presented by the Union to testify as to the functions of such officials. Among the employee witnesses presented by the Union,⁶ Zirkle was the most impressive. She was candid and forthright throughout her testimony. Much of her testimony, however, was devoted to describing the functions of the zone committeepersons in, and the mechanics of, grievance processing. I find Zirkle's testimony of little probative value relative to the issue of Markel's required functions. Markel was not a zone committeeperson, except for one day, 5 years before the hearing, when she was so formally designated.⁷

The General Counsel's witnesses were the Employer's industrial relations manager Richard Franklin; Plant Operations Manager Timothy Fout; and General Foreman Robert Bove. In contrast to the presentations of Markel and Reynolds, I found Franklin, Fout, and Bove more comprehensive, direct, concise, and precise. They were unshaken when cross-examined. Their testimony is supported, in many instances, by the testimony of the Union's witnesses. Wherever conflicts exist, I credit Franklin, Fout, and Bove.

Markel testified she performed duties as recording secretary in addition to those specified in the union's constitution and bylaws. Thus she claimed she solved employee work-related problems on the shop floor, consulted

with employees regarding their grievances, carried information with her which is used by zone committeepersons and other union officers in grievance handling, posted union notices, and kept minutes of union-management meetings.

Examination of Markel's testimony regarding each of these additional factors is illuminating. Concerning problem-solving on the shop floor, she first testified that employees "normally" would seek her for assistance in solving their work-related problems. When asked to describe the frequency of such activity, Markel said those situations occurred "a lot of times." Later, she conceded it occurred on "a very irregular basis." When asked to detail the instances she performed such function, Markel identified only two occasions within the past 4-1/2 years which she claimed involved consultations on behalf of employees with management officials. One of those incidents took place when she had been formally designated as alternate zone committeeperson. She acknowledged she was then acting in the stead of the absent regular zone committeeperson, and not in her capacity as recording secretary. The second incident involved a joint meeting among zone committeeperson Zirkle, Plant Manager Fout, and Markel. Zirkle and Markel approached Fout to discuss an attendance problem of another employee. They told Fout they wanted a chance to work with that other employee to assist her in resolving her problems. They asked for Fout's cooperation. Fout was advised that he was not being consulted on official union business. The subject matter of their discussion was not contained within any grievance then pending, nor did it later become the subject of a grievance.

Markel presented no other examples of her claimed problem-solving function. She agreed she generally has not directly processed grievances and that she had not been designated as alternate zone committeeperson for over 2 years.

With respect to Markel's asserted consultation with employees on grievances, she first testified those situations occurred "a lot" of times. She described, however, only two such conversations. As a result of each consultation, Markel directed the complaining employee to his zone committeeperson. The record shows that employee complaints are received by zone committeepersons frequently, ranging from twice a week to daily.

In connection with the claim Markel carried documents with her used by union officials, she testified those documents included past grievances and notes, minutes of management-union meetings over a 2-year period, and the union constitution. When asked to describe how these documents were used by the zone committeepersons, Markel admitted she had no recollection of any zone committeeperson asking to refer to the notes of union-management meetings, and recalled only two occasions when she was asked for information on prior grievances. On each of these latter occasions, the needed information was not in her briefcase. Markel had to go to the union hall during lunch hour in one of those incidents, and after work in the other, to procure the requested information.

⁵ Not every bit of evidence, nor argument of counsel, is discussed. Omitted material has been considered, but deemed irrelevant, superfluous, or of little probative value.

⁶ International Representative Carl Cross also testified on behalf of the Union to show the recording secretary functioned in preparation for collective-bargaining negotiations. Cross acknowledged that he can communicate, and has communicated, with Markel after her layoff for that purpose. In sum, I find Cross' testimony sheds no light on Markel's in-plant functions.

⁷ The five zone committeepersons are expressly designated as the in-plant representatives of the unit employees. (art. III (V), (VI), and (VII), Jt. Exh. 3.) In their absences, grievances are to be processed by the Union president or his designee (Jt. Exh. 3, art. III (7)).

Regarding notice posting, Markel testified she posted notices of monthly membership meetings, formal appointments of alternate zone committeepersons, and miscellaneous other matters of general interest, on the Employer's bulletin board. Prior to her layoff, Markel generally was at work to perform this function. In her absence, required notices had been posted by the union president. Since Markel's layoff, she acknowledged she sometimes visited the shop to post notices without the Employer having attempted to deny her plant access or otherwise prevent her from posting them.

