UNION STEWARD SUPERSENIORITY*

I
INTRODUCTION

Over 40 percent of all labor contracts currently in force contain special provisions granting employee grievance representatives preference in seniority rights.[1] Although such special rights are usually narrow in scope, restricted in their application to layoff and recall privileges,[2] roughly one-third of these provisions, appearing in some 14 percent of all labor agreements, provide superseniority for union stewards as to a number of additional privileges which seniority rights may encompass: promotions, work-shift selection, overtime assignment, and/or choice of vacation period.[3] Among the contract models which include such broad steward superseniority provisions is the Central States Area Supplement to the Teamsters' National Master Freight Agreement,[4] which governs the employment of over-the-road truck drivers in 16 states.[5]

Although the precise origins of superseniority clauses are unclear, such provisions have been widely accepted since their advent in the 1930's.[6] Unions seek these clauses, which transfer employment prerogatives from the rank-and-file to stewards, in order to maintain the continuity of union leadership, to protect the operation of the grievance resolution procedure, and to shield union representatives from discriminatory treatment at the hands of management.[7]

In *Dairylea Cooperative Inc.*,[8] however, the National Labor Relations Board (NLRB) declared that broad steward superseniority clauses—those not limited to layoff and recall benefits—are presumptively unlawful.[9] The decision was enforced by the Second Circuit in *NLRB v. Teamsters Local 338*.[10] Such clauses must therefore be supported by legitimate and substantial business justifications in order to be upheld.[11] *Dairylea* was followed by a host of NLRB Advice Memoranda, Complaints, and Administrative Law Judge rulings on the

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* Winner of the Sol D. Kapelsohn Prize, awarded annually to the graduating senior who has made the most outstanding contribution to scholarship in the field of labor law.

1. BNA, BASIC PATTERNS IN UNION CONTRACTS 36 (8th ed. 1975); P-H. IND. REL. ¶ 53,160.
2. Wortman, *Superseniority—Myth or Reality?* 18 LAB. L.J. 195, 199 (1967).
3. BNA, *supra* note 1, at 36.
4. The Supplement declares superseniority to be discretionary with union locals. BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (CBNC) 30:103.
5. *Id.* at 30:101.
6. Wortman, *supra* note 2, at 195.
7. *Id.* at 199.
8. 219 N.L.R.B. 656 (1975) [hereinafter cited as *Dairylea*].
9. *Id.* at 658.
10. 531 F.2d 1162 (2d Cir. 1976) [hereinafter cited as *Local 338*].
11. *See* text accompanying notes 61-64 *infra*.

superseniority issue.[12] Recently, this evolving area of law has taken a new tack, with Board decisions distinguishing *Dairylea* and permitting a slight extension in permissible superseniority under special conditions.[13] However, if the general thrust of the *Dairylea* line of cases is followed, labor organizations will soon witness court-dictated changes in the provisions of great numbers of collective bargaining contracts.

This Note will discuss the legality of broad steward superseniority clauses from three different perspectives: (1) an historical analysis in terms of prior relevant decisions and the union duty of fair representation; (2) a discussion within the framework of required justification as established by the NLRB and

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12. If a complaint is issued and goes to trial, a labor case will usually be heard before an NLRB Administrative Law Judge. The Administrative Law Judge's decision may then be adopted, modified, or reversed by the Board. The Board's order, in turn, may be enforced by the appropriate United States Circuit Court if the court finds that there is substantial evidence for the Board's factual findings, and that the Board correctly applied the law to those facts. NATIONAL LABOR RELATIONS ACT (NLRA) § 10(e), *as amended*, 29 U.S.C. § 160(e) (1970).

