

**The Motor Convoy, Inc. and Harold J. Driver  
General Drivers, Warehousemen and Helpers Local  
Union No. 89, affiliated with the International  
Brotherhood of Teamsters, Chauffeurs, Ware-  
housemen and Helpers of America, AFL-CIO  
and Harold J. Driver.** Cases 9-CA-24852 and  
9-CB-6900

May 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT, DEVANEY, OVIATT, AND  
RAUDABAUGH

On March 8, 1989, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondents filed exceptions and supporting briefs.

The National Labor Relations 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, and conclusions only to the extent consistent with this Decision and Order.

The judge refused to defer to a grievance panel arbitration award and found that the Respondent Company violated Section 8(a)(1) and (3) of the Act and the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by giving the Union steward, Donald Malone, superseniority for the purpose of job bidding. We disagree. For the reasons that follow, we find that the complaint should be dismissed by deferring to the arbitral award.

The Company has three types of driver positions: city drivers, short country drivers, and over-the-road drivers. In 1981, pursuant to the collective-bargaining agreement's superseniority provision, Union Steward Malone obtained the one permanent city driver slot, which the judge found to be the most lucrative position. In 1987, three employees, including the Charging Party, filed a grievance over the superseniority issue. The arbitration panel upheld the superseniority practice.

The judge found this case is controlled by *Dairylea Cooperative*, 219 NLRB 656 (1975), *enfd. sub nom. NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976), which held that steward superseniority for purposes other than layoff and recall is presumptively unlawful, but the presumption may be rebutted by a showing of legitimate and substantial business justification. After reviewing the facts concerning the steward's duties; the method of processing grievances; and the availability of a driver to serve as steward when holding the city driver as opposed to the country day driver position, the judge concluded that the Respondents did not show that Malone needed the city driver job in order to serve as steward and, therefore, did not rebut the *Dairylea* presumption. The judge

found it inappropriate to defer to a grievance panel's arbitration award because, according to the judge, the panel's decision is inconsistent with his conclusion and, therefore, repugnant to the Act.

The Union has excepted, *inter alia*, to the judge's failure to defer to the grievance panel arbitration. We agree that deferral is appropriate in this case.

The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the Board. *Raytheon Co.*, 140 NLRB 883 (1963). In *Olin Corp.*, 268 NLRB 573, 574 (1984), the Board clarified that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board will find deferral inappropriate under the clearly repugnant standard only when an arbitrator's award is "'palpably wrong,' i.e., . . . is not susceptible to an interpretation consistent with the Act." *Ibid.* The party seeking to have the Board reject deferral bears the burden of proof. *Ibid.*

Our dissenting colleagues assert that the issue in this case is not suitable for deferral. We disagree. The issue in this case is whether the Respondent Union justified the superseniority accorded to Steward Malone, i.e., whether Malone could have effectively performed his steward duties in a position other than that of city driver. We see no reason why an arbitrator cannot make this factfinding based on evidence presented by the parties. Indeed, the parties and the arbitrator are probably in a better position than the Board to make a determination of the needs of the shop.

In support of their position, the dissenters cite *Auto Workers Local 1161 (Pfaudler Co.)*, 271 NLRB 1411 (1984), *enfd. sub nom. NLRB v. Auto Workers Local 1161*, 777 F.2d 1131, 1140-1141 (6th Cir. 1985). The case is wholly inapposite. In the first place, the case involved prearbitration deferral under *Collyer Insulated Wire*,<sup>1</sup> not postarbitration deferral under *Olin*.<sup>2</sup> Secondly, the case involved a clause that was unlawful on its face. The Sixth Circuit, in agreeing that deferral was unwarranted, stated:

<sup>1</sup> 192 NLRB 837 (1971).

<sup>2</sup> In seeking to minimize this difference between *Pfaudler* and the instant case, the dissenters suggest that cases that are not subject to prearbitration deferral under *Collyer* are necessarily not subject to postarbitration deferral under *Olin*. They cite no support for this proposition. We think that this is neither the law nor prudent policy. For example, if parties voluntarily proceed to arbitration in a case that is not subject to prearbitration deferral (e.g., a failure to provide information), and if the arbitrator renders an award that is wholly consistent with the Act, we do not think that the award is necessarily non-deferrable under *Olin*.

The Board has consistently refused to defer to arbitration where the contractual clause that is the subject of the grievance-arbitration proceeding is itself illegal.