Relative to Markel's minute-keeping during union-management meetings, the evidence shows those meetings are held during working hours (Jt. Exh. 3, art. III (9)). The primary purpose of those meetings is to discuss and consider grievances. Markel agreed her principal function during those meetings was to record the proceedings. The Union's president was principal spokesperson. Zone committeepersons take part in discussions during consideration of grievances which involve employees within their zone.⁸ Notes of these meetings are also made by one of the Employer's representatives present. It is the latter's notes which become the official minutes, copies of which are ultimately distributed to each member of the seven-member union committee.

Generally, 1 week's advance notice of the union-management meetings is provided participants. Markel testified she continued to keep minutes of those meetings after her layoff, and admitted that it is not necessary for her to be in the shop in order to do so.

Occasionally the union committee (including the recording secretary) caucuses, out of the presence of the management officials, to consider and vote on its position regarding grievances. As a member of the union committee, Markel casts a vote. When the meeting reconvenes jointly with management, it is the union president who announces the Union's position. Markel, as recording secretary, never has made that announcement.

C. Analysis

1. The superseniority clause maintenance and enforcement

The plain language of the contractual superseniority clause in question undeniably grants such status to the Union's recording secretary.

In *Gulton Electro-Voice*, supra, the Board announced the test by which it would determine whether superseniority grants to union officials would be lawful. Thus, the Board stated, "We 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." *Gulton*, supra at 409. (Emphasis added.)

This standard has been applied consistently in subsequent cases. See *Inmont Corp.*, 268 NLRB 1442 (1984);

⁸ The shop is divided into five zones, each of which is serviced by a specific zone committeeperson.

Hubble, Inc., 268 NLRB 620 (1984); *Electrical Workers IUE Local 826 (Otis Elevator)*, 268 NLRB 180 (1983); *Niagra Machine & Tool Works*, 267 NLRB 661 (1983); and *Auto Workers Local 561 (Scovill)*, 266 NLRB 1056 (1983).

Two elements must exist for a superseniority grant to be lawful. The union official desiring such status must (1) be responsible for grievance processing or other matters directly related to administering the labor agreement, and (2) demonstrate that on-the-job plant presence is required to perform those activities. *Auto Workers (Ex-Cell-O Corp.)*, 268 NLRB No. 206, slip op. 4-5 (1984) (unpublished).

Superseniority is inherently discriminatory. *Gulton*, supra at 407; *Dairy Lea Cooperative*, 219 NLRB 656 (1975), *enfd. sub nom. Teamsters Local 338 v. NLRB*, 531 F.2d 1162 (2d Cir. 1976).

The contract clause in this case, on its face, satisfies the requirements of the General Counsel's prima facie case. The burden thus shifts to the Union to demonstrate that its recording secretary is required to perform grievance and on-the-job contract administration activities. The totality of credited evidence persuades me this burden has not been met.⁹

Disposition of the underlying issue depends on resolution of the factual question: Do the duties and activities of recording secretary involve such matters of grievance processing and contract administration that require that official's in-plant presence? To answer this question requires analysis of the constitutional duties, obligations and responsibilities, as well as the functional activities of the recording secretary.

The applicable constitution and bylaw provisions, in my view, do not mandate the recording secretary's participation in grievance processing or administration of the collective-bargaining agreement. The duties imposed on the recording secretary admittedly can be performed off-the-job. Accordingly, I conclude that the provisions of the constitution and bylaws, standing alone, do not vest the recording secretary with such responsibilities which would justify a grant of superseniority.

Nonetheless, the Union argues that the actual functions performed by its recording secretary Markel, in particular, demonstrate the need for her presence on-the-job. I disagree.

Plainly, the proven performance of certain functions does not establish a requirement of the recording secretary's in-plant presence. In Markel's 6 years as recording secretary, she participated in only one discussion with management officials concerning employee work problems. This was as alternate zone committeeperson and not in her capacity as recording secretary. The single other such discussion is so isolated, in the context of employee problems arising almost daily, as to warrant no further comment.

⁹ The Union argues that the *Gulton* standards are improper. In the alternative, the Union contends the record contains evidence which meets those standards. Determination of the propriety of these standards is not within my authority. This decision deals only with the alternative contention.