As of this writing, *Dairylea* has spawned the following actions, in addition to the three NLRB decisions cited in note 110 *infra*:

Administrative Law Judge decisions (these decisions often presenting conflicting results, largely due to differing factual circumstances): W.R. Grace & Co. and Teamsters Local 701, Cases 22-CA-6988 and 22-CB-3236, JD-854-76, (Administrative Law Judge Robert M. Schwarzbart) December 29, 1976 (superseniority for all purposes); Local 1331, UAW, Case 8-CB-2960, JD-801-76, (Administrative Law Judge Thomas E. Bracken) December 10, 1976 (shift and overtime preference for union officers and stewards); USA, Local 2374, Case 13-CB-6072, JD-269-76, (Administrative Law Judge Thomas R. Wilks) May 5, 1976 (retention of job classification); Local 623, UE, Case 6-CB-3520, JD-245-76, (Administrative Law Judge Eugene G. Goslee) April 25, 1976 (narrow superseniority for union officers); Allied Supermarkets, Inc. and Teamsters Local 337, Cases 7-CA-12420 and 7-CB-3411, JD-230-76, (Administrative Law Judge Eugene G. Goslee) April 15, 1976 (superseniority for all purposes); Martin Marietta Aerospace and Local 766, UAW, Cases 27-CA-4704 and 27-CB-974, JD-(SF)-39-76, (Administrative Law Judge William J. Pannier III) February 20, 1976 (retention of job classification for union officers as well as stewards).

Settled complaints: Cooper Tire and Rubber Co. and URW, Local 752, Cases 26-CA-6026 and 26-CB-1141, May 19, 1976 (shift preference for union officers).

Complaints in litigation: Otis Elevator Co. and Local 489, IUE, Cases 22-CA-7070, 22-CB-3275, 22-CA-7133, 22-CB-3281, and 22-CB-3306 (complaint issued Sept. 13, 1976) (retention of job classification); A.P.A. Transport Corp. and Teamsters Local 617, Cases 22-CA-6760 and 22-CB-3145 (complaint issued May 21, 1976) (superseniority for all purposes); Westinghouse Electric Corp. and Local 601, IUE, Cases 6-CA-8753 and 7-CB-3512 (complaint issued April 29, 1976) (retention of job classification).

NLRB Advice Memoranda (NLRB Division of Advice directs regional offices whether or not to issue a complaint): Teamsters Local 229, Case 4-CB-2568, August 30, 1976, 4 AMR ¶ 10,020 (deferral to arbitrator's award upholding overtime preference granted); Local 489, IUE, Case 22-CB-3234, August 27, 1976, 4 AMR ¶ 10,018 (complaint against narrow clause dismissed); Modernfold–Div. of Am. Standard and Bhd. of Carpenters and Joiners, Local 1910, Cases 25-CA-7814 and 25-CB-2564, July 30, 1976 (shift, job classification, and layoff preference for union officers and stewards); International Harvester, Case 13-CA-15045, July 28, 1976, 4 AMR ¶ 10,003 (overtime preference); New York Airbrake Co. and Molders Union, Cases 3-CA-6346 and 3-CB-2616, February 25, 1976 (layoff and shift preference for union officers); IAM, Local 1345, Case 14-CB-3082, December 31, 1975 (retention of job classification for union officers and stewards); USA, Local 2177, Case 4-CB-2618, December 31, 1975 (shift preference for union president); International Union, UAW, Case 7-CB-3418, December 22, 1975 (protection against job downgrading).

13. *See* text accompanying notes 106-34 *infra*. In Hospital Service Plan and Local 32, Office and Professional Employees, 227 N.L.R.B. No. 88 (1976), and Local 780, IATSE, 227 N.L.R.B. No. 79 (1976), the NLRB extended its grant of presumptive lawfulness to clauses conferring retention of job classification benefits.

the Second Circuit; and (3) a presentation of an authorizing theory which holds the grant of superseniority privileges to be within the bounds of permissible union discretion. Consideration will then be given to the related issue of whether non-steward union officials may partake in superseniority privileges.

II
SUPERSENIORITY AND THE UNION DUTY OF FAIR REPRESENTATION

Unions' rights and obligations with respect to their members under the National Labor Relations Act[14] stem from the historical union duty of fair representation. The United States Supreme Court first established this duty in *Steele v. Louisville & Nashville Railroad*[15] by declaring that the statutory representative of a craft may not conclude collective bargaining contracts which discriminate among the members of the unit represented for reasons irrelevant to the authorized purposes of the agreement.[16] One of the matters which the Court expressly stated *was* relevant to the purposes of labor contracts was seniority; employees may be differentiated in bargaining agreements based on seniority gradations.[17] Since seniority does not arise directly from the employer-employee relationship, but rather as a result of the collective bargaining agreement,[18] unions have great discretion in granting the flow of employment privileges to employees distinguished on this basis.