By contrast, the clause in the instant case is not attacked as unlawful on its face. The sole allegation concerns the application of the clause to Steward Malone. And, as noted above, the issue of legality of application turns on the factual question of whether Malone could effectively perform his steward duties if he had not been given the job of city driver.

Our dissenting colleagues also claim the arbitral proceedings were not fair and regular. It is true that the Board has found deferral to arbitration inappropriate when there is proof that an actual conflict of interest existed between individual employee grievants and the union representing them. *Tubari Ltd.*, 287 NLRB 1273 fn. 4 (1988). Under *Olin*, however, the General Counsel bears the burden of raising and proving the argument that an actual conflict of interest impaired the fairness of arbitration proceedings.

In this case, the General Counsel has not even raised the fairness issue. Further, the grievants' position in arbitration was supported by the Employer, and there is no showing that the Employer did anything less than vigorously oppose the grant of superseniority. In these circumstances, we cannot say that the General Counsel has shown that the arbitral proceedings were not fair and regular.<sup>3</sup>

The only other argument made against deferral is the dissent's assertion that the arbitration panel's award is repugnant to the Act. In determining repugnancy, the Board will weigh the difference, if any, between the contractual standard used by an arbitrator and the statutory standard used by the Board. *Olin*, supra at 574. In the instant case, the statutory standard is whether there was a need for superseniority for job bidding purposes, i.e., whether Malone could have effectively performed his steward duties in a position other than that of city driver. *Electronic Workers IUE Local 663 (Gulton Electro Voice)*, 276 NLRB 1043 (1985). In the arbitration proceeding, the Union's position was that superseniority was necessary for Malone to perform his steward duties. The contract provided that superseniority may be granted if it "may be useful" in the performance of steward duties. The arbitral opinion states only that Malone "did not use the right to bid for monetary gain."

<sup>3</sup>The fact that the Employer, as a co-Respondent with the Union in this case, may now have a somewhat different position with regard to the necessity of superseniority than it argued to the panel does not establish that the proceedings were not fair and regular. To the contrary, the fact that the Employer might be charged with an unfair labor practice if it granted superseniority, as of course it was, provided the Employer with a substantial reason to vigorously pursue the employees' claims and oppose the Union and the grant of superseniority.

In light of the brevity of the arbitral conclusion, there is a possibility that the panel's award was based on a contractual standard requiring less showing of need for superseniority than the statutory *Dairylea* standard. The test under *Olin*, however, is whether the arbitral opinion is *susceptible to an interpretation* consistent with the Act. In the instant case, the General Counsel does not dispute that the arbitration concerned the steward's need for superseniority to perform his duties.<sup>4</sup> Nor does the General Counsel claim that the arbitration panel was not presented generally with the facts relevant to resolving the unfair labor practice. Given the Union's position in arbitration that superseniority was necessary for the performance of steward duties, and given the arbitration panel's ultimate agreement with the Union, the arbitral opinion is at least "susceptible" to the interpretation that the panel found that superseniority was necessary to the performance of steward duties.<sup>5</sup> In any event, the General Counsel has not met his burden of showing that the award is not susceptible to the above interpretation.

The dissent also relies on the language of the contract and the language of the award. Concededly, neither the contract nor the award read expressly in terms of the *Gulton* standard. However, *Olin* does not require that the contract or the award read expressly in terms of statutory standards. The question is whether the arbitral award is *susceptible to an interpretation consistent with the Act*. Thus, for example, if an arbitrator upholds an employer's argument that its actions were justified by a contractual management-rights clause, the Board, in an 8(a)(5) unilateral change case, would defer to the award, even if neither the award nor the clause read in terms of the statutory standard of clear and unmistakable waiver. The award is susceptible to the interpretation that there was such a waiver, even though the contract and the award do not read in these terms. Similarly, in the instant case, the award is susceptible to an interpretation consistent with the Act even though it does not read in statutory terms. This is particularly so in light of the fact that the Union presented evidence that the grant of superseniority was necessary for the performance of Malone's duties as steward.

Further, even assuming *arguendo* that the panel used a standard different from the statutory standard, that difference is not necessarily sufficient to establish that the award is repugnant. As noted supra, this difference in standards is *relevant* to the issue of repugnance. The

<sup>4</sup>In questioning the union business agent about the grievance panel arbitration, counsel for the General Counsel asked, "Well, the company didn't support the Union's position that super seniority was necessary for the steward to perform his duties, did they?"