Markel's discussions of problems with individual employees fail to support the Union's contentions, for two reasons; first, because those problems were actually handled by the appropriate zone committeeperson and, second, because the record shows the discussions were gratuitous undertakings, engendered by virtue of her personal experience and knowledge. That her wisdom was acquired through her service as recording secretary is fortuitous, and did not derive from the exercise of the duties prescribed for that office. Thus this factor does not militate toward the conclusion that the recording secretary is required to be present in the shop.

The records Markel claimed she kept, she asserted, were in the trunk of her automobile. Concededly, maintenance of the Union's records is a function encompassed within the recording secretary's duties. It is not, however, prescribed that those records should be maintained in or near the work place of the represented employees. If such a requirement had existed, the evidence nevertheless shows on-the-job presence of either the records or the recording secretary was unnecessary because Markel had to obtain the records, in the two situations she described, by traveling to the union hall during nonworking hours.

The notice-posting function assumes a similar character. The evidence shows virtually any union official could post notices, as did its president. More importantly, Markel, herself, acknowledged she had no difficulty posting notices after her layoff. Patently, the notice-posting activities of the recording secretary, especially in the instant context, bear no relationship to contract administration or day-to-day grievance handling.

Likewise, the record reflects no impairment of the recording secretary's function of keeping minutes at the monthly joint union-management meetings. Markel performed that activity, even after her layoff. She admitted she need not be at the shop to satisfy this aspect of her functions. Ample advance notice of the meetings was available.

The collective-bargaining agreement provides cogent evidence that the recording secretary is not a necessary functionary in grievance handling. The zone committeepersons are responsible for initial grievance processing. When grievances reach the third step, they are brought to the Union's management committee. There, the recording secretary (though attending) is responsible only for memorializing the proceedings. Though the evidence shows the recording secretary casts a vote to determine the Union's position on grievances, that function is performed as an intraunion matter. Discussion of the merits of grievances, and announcement of statements of the Union's position, involves the zone committeepersons and union president.

The Union argues each of the above-cited cases, especially those involving other UAW Locals, is markedly distinguishable from the case at bar because, herein, the evidence reflects the actual functions of the recording secretary far exceed the proved functions of the officers involved in the cited cases. Unquestionably, some such additional evidence appears herein. That evidence, however, has been clearly exaggerated. Whatever Markel, as recording secretary, has done in the formal or informal

grievance procedure has been of valuable assistance and was performed with arguably commendable objectives. Yet, the record is equally clear that those functions are *not required* by her office. They resulted, and were undertaken, purely from what might be called her personal institutional memory and experience. Other union officials, the president, and zone committeepersons were the duly-constituted recognized and functioning officials for in-plant contract administration and grievance processing.

The recording secretary's remaining functions are connected to obligations as a union officer and executive board member; and not directly related to the administration of the collective-bargaining agreement. The level of responsibility vested in the recording secretary for such purposes, does not, in my view, rise to the level of responsibility which meets the *Gulton* standards recognized as necessary to help stabilize labor relations in the shop. They are strictly intraunion activities.

On all the above, I find that maintenance of the provision which grants superseniority to the recording secretary is unlawful in violation of Section 8(b)(1)(A) of the Act.

I now turn to the General Counsel's contention that the Union unlawfully sought to enforce and apply the superseniority clause. This is based on the filing¹⁰ and processing of Markel's layoff grievance.

The Union concedes the purpose of the grievance is to compel compliance with the superseniority clause which I have found unlawful. That admission, coupled with the fact the grievance has not been withdrawn, comprises an undeniable effort to enforce and apply the superseniority clause to the Union's recording secretary which, in the instant circumstances, is unlawful, in violation of Section 8(b)(2) of the Act. That section provides, in relevant part, ". . . it 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 [Section] 8(a)(3)."

In the instant case, implementation of superseniority for the recording secretary would cause the Employer to lay off, for discriminatory reasons, an employee more senior to the recording secretary. This is precisely a result the Act intends to proscribe. That result is exacerbated by the Union's claim (discussed *infra*) that the allegations herein should be deferred, pending submission of the grievance to the contractual arbitration procedure. See *Distillery Workers Local 122 (Oz Liquor)*, 261 NLRB 1070 (1982).

¹⁰ During my effort at the hearing to delineate the issues, I asked the General Counsel whether he contended the mere filing of Markel's grievance constitutes a violation of the Act. The General Counsel replied affirmatively. The parties were asked to brief that issue. All have done so. My examination of the complaint reveals such a violation is not explicitly alleged. I consider the matter to have been fully litigated. Nonetheless, in view of my disposition of the issues actually pleaded, and the fact that each of the cases cited by the General Counsel and the Union in support of the theory that the filing of a grievance to enforce an unlawful contract provision is clearly distinguishable because it was not the *filing* of a grievance which constituted any unfair labor practices found in those cases, I conclude it serves no useful purpose to make findings on this unpleaded theory.