Three years after the decision in *Steele* was handed down, a series of cases arose concerning the seniority rights of veterans under the Selective Training and Service Act of 1940 (STSA).[19] This statute provided that a returning veteran, re-employed by his pre-military service employer, should be restored to the position he held before he entered the military "without loss of seniority" during the first year of his re-employment.[20] If the veteran were laid off during that year, while a union steward with less "natural" seniority were retained, it could be argued that the veteran's statutory rights had been violated.

The first of the veteran cases decided on the circuit court level was *Gauweiler v. Elastic Stop Nut Corp.*[21] The Third Circuit assumed the validity of superseniority for union stewards, as such provisions had never been challenged.[22] The court concerned itself solely with whether such clauses were binding equally on veterans and non-veterans. Since the rights of veterans under the STSA were "subject to the well established and accepted routine of collective bargaining, so far as this particular right of seniority [was]

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14. 29 U.S.C. §§ 151 *et seq.* (1970).
15. 323 U.S. 192 (1944).
16. *Id.* at 203.
17. *Id.*
18. Trailmobile Co. v. Whirls, 331 U.S. 40, 53 n.21 (1946); Local 1251, UAW v. Robertshaw Controls Co., 405 F.2d 29, 33 (2d Cir. 1968, en banc). Seniority may also arise from a statute, but statutory seniority is not relevant for present purposes.
19. Act of Sept. 16, 1940, ch. 720, 54 Stat. 885, *as amended*, 58 Stat. 798, ch. 548, Dec. 8, 1944.
20. *Id.* § 8(d).
21. 162 F.2d 448 (3d Cir. 1947) [hereinafter cited as *Gauweiler*].
22. *See id.* at 451 & n.4, 452 & n.5.

concerned,"[23] the seniority rights of non-steward veterans were inferior to those of stewards in the Elastic Stop Nut plant.[24] The validity of superseniority clauses was not a contested issue in the case. If such clauses were invalid, however, they could not be binding on veterans regardless of the limitations on their STSA rights. A finding that such clauses did not violate the union's duty of fair representation was therefore a necessary step in reaching the ratio decidendi. Accordingly, the court of appeals mentioned the validity of such clauses: "The provision for top or preferred seniority for union officers and other officials is neither uncommon nor arbitrary."[25] While adding a pleasant perquisite to union office, such clauses also served to make sure that an employee grievance representative was always on the job to look after the interests of other employees.[26]

Though *Gauweiler* had involved a narrow superseniority clause, its principle was held equally applicable to broad clauses in *DiMaggio v. Elastic Stop Nut Corp.*[27] and *Koury v. Elastic Stop Nut Corp.*,[28] two other STSA seniority cases decided by the Third Circuit the same day as *Gauweiler*.[29] No distinction was drawn on the basis of the benefits to which superseniority related. Indeed, the fact that the clauses differed is barely discernible.[30]

Three months after these decisions were handed down the Labor Management Relations Act (LMRA)[31] became effective,[32] adding section 8(b)(2)[33] to complement section 8(a)(3)[34] of the National Labor Relations Act as an important statutory prohibition of unfair labor practices. Under section 8(a)(3) it had been an unfair labor practice for an employer to encourage or discourage membership in any labor organization by discrimination in regard to any term or condition of employment. Section 8(b)(2) made it an unfair labor practice for a

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23. *Id.* at 452.

24. *Id.* at 451.

25. *Id.* The court cited Droste v. Nash-Kelvinator Corp., 64 F. Supp. 716, 721 (E.D. Mich. 1946) as authority. 162 F.2d at 451 n.4. Droste v. Nash-Kelvinator Corp. cited no authority for its statement that "[i]t is not unusual to provide in labor contracts that certain employees shall head the seniority list." 64 F. Supp. at 721.

The appeals court did not mention that the House of Representatives' Report on the Labor Management Relations Act, issued the previous month, had explicitly noted the legality of narrow superseniority clauses, at least under § 8(a)(2) of the NLRA. H.R. REP. No. 245, 80th Cong., 1st Sess. 28-29, April 11, 1947. This statement has also gone unmentioned by every other court which has dealt with superseniority.