<sup>5</sup>Because we have found, as required by *Olin*, the arbitral opinion is susceptible to an interpretation consistent with the Act, we find it unpersuasive that our dissenting colleagues have posited an alternative interpretation which is not consistent with the Act.

issue is whether this difference is *dispositive* of the issue of repugnance.

In *Olin*, the Board said that it would not require that the arbitral award be totally consistent with Board precedent. In *Dennison National Co.*, 296 NLRB 169 (1989), an arbitrator found that, under the contract's management-rights clause, an employer was privileged to make a unilateral change. The General Counsel argued that the award was repugnant because the arbitrator failed to use the statutory standard of whether the management-rights clause clearly and unmistakably waived the right to bargain. In spite of the difference in standards, the Board deferred. The Board said that deferral is appropriate notwithstanding that the arbitral award may be inconsistent with Board precedent.<sup>6</sup> See also *Postal Service*, 275 NLRB 430 (1985) (Board deferred to arbitration award finding waiver of *Weingarten* rights notwithstanding failure to apply statutory standard).

Based on the above, we conclude that the arbitral award herein is not repugnant to the Act, even if the arbitration panel used a standard different from the statutory standard. We find, therefore, that the judge improperly substituted his judgment for that of the arbitration panel in resolving the contractual dispute.<sup>7</sup>

Accordingly, we shall defer to the grievance panel arbitration award and dismiss the complaint.

#### ORDER

The complaint is dismissed.

CHAIRMAN STEPHENS and MEMBER OVIATT, dissenting.

We dissent from our colleagues' decision to defer to the award of the bipartite arbitration panel. We agree with the judge that deferral is inappropriate because it is evident that the arbitration panel applied a standard that is repugnant to the Act. We would also decline to defer on two additional grounds. In our view, the statutory issue here was not appropriate for resolution by an arbitral panel; and the proceedings were not fair and regular because employees Helm and Driver, the al-

leged discriminatees in this case, were not adequately represented in the arbitral proceedings.<sup>1</sup>

Addressing first the question whether the issue is even suitable for arbitration, we would find that deferral of the issue in this case is contrary to the Board's holding in *Auto Workers Local 1161 (Pfaudler Co.)*, 271 NLRB 1411 (1984), *enfd. sub nom. NLRB v. Auto Workers Local 1161*, 777 F.2d 1131, 1140-1141 (6th Cir. 1985). In *Local 1161* the Board refused to defer a superseniority issue to arbitration for the following reasons (271 NLRB at 1416):

*Gulton [Gulton Electro-Voice]*, 266 NLRB 406 (1983), *enfd. sub nom. Electrical Workers Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984)] 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.

Although the clause in *Local 1161* was attacked as unlawful on its face and the present case directly involves only the lawfulness of the clause as construed and applied, the same barrier to deferral exists.<sup>2</sup> The question presented to the bipartite arbitral panel was simply whether the award of superseniority to Union Steward Malone violated the rather vague standard of the contract clause. The panel had no contractual mandate to decide whether a particular application of that standard would comply with the policy of *Dairylea Cooperative*, 219 NLRB 656 (1975), *enfd. sub nom. NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976), under which superseniority clauses granting preferences beyond layoff and recall are presumptively unlawful, with the party urging their validity bearing the burden of rebutting the presumption.<sup>3</sup> Of course, a construction of the clause that runs afoul of the *Dairylea* policy could convert a presumptively unlawful clause into one that is per se unlawful.<sup>4</sup> Whether

<sup>1</sup> See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), reaffirmed in *Olin Corp.*, 268 NLRB 573, 574 (1984) (setting out standards of repugnancy, fairness and regularity, and adequate consideration of the statutory issue).

<sup>2</sup> We acknowledge, as our colleagues in the majority point out, that *Local 1161* concerned *Collyer* (i.e., prearbitral) deferral, but we do not agree that *Local 1161* is inapposite for that reason. If, under Board law, a certain type of issue is inappropriate for deferral at the outset, such an issue cannot be rendered appropriate by the fact that parties have gone ahead with arbitration proceedings and now present the award for deferral.

<sup>3</sup> Accord: *Mechanics Educational Society Local 56 (Revere Copper)*, 287 NLRB 935, 937 (1987); *Laborers Local 380 (Mautz & Oren)*, 275 NLRB 1049, 1053-1054 (1985).