On all the foregoing, I find that the Union has violated Section 8(b)(2) of the Act by processing and maintaining the Markel grievance.

2. The statute of limitations issue

The Union claims these proceedings are barred by Section 10(b) of the Act because the statute of limitations began to run either (a) on September 15, 1982 (when Markel's superseniority under the current collective-bargaining agreement was posted), (b) in June 1982 (when Markel was initially granted superseniority), or (c) in July 1981 (when the unlawful clause was negotiated and first became effective).

In pertinent part, Section 10(b) states "[N]o complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge." Each of the dates proposed by the Union to have initiated the application of Section 10(b) is more than 6 months before August 14, 1983, the date on which the instant charge was filed. The question presented is whether or not any act occurred within 6 months of the charge's filing which constitutes an unfair labor practice. In relevant part, the instant complaint alleges:

5(a) On or about July 30, 1981, the Employer and Respondent (the Union) entered into, and since said date have maintained, an agreement which provides in pertinent part: (Text of Article III, paragraph 4 and Article IX, paragraph 40 omitted. See Section II-B (1), *supra* for text.)

5(c) On or about August 10, 1983, Respondent attempted to apply and enforce . . . (the alleged unlawful superseniority agreement) . . . to cause the Employer to recall Respondent's Recording Secretary from layoff in preference to another employee with greater actual seniority.

Paragraphs 6 and 7 of the complaint allege that each of the above acts constitutes violations of Section 8(b)(1)(A) of the Act.

The Union is literally correct in asserting that the date when maintenance of the superseniority clause began (July 30, 1981) is beyond 6 months from the date the charge was filed. Nevertheless, I conclude that factor does not warrant application of Section 10(b) in the circumstances of this case. I have not found that the *execution* of the 1981-1984 collective-bargaining agreement was violative of the Act.

The evidence shows that regardless of the dates the superseniority clause became effective or the initial date of Markel's superseniority was granted, it was in effect uninterruptedly from at least September 1982 until her August 8, 1983, layoff. Thus, *maintenance* of the contractual provision, found unlawful as to the recording secretary, occurred on a daily basis for several months immediately preceding the filing of the charge.

The complaint, in paragraph 5(C), charges that it is an unlawful effort, at least by the Union's pursuit of Markel's grievance, to apply and enforce the unlawful superseniority by reestablishing her superseniority status which she enjoyed until the Employer's receipt of the UAW's district director's letter. That pursuit began on

August 9, 1983, only 6 days before the charge was filed. Processing of the grievance clearly was an attempt to enforce and apply the superseniority provision which I have found unlawful. Thus, the activity which I have found unlawful occurred well within the 6-month period before the charge was filed.

In the above-described chronology, the Union's unlawful conduct, as unfair labor practices, are not barred by the Act's statute of limitations (*Auto Workers Local 561 (Scovill)*, *supra*, fn. 5 and accompanying text. In *Auto Workers Local 561*, Judge Hutton S. Brandon wrote a scholarly examination of this issue. (See Judge Brandon's decision, p. 9-10, including his observations on *NLRB v. Auto-Warehousers*, 571 F.2d 860 (5th Cir. 1978), principally relied on by the Union in the instant case. I fully concur in, and subscribe to, Judge Brandon's 10(b) discussion, analysis, and conclusions, and incorporate them by reference.)

On all the foregoing, I find no merit to the Union's claim that this action is time-barred.

3. Deferral to arbitration

In closing remarks at the hearing, the Union's counsel moved me to defer decision on the merits of the complaint allegations to the parties' contractual arbitral forum. The motion was taken under advisement, for ruling within this decision. The General Counsel and Employer oppose the motion. On the state of this record, I conclude the Union's motion must be denied.

It is true, as the Union contends, that the Board, in *United Technologies Corp.*, 268 NLRB 557 (1984), strongly expressed the view that recourse to a contractually negotiated arbitral process for resolution of issues arising under a contract is preferable to litigation of the issues before the Board. Thus, the Board stated, "where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery" (268 NLRB at 559). Deferral to the contractual arbitration procedure "is merely the prudent exercise of restraint, a postponement of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed" (268 NLRB at 560).