26. 162 F.2d at 451.

27. 162 F.2d 546 (3d Cir. 1947) [hereinafter cited as *DiMaggio*].

28. 162 F.2d 544 (3d Cir. 1947) [hereinafter cited as *Koury*].

29. The Third Circuit decided four superseniority cases on May 20, 1947: *Gauweiler*, *DiMaggio*, *Koury*, and Payne v. Wright Aeronautical Corp., 162 F.2d 549 (3d Cir. 1947). *Payne*, like *Gauweiler*, involved a narrow clause.

30. DiMaggio v. Elastic Stop Nut Corp., 162 F.2d at 547 (3d Cir. 1947); Koury v. Elastic Stop Nut Corp., 162 F.2d at 545 (3d Cir. 1947). The court's language is, in fact, more confusing than explanatory. However, it is generally recognized that these two cases involved broad superseniority. Brief for Union at 9-10, Dairylea Cooperative Inc., 219 N.L.R.B. 656 (1975); Brief for NLRB at 17, Brief for Union at 32, NLRB v. Teamsters Local 338, 531 F.2d 1162 (2d Cir. 1976).

31. 29 U.S.C. §§ 141 *et seq.* (1970).

32. The Third Circuit cases were decided on May 20, 1947. The LMRA became effective August 22, 1947.

33. 29 U.S.C. § 158(b)(2) (1970).

34. *Id.* § 158(a)(3).

union to cause or attempt to cause section 8(a)(3) discrimination.[35]

A year later another superseniority case involving a veteran reached the circuit court level. The briefs presented to the Ninth Circuit in *Aeronautical Industry District Lodge 727 v. Campbell*[36] did not question the validity of the union's narrow superseniority clause.[37] Possible violations of section 8(a)(3) and the recently enacted section 8(b)(2) were not mentioned.[38] Argument was confined to whether such clauses could validly be applied to veterans as well as non-veterans.[39] Disagreeing with Third Circuit precedent, the Ninth Circuit held such clauses void and of no effect "as to re-employed veterans . . . during their statutory year of re-employment."[40] By implication, such clauses were valid as to both non-veterans and veterans after the year of seniority protection afforded by the STSA had ended.

The Supreme Court granted certiorari to resolve this conflict between circuits with respect to the rights of veterans under the STSA.[41] Discussion in *Campbell* at the Supreme Court level was confined to this issue, and the validity of superseniority clauses in general was assumed. As noted in the brief filed on behalf of the returning veterans, "if the non-veteran employees choose to make a collective bargaining agreement giving super-seniority to union officers, they have no complaint if Section 8 [of the STSA] limits the application of such super-seniority to the non-veteran employees."[42] No mention was made of sections 8(a)(3) or 8(b)(2) of the NLRA.[43]

Just as in *Gauweiler*, it was necessary to make a finding that superseniority clauses were valid in order to reach the ultimate issue in the case. In so doing the Supreme Court looked not to sections 8(a)(3) and 8(b)(2), but rather to the pre-section 8(b)(2) *Gauweiler* decision. After a preliminary discussion stressing the union's right to determine seniority according to principles other than simple time considerations,[44] the Court followed the approach of *Gauweiler* and paraphrased the Third Circuit's statement about superseniority clauses:[45] "[a] provision for the retention of union chairmen beyond the routine requirements of seniority is not at all uncommon and surely ought not to be

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35. *See* note 72 *infra*.

36. 169 F.2d 252 (9th Cir. 1948).

37. Appellant's Opening Brief; Brief for Appellees Campbell, Joplin & Kirk; Appellant's Reply Brief; Brief for Appellee Lockheed; and Supplement to Appellee's Brief, Aeronautical Indus. Dist. Lodge 727 v. Campbell, 169 F.2d 252 (9th Cir. 1948).

38. *Id.* Although such claims are properly addressed to the NLRB in the first instance under § 10(a) of the NLRA, 29 U.S.C. § 160(a) (1970), they would surely have been presented to or mentioned by the federal courts if considered substantive. *Cf.* the recent case of Association of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), on incomplete federal preemption in the union-employee area.