<sup>4</sup> An arbitral construction of a contractual provision normally becomes "a binding part of the agreement." Elkouri and Elkouri, *How Arbitration Works* 425 (4th ed. 1985). Such a construction could therefore convert a provision into an unlawful clause (not merely one that is potentially or presumptively so). See, e.g., *Bricklayers Local 2 (Gunnar I. Johnson)*, 224 NLRB 1021, 1026 (1976), *enfd.* 562 F.2d 775, 786-787 (D.C. Cir. 1977). Accord: *NLRB v. Elevator Constructors*, 902 F.2d 1297, 1302, 1305 (8th Cir. 1990).

<sup>6</sup> Compare *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982), *enfd.* 722 F.2d 1120, 1126 (3d Cir. 1983). In that case, the arbitrator based his opinion on a noncontractual residual rights theory under which management could make unilateral changes unless the contract forbids them. The Board refused to defer to the arbitral opinion. Because waiver of the right to bargain is bottomed on party consent, the arbitral award based on something other than a contract clause or party conduct was repugnant to the Act. By contrast, both *Dennison* and the instant case involve contractual provisions.

<sup>7</sup> The judge found the arbitration panel's decision repugnant to the Act because that decision was inconsistent with the judge's conclusion that the Respondents failed to justify application of superseniority for job-bidding purposes. However, "the Board's standard of review does not contemplate that the Board will substitute its judgment for that of the arbitrator in resolving contractual issues." *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985). In *Olin*, *supra*, 268 NLRB at 574, the Board specifically criticized the approach followed by the judge here "of determining the merits *before* considering the appropriateness of deferral." (Emphasis in original.)

the argument advanced by the party (the Respondent Union) seeking a construction of the clause that would validate the grant of superseniority to Steward Malone would have this effect would seem to be for the Board to decide and “beyond the authority and competence” of an arbitral panel.

Even assuming *arguendo* that the grant of superseniority here is a proper subject for deferral, we would find the award repugnant. The operative portion of the contract clause at issue in this case—granting “*such other employment preferences as may be useful in the performance of his duties as Steward as requested by the Local Union in writing*” (emphasis added)—is presumptively unlawful under *Dairylea*. In denying the grievance of Helm and Driver, who were more senior than Steward Malone, the arbitration panel did not purport to make even the minimal finding that Steward Malone needed to obtain the more lucrative city driver route because it “may be useful” to his grievance duties. Rather, the panel denied the grievance because it concluded that Malone did not “use the right to bid for monetary gain.” Without examining the evidence put forward in the present proceeding, we would find that, given the Board’s doctrine of presumptive illegality, the arbitration panel applied a standard that is repugnant to the Act.

The majority contends that the arbitration panel’s award is susceptible to an interpretation that the panel found superseniority was necessary to the performance of steward duties. In our view nothing in the award supports such an interpretation. The award speaks only to the purported motive for the steward’s receipt of superseniority—that it was not pursued for “monetary gain.” Such a finding, even if true, is not connected to the statutory requirement that superseniority be necessary for the performance of the steward’s duties, or even that it be “useful” to those duties. Indeed, the panel’s finding has nothing at all to do with the “need” for superseniority, only with the steward’s “good faith.” Further, the award’s repugnancy is seriously compounded by the fact that, as noted above, the award must be evaluated within the context that the grant of superseniority here is presumptively unlawful. Therefore, any such evaluation must contain some ground that would *overcome* this presumption under current Board law.<sup>5</sup>

We note also that the employee right at issue under the *Dairylea* doctrine—the right not to suffer a relative loss of job benefits simply because one is not the union steward—is not a right that unions may waive on behalf of union employees. Just as an employer and union may not lawfully agree on a clause that suppresses the workplace solicitation rights of union dissidents (*NLRB v. Magnavox*, 415 U.S. 322 (1974)), so they may not lawfully agree on a clause that confers benefits on union stewards or officers without adequate justification. In this regard, the contractual interpretation problem here is similar to that in *Bricklayers Local 2*, *supra*, and *Elevator Constructors*, *supra*, which involved clauses that, under Sec. 8(e) of the Act, a union and an employer could not lawfully enter into.