Gulton and its progeny make clear that it is for the Board to establish the standards by which it will be determined whether or not a particular contractual superseniority clause has exceeded lawful bounds. That issue, in the first instance, is for the Board to decide. It is beyond the authority and competence of an arbitrator. I have found above that the duties and responsibilities of the instant Union's recording secretary do not require that officer's in-plant presence to further the administration of the collective-bargaining agreement. Accordingly, I conclude that the evidence does not overcome the inherently discriminatory grant of superseniority to the Union's recording secretary.

In this context submission of Markel's grievance to arbitration, and deferral of a decision on the merits of the complaint allegations to that process, neither provides a

means for resolution of the underlying issues of the grievance nor fosters the precepts of collective bargaining.

Moreover, it cannot be said that the underlying issues could be resolved by recourse to arbitration. The contract's meaning does not lie at the core of the instant dispute. Instead it revolves around the legality of the superseniority clause. That is a threshold question which must be resolved by the Board. Once that question of contract legality has been resolved (as I have done), nothing remains for an arbitrator's decision.

Moreover, the lesson of *Wine & Liquor Store Employees Union, Local 122*, supra, is instructive. There, a union attempted to use the contractual arbitration procedure to enforce an unlawful union-security clause. The attempt to arbitrate was held to be violative of the Act. Thus, it is clear that lawful invocation of the arbitration procedure presumes the legality of the clause which gives rise to the arbitration proceedings. In the instant case, the disputed clause is unlawful as applied to the recording secretary. Submission to arbitration would compound the illegality found herein and also cloak that illegality with an unwarranted aura of respectability. It follows that the Union's request to defer to arbitration should be rejected. Accordingly, the Union's motion is denied.

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining and enforcing a seniority clause in its collective-bargaining agreement with The Pfaudler Company, a Division of Kennecott Corporation, according the Union's recording secretary superseniority, and by attempting to enforce and apply that provision by processing a grievance on behalf of the recording secretary to reinstate such superseniority, the Union engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.
4. Section 10(b) of the Act does not bar the instant proceedings.
5. It is not appropriate to defer Markel's grievance to the contractual arbitration procedure.
6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Union has engaged in certain unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I have found the superseniority clause here in dispute is unlawful as applied to the Union's recording secretary. Thus, the Union shall be ordered to cease and desist from maintaining and enforcing, or attempting to enforce, such clause with respect to its recording secretary.

Inasmuch as the Union's pursuit of Markel's grievance is for an unlawful objective (enforcement and application of the unlawful superseniority), the Union shall be or-

dered to cease and desist from such pursuit by requiring the grievance to be withdrawn and by refraining from filing further grievances to grant superseniority to its recording secretary. See *Teamsters Local 515 (Cavalier Corp.)*, 259 NLRB 678 (1981).

Finally, the Union shall be ordered to cease and desist from, in any like or related manner, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 1161, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Maintaining and enforcing, or attempting to enforce, its superseniority clause in its collective-bargaining agreement with Pfaudler Company, A Division of Kennecott Corporation, with respect to the Union's recording secretary.
 - (b) Further processing Markel's grievance of August 9, 1983, and filing and processing any further grievance which would have the effect of granting superseniority to its recording secretary.
 - (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action which I find will effectuate the policies of the Act.
 - (a) Immediately withdraw Markel's August 9, 1983 grievance and file and process no further grievance which would have the effect of granting superseniority to its recording secretary.
 - (b) Post at its offices and meeting hall copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 8 after being signed by the Union's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that said notices are not altered, defaced, or covered by any other material.
 - (c) Mail signed copies of the attached notice to the Regional Director for Region 8, for posting by the Employer, if it is willing.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² 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."

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain and enforce, or attempt to enforce, any agreement with Pfaudler Company, a Division of Kennecott Corporation, which accords superseniority to our recording secretary.

WE WILL NOT cause or attempt to cause the above-named employer to discriminate against employees by requiring that our recording secretary be retained as an active employee when other employees who have greater seniority in the terms of length of employment are laid off.

WE WILL NOT file or process any grievance which has the effect of giving superseniority to our Recording Secretary.

WE WILL NOT in any like or related manner restrain or coerce the employees of Pfaudler Company, a Division of Kennecott Corporation, in the exercise of their rights set forth at the top of this notice.

WE WILL immediately withdraw the August 9, 1983 grievance on behalf of our recording secretary.

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, LOCAL UNION NO. 116