The Board in *Dairylea* specifically recognized the relevance of *Aeronautical Indus. Dist. Lodge 727 v. Campbell* to proceedings under the NLRA. 219 N.L.R.B. at 658 n.6.

39. *See* note 37 *supra*.

40. 169 F.2d at 253.

41. Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 522 (1949) [hereinafter cited as *Campbell*, which refers to the case only at the Supreme Court level].

42. Brief for Respondents Campbell, Joplin & Kirk at 42-43.

43. Brief for Appellant Lodge 727; Brief for Respondents Campbell, Joplin & Kirk; Brief for Respondent Lockheed.

44. 337 U.S. at 526-27.

45. *Compare* 337 U.S. at 527-28 *with* 162 F.2d at 451-52.

deemed arbitrary or discriminatory."[46] The Court noted that such clauses serve to secure better working conditions for employees by providing representatives who are not subject to the uncertainties of layoff.[47] Furthermore, the seniority rights of veterans are determined under the conventional uses of the seniority system.[48] Therefore, the Court found, the rights of non-steward veterans are inferior to those of stewards.[49]

One might conclude that since the Supreme Court followed the path set out in *Gauweiler* so closely, it would have also followed the Third Circuit approach in *DiMaggio* and *Koury* and applied the *Gauweiler* rationale to broad superseniority clauses. However, since *Campbell*'s legitimization of narrow superseniority may well have been in part due to judicial oversight—the failure to consider fully sections 8(b)(2) and 8(a)(3)—such a conclusion would be speculative. Although *Campbell* uncritically assumed *Gauweiler*'s validation of superseniority clauses, it did attempt to buttress *Gauweiler* by citing authorities on seniority systems in support of its position.[50] These sources neither clearly favor nor clearly oppose seniority preferences which go beyond layoff and recall. While many of the cited sources do not distinguish broad from narrow superseniority,[51] others would restrict seniority preference to layoff benefits.[52] Several do not indicate a position on the issue.[53] Thus no certain conclusions may be based on *Campbell* alone.

However, the Supreme Court has in other cases recognized wide union discretion in the seniority area. In *Ford Motor Co. v. Huffman*,[54] the Court validated a collective bargaining clause granting seniority credit for pre-employment military service.[55] Although unwilling to define the limits of a collective bargaining representative's discretion, the Court stressed that so long as

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46. 337 U.S. at 528.

47. *Id.* at 529.

48. *Id.* at 526. This notation disposes of the General Counsel's contention that the veteran cases are inapposite to current attacks on superseniority. The claim was raised in the NLRB's brief in *Local 338* that cases arising under the STSA are inapplicable to ones arising under the NLRA, as the respective statutes are not *in pari materia*. Brief for NLRB at 18, NLRB v. Teamsters Local 338, 531 F.2d 1162 (2d Cir. 1976). However, the STSA sought to protect the rights of veterans under legitimate existing seniority systems. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 288 (1946). The NLRA also seeks to promote legitimate collective bargaining practices, including seniority systems. NLRA § 1, 29 U.S.C. § 151 (1970). The claim is therefore without merit.

49. 337 U.S. at 529.

50. *Id.* at 528 n.5.

51. R. & E. GREENMAN, GETTING ALONG WITH UNIONS 25-26, 85-86 (1948); COLLECTIVE BARGAINING PROVISIONS, SENIORITY PROVISIONS, U.S. DEP'T OF LABOR 27-29 (1948); S. WILLIAMSON & H. HARRIS, TRENDS IN COLLECTIVE BARGAINING 100-03 (1945). *See* F. HARBISON, SENIORITY POLICIES & PROCEDURES AS DEVELOPED THROUGH COLLECTIVE BARGAINING 11-12 (1941), *cited in* 337 U.S. at 527.

52. UNION AGREEMENTS IN THE COTTON-TEXTILE INDUSTRY, U.S. DEP'T OF LABOR, BULL. No. 885 at 28 (1946); COLLECTIVE BARGAINING IN THE OFFICE, AMERICAN MANAGEMENT ASS'N, RESEARCH REP. No. 12 at 72; SENIORITY PROVISIONS IN UNION AGREEMENTS, U.S. DEP'T OF LABOR, SERIAL No. R1308 at 7 (1941).