<sup>5</sup>We do not agree that the majority’s hypothetical management-rights clause is a valid comparison, because the clause as posited is not unlawful. In this

In these circumstances, this case is distinguishable from those cases cited by the majority in which the Board deferred even though the arbitrator’s analysis perhaps did not “comport precisely” with Board precedent. *Postal Service*, 275 NLRB 430, 432 (1985). Here the majority defers to an award validating a presumptively unlawful grant of superseniority when the only ground available to it to do so is that the steward did not act for monetary gain. Because we find that such a reason bears no relationship to any meaningful statutory inquiry pertinent to the issue presented, we find that the award is repugnant to the Act.

As stated above, we would also find deferral inappropriate because the proceedings were not fair or regular.<sup>6</sup> Given the adverse position that the Respondent Union took to the challenge to Malone’s exercise of superseniority to claim the city driver position, the Union obviously could not adequately represent the employee grievants in the arbitral procedure—nor did it even attempt such representation. The grievants were “represented” instead by the Respondent Employer. We do not question the integrity of the Employer, but the fact remains that whatever the vigor of its challenge to the Union’s interpretation of the provision before the bipartite panel, its interests were not fully congruent with those of the grievants (the alleged discriminatees); and, unlike the Union, the Employer owed them no duty of fair representation. Indeed, in arguing to us now that it should not be found secondarily liable if the Board adopts the judge’s finding that the grant of the job preference was unlawful, the Employer states that the “real dispute in this matter is between the Union and its members” and that the Employer “has no specific interest in the union steward having the ability to exercise super-seniority to gain the city driver position,” but is subject to the panel award and wants to maintain “a good relationship with the Union” and “avoid the risk of a strike over this provision.”

Because we would not defer to the arbitral award, we would reach the merits of the case. For the reasons stated by the judge, we would find that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act and that the Respondent Employer violated Section

case, the bipartite panel has effectively amended the contract to provide that superseniority going beyond layoff and recall is permissible if a steward acts for other than monetary gain—a clause that is clearly unlawful under *Dairylea*, *supra*, and its progeny. See fn. 4, *supra*.

<sup>6</sup>Our colleagues fault us for relying on the absence of fair and regular proceedings because the General Counsel made only a repugnancy argument in contending that deferral was inappropriate. In our view, the Board may consider record evidence that clearly establishes the inappropriateness of deferral whether or not the General Counsel expressly adverts to it. In any event, we note that the General Counsel had little incentive to make extensive arguments concerning deferral in view of the fact that only the Respondent Employer raised deferral as an affirmative defense in its answer to the complaint and that neither Respondent expressly urged deferral in its brief to the judge. Indeed, those briefs could well be construed as manifesting an abandonment of the defense in the proceeding before the judge.

8(a)(3) and (1). We would adopt the judge's recommended Order, including his recommendation that the Respondent Employer be deemed only secondarily liable for the amount of backpay owed.

*Deborah Jacobson, Esq.*, for the General Counsel.  
*Forrest W. Hunter, Esq. (Alston & Bird)*, of Atlanta, Georgia, on behalf of the Company Respondent.  
*Ralph H. Logan, Esq. (Hardy, Logan, Priddy & Cotton)*, of Louisville, Kentucky, for the Union Respondent.

## DECISION

### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Louisville, Kentucky, on February 9, 1988. The charges were filed by Harold J. Driver, an individual, on November 6, 1987, against the Respondents, the Motor Convoy, Inc. (the Employer) and General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union). The consolidated complaint, issued on December 15, 1987, charged the Employer with a violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and the Union with a violation of Section 8(b)(1)(A) and 8(2) of the Act. The issue is whether the Respondents violated the Act by giving superseniority to the union steward for the purpose of job bidding.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Employer, and the Union, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Company, the Motor Convoy, Inc., is a Georgia corporation with an office and place of business at Louisville, Kentucky. It is engaged in the transportation and delivery of new automobiles. Its revenues, which are in excess of \$50,000, are derived from shipments to points outside the State of Kentucky. The Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

#### II. FACTS

The Company employs approximately 30 drivers at its terminal in Louisville, Kentucky, who transport trucks and cars to various destinations. The driver positions fall into three categories: city driver, short country drivers, and over-the-road drivers (Tr. 14-15). Most of the drivers were over-the-road drivers who transport their load of new cars from 150 miles to about 450 miles and take from 2 to 4 days to complete their deliveries before returning to the terminal. The next category, the short country drivers, make their deliveries

to areas of up to 25 miles from the Louisville terminal. The three drivers who are employed as short country drivers can complete one or two deliveries in 1 day and return to the terminal without spending a night on the road. They, as well as the over-the-road drivers, are paid by the trip. The city driver averages three trips per day and is paid by the number of units delivered. All drivers are covered by a collective-bargaining agreement between the Union and the Company known as the National Master Automobile Transporters Agreement and the Central and Southern Conference Areas Supplemental Agreement, effective from June 1, 1985, to May 31, 1988 (G.C. Exh. 2). The agreement provides for superseniority for the union steward in article 37 as follows:

There may be a Steward at each terminal from the active seniority list. One (1) Steward under each separate contract (i.e., Truckaway, Local and Garage) shall be granted super-seniority for purposes of layoff and recall and such other employment preferences as may be useful in the performance of his duties as Steward as requested by the Local Union in writing.

Donald Malone, the current steward at the Employer's Louisville terminal, exercised this superseniority provision by bidding on the available jobs to become the city driver. He is number 12 on a seniority list containing the names of 30 drivers. He has been the sole city driver since 1981 after the Union informed the Employer by letter, dated March 23, 1981, as follow (G.C. Exh. 4).

Please be advised that Local 89 consistent with the labor agreement, Article 36, titled Stewards, have superseniority for all purposes, all working conditions including layoffs and any other benefits, including shift changes.

Thank you for adjusting your records to reflect the above.

The city driver's position was considered the best of the three job categories for a number of reasons. First, the city driver earns considerably more than the others because, in the words of the terminal manager, "[t]hey pay so much more than the short country runs or the over the road runs" (Tr. 164).<sup>1</sup> Second, the city driver works fewer hours, usually 5 days a week, as compared with the over-the-road or the short country drivers who frequently work 6 days per week (Tr. 70). One of the reasons for this difference is that the city driver has "a different bed of rig to haul, "which requires less effort to tie down the load (Tr. 63). He can therefore load his truck in less time than the drivers in the other categories using different equipment. Finally, the city driver returns everyday to the terminal while the over-the-road drivers may spend several nights on the road.

Three employees, including Duey Bob Helm and Harold J. Driver (the Charging Party), filed a grievance over the superseniority issue (Tr. 78, 81). The arbitration panel upheld the superseniority practice as applied to the steward "because the facts presented did not indicate that the steward used his right to bid for monetary gain" (U. Exh. 1). Duey

<sup>1</sup>There is testimony that other drivers could earn as much as the city drivers, but a comparison of the actual earnings of several drivers shows that Malone earned substantially more than the short country driver (G.C. Exh. 5).

Bob Helm was “number one on the seniority list” and Harold J. Driver was number two on the list (Tr. 75, 58, G.C. Exh. 3).

## II. ANALYSIS

The Employer argues that it “challenged the union’s position at arbitration, but lost . . . that the union does have some basis for requesting superseniority for the union steward in the instant situation” but because the Employer “has done what it could to challenge the situation . . . it should have no liability in this case irrespective of which way the Board ultimately rules” (E. Br. 3–4). The General Counsel’s position is that “the evidence falls far short of . . . showing . . . a legitimate and substantial justification for the application of superseniority for job bidding purposes” and that both “Respondents violated Sections 8(b)(1)(A) and (2) and 8(a)(1) and (3) of the Act as alleged in the complaint” (G.C. Br. 5, 8).

The Union submits that the record establishes “that it is necessary that a steward be available to the employees . . . only by being on the city run . . . [can] the steward [be] accessible to the over-the-road drivers as well as the short country drivers.” Moreover, according to the Union, the steward’s “ready availability, is also economically beneficial to both the unit members and the employer,” and because “job bid preference does not exist for monetary gain,” the Union did not violate the Act (Tr. Br. 8, 9, 12–13).

The parties agree that the principles contained in *Dairyalea Cooperative*, 219 NLRB 656 (1975),<sup>2</sup> are controlling in the instant situation. There, the Board recognized on one hand that unions have a legitimate interest in some form of superseniority for their stewards because it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of an experienced steward on the job. On the other hand, the Board found that superseniority ties job rights and benefits to union activities, a dependent relationship that is at odds with the policy of the Act designed to insulate the one from the other, *id.* at 658. The governing principle of *Dairyalea* is that contractual provisions granting superseniority to union stewards for benefits other than layoff and recall are presumptively unlawful. This presumption is rebuttable by coming “forward with evidence of legitimate and substantial business justifications” for the clause.

The question is whether the Union or the Employer have established a legitimate and substantial business justification for the application of superseniority beyond layoff and recall to Union Steward Malone for purposes of bidding on the city driver’s job. The General Counsel submits that the evidence falls far short of such a showing because the steward’s function to attend grievance meetings and panel hearings was possible for other drivers who were not city drivers, and because short country drivers were nearly equally accessible to perform a steward’s other duties of handling minor problems or processing grievances. The Union vigorously argues that the evidence demonstrates a legitimate justification for the superseniority practice, because only the city job allows a steward to be available to the employees, and because the job bidding preference “works to the benefit of all unit em-

ployees” and not for monetary gain. Both Respondents rely on an Advice Memorandum in *Automobile Transport, Inc. and Teamsters IBT Local 299, 1977–1978 CCH NLRB Decisions*, § 20128 (Mar. 9, 1977). There, the General Counsel dismissed the charges under similar circumstances where the steward had a choice of three trip “boards”—the “city board,” the “short board,” and the “territory board”—he exercised his superseniority in selecting the shortest run, namely, the city board. The General Counsel reasoned that the Employer had shown sufficient justification to overcome the presumption of illegality because it was necessary for the steward to be available at such times as was convenient for other employees and for the Employer’s representative to consult with him. And the shortest run on the city board would allow the steward the most flexibility in being able to pursue his duties as a steward without suffering a loss of pay.

The record in the instant case shows that the steward’s functions could be performed by other drivers, particularly those on the short country runs. The function of the steward is varied and can be summarized as follows: From time-to-time the steward discusses with the other drivers their rights under the contract, and during contract negotiations he assists the business agent. A steward should therefore be available to the other drivers, for those purposes and to the business agent during those negotiations. The steward also assists drivers during the initial stage of the grievance procedure, as for example when the employee discusses a problem with his supervisor. That function of a steward involves approximately 1 hour a month of his time (Tr. 160). Most grievances are resolved at that level. If the matter remains unresolved, the grievance is reduced to writing, a task in which the steward is expected to assist. The record shows that 31 written grievances were filed in 1987.

The steward also attends monthly meetings, attended by the terminal manager, the business agent, and three committeemen, to discuss the written grievances. These monthly meetings are usually held in the morning so that drivers can still get a day’s work done. The steward will also attend the Quad City Panel meetings, which meet every 5 or 6 weeks to handle the still unresolved grievances. These meetings last from 1 to 2 days. The grievances not resolved at the Quad City Panel are forwarded to the Central Southern Committee, which meets four times a year, and lasts up to 4 days. The steward is not expected to be present for the entire meeting, but should be in attendance on the first day and at the particular time when his case is discussed.

The steward is not reimbursed for his attendance at the panel or the Central Southern meetings. However, he receives 20 hours per month pay in consideration for his steward’s duties.

Even without the steward’s special pay, Steward Malone earned considerably more as the city driver than the short country drivers earned. The General Counsel computed the extra pay at approximately \$17,000 per year more than the average pay for the a average short country run driver.

Although the city driver works almost 20 hours per week less than other drivers, the record shows that he usually goes home after his work so that his availability to the drivers at the terminal is not much greater than it would be for an employee on the short country run. The latter involves one to two loads per day lasting up to 2 hours for each load, as

<sup>2</sup> *Enfd. sub nom. NLRB v. Teamsters Local 338 (Dairyalea Cooperative)*, 531 F.2d 1162 (2d Cir. 1976).

compared with the city run with two to three loads per day lasting no more than 30 minutes for each load. Accordingly, the city driver is at the terminal more frequently than a short country driver, but the latter spends more time at the terminal. A driver in either category would be available on a daily basis in the evening at home to receive telephone calls. The General Counsel is therefore correct in stating that any increased availability with the city run position is insignificant when compared with the short country driver. Indeed, William Lyle, Respondent's terminal manager, testified that an employee in the short country run would be able to function as a steward because he is in the terminal at least once a day (Tr. 160-161).

To be sure, the same cannot be said in connection with the over-the-road drivers, because they spend several days on the road, usually 2 days and occasionally 3 to 4 days to complete their trips without returning to the terminal.<sup>3</sup> The record shows that some drivers have called Steward Malone at home during evening hours. Clearly their availability to the other drivers would be more limited and might have some inhibiting effect on a steward's effectiveness, taking into consideration the requirement of the collective-bargaining agreement that written grievances involving certain matters must be filed within 10 days. Generally, however, it appears that even an over-the-road driver could perform a steward's function. The record shows, for example, that Duey Bob Helm served as steward for several months while he was an over-the-road driver (Tr. 76). Moreover, a grievance can be put into writing by the affected employee or the business agent. Aside from a steward's regular meetings (i.e., one monthly grievance meeting, the panel hearings once every 5 or 6 weeks, and the Central Southern meetings four times a year), the steward spends only about 1 hour a month with the terminal manager on informal grievances (Tr. 160). And his contact with his fellow employees on matters of contract interpretations or counseling could still be possible at the terminal or at his home, although not on a daily basis.

In any case, because the burden of rebutting the presumptions of illegality is on the Respondents, I conclude that the record does not adequately demonstrate the justification of a steward's superseniority based on his availability to the other drivers.

Neither does the record support the justification for superseniority on the theory that it furthers the effective administration of the bargaining agreement or the bargaining process. The Respondents argue that many employers are in favor of maintaining the current system and support Steward Malone as the most experienced and effective person for the union position or one who has "contributed to a relatively harmonious relationship between management and labor." But the record does not show that the current steward would discontinue his union role or be unable to perform his union functions if he were outbid for the city job by a more senior driver and had to work as an over-the-road driver. As already stated, in addition to his driver's pay, a steward is compensated at his hourly rate for 20 hours per month for the time lost or spent on union business. And the additional benefits of a city driver who works fewer hours than other drivers and receives more pay, tips any balance strongly in favor of union activity, a result that is contrary to the letter and

spirit of the Act whose purpose is to avoid discrimination against employees. The Board recognized in *Dairylea*, supra at 659, "that the inconvenience and other disadvantages of being a steward may very well in some situations discourage employees from accepting the [steward's] position," but a union should be able to encourage its employees to become stewards without the necessity for rank-and-file employees to "subsidize its stewards by surrendering to them certain job benefits or privileges in return for the steward's union activity."

In conclusion, the Respondents have failed to demonstrate an adequate justification for the application of superseniority for job-bidding purposes, accordingly the presumption of illegality remains unrebutted. Moreover, because the decision of the grievance panel is inconsistent with this conclusion, it is considered to be repugnant to the policy of the Act, making it inappropriate for the Board to defer to that decision. *Olin Corp.*, 268 NLRB 573 (1984). The record shows that Duey B. Helm would have been able to bid for the city driver's position and Harold J. Driver would have been able to bid on the overflow business as the alternate city driver (Tr. 75).

#### CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By applying and enforcing a clause in its collective-bargaining agreement permitting union stewards to exercise superseniority for the purpose of bidding on routes and vehicles, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 8(b)(2) and (1)(A), respectively.

#### THE REMEDY

Having found that the Respondents engaged in certain unfair labor practices, I recommend that they cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices and to effectuate the policies of the Act.

I recommend that the Respondents cease and desist from applying and enforcing any superseniority clause permitting stewards to bid on routes and vehicles.

I have found that the Respondents unlawfully applied and enforced superseniority so as to deprive Duey Bob Helm, who was number one on the seniority list, and Harold J. Drive, who was number two on the seniority list, of the city driver position and the alternate city driver position, but for the illegal discrimination against them. Because the record shows that the Union initiated the unlawful practice by letter of March 23, 1981, and that the Respondent Employer complied with the unlawful request since that time, both Respondents should be ordered jointly and severally to make Duey Bob Helm and Harold J. Driver whole for any loss of earnings they may have sustained as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because the record further shows that the Respondent Employer took a position at the arbitration

<sup>3</sup> *A.P.A. Transport Corp.*, 239 NLRB 1407 (1979).

hearing that superseniority for the steward be recognized for layoff and recall only, I further recommend that the Respondent Union be held primarily liable and the Respondent Company secondarily liable for the amount of backpay.

Also in order to remedy fully the effects of the Respondents' unlawful conduct, the Respondent Company shall be ordered to assign Helm and Driver, if they so desire, the driver routes they would now hold but for the unlawful discrimination and the Respondent Union shall be ordered to

notify in writing the Respondent Company and Duey Bob Helm and Harold J. Driver that it has no objection to assigning Helm and Driver such routes. The Respondent Employer's backpay obligation shall run from the effective date of the discrimination to the time it makes such offer and the Respondent Union's backpay obligation shall run from such effective date to the date of its notification to the Respondent Company.

[Recommended Order omitted from publication.]