53. R. THOMAS, AUTOMOBILE UNIONISM 56 (1941); THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD, U.S. DEP'T OF LABOR, VOL. I at 148.

54. 345 U.S. 330 (1953) [hereinafter cited as *Huffman*].

55. *Id.*

contractual provisions are negotiated in good faith and with honesty of purpose, bargaining representatives are allowed a wide range of discretion in serving the units they represent.[56] The decision upholds the right of bargaining representatives to calculate seniority on bases other than simple comparisons of length of employment service:

> Variations acceptable in the discretion of bargaining representatives . . . may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and *time or labor devoted to related public service, whether civil or military, voluntary or involuntary*.[57]

Cited as authority for the proposition that representatives have the right to make such variations are Williamson and Harris, *Trends in Collective Bargaining*, which sanctions broad as well as narrow steward superseniority,[58] and *Hartley v. Brotherhood of Railroad & Steamship Clerks*, which supports wide union discretion in the seniority area.[59] *Campbell* is cited as a specific instance in which a seniority clause not based solely upon relative lengths of employment was upheld.[60]

III
THE *DAIRYLEA* GLOSS

In *NLRB v. Great Dane Trailers*[61] the Supreme Court established a paradigm for the classification of section 8(a)(3) violations. Employer conduct regarding employees is divided into two categories: conduct which is so harmful it is considered "inherently destructive" of employee rights and conduct which has only a "comparatively slight" effect on those rights.[62] If the employer's activity is found to be "inherently destructive," no proof of an anti-union animus is required, and a section 8(a)(3) violation is made out even if the employer introduces evidence that the conduct is motivated by legitimate business considerations.[63] However, if the adverse effect on employee rights is "comparatively slight," and if the employer comes forward with evidence of legitimate and substantial business justifications for that conduct, then the General Counsel of the NLRB must prove a specific prohibited motivation behind the conduct to sustain the section 8(a)(3) charge.[64]

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56. *Id.* at 338.
57. *Id.* at 338-39 (emphasis added).
58. WILLIAMSON & HARRIS, *supra* note 51, at 100-03 (1945).
59. 283 Mich. 201, 277 N.W. 885 (1938). The specific issue in *Hartley*, reduction of seniority rights of married women, would be decided differently today.
60. 345 U.S. at 342.
61. 388 U.S. 26 (1967).
62. *Id.* at 34.
63. *Id.*
64. *Id.*

A. *Argument and Holding*

Steward superseniority was first challenged in a complaint filed against a Teamster local in 1973.[65] Since 1937 the local's contracts had granted top seniority to stewards with respect to all employment emoluments in which seniority was a consideration: overtime assignment, vacation period selection, assignment of driver routes, and choice of shifts, in addition to layoff and recall preference.[66] The complaint, filed on behalf of a driver who lost to the steward in the bidding for a new route, alleged violations of sections 8(a)(1)[67] and 8(a)(3)[68] by Dairylea Cooperative Inc., and violations of sections 8(b)(1)(A)[69] and 8(b)(2)[70] by Teamster Local 338. Since the driver had the greatest length of service in the unit, with more than twenty-four years greater "natural" seniority than the steward, his failure to obtain the new route was due solely to the broad superseniority clause.[71]

The NLRB General Counsel contended that, since the clause conditioned employment benefits on union activity, it encouraged union activism and therefore came within the definition of section 8(a)(3) discrimination set forth in *Radio Officers' Union v. NLRB*.[72] However, in light of *Campbell*, the General Counsel restricted his attack on the *Dairylea* clause to seniority benefits other than layoff and recall.[73] Although sections 8(a)(3) and 8(b)(2) were not treated in *Campbell*, the General Counsel accepted *Campbell* as validating narrow clauses, apparently under any statute.[74]

The union responded by citing the pervasive, long-standing, and unchallenged use of superseniority clauses. It argued that since seniority rights arise from the collective bargaining agreement, and the complainant had always worked under contracts containing broad clauses without ever having challenged them, he could not now object to their application. As the clause did not discriminate between union members and non-members, the union contended that it did not result in the type of discrimination prohibited by sections 8(a)(3) and 8(b)(2).[75]

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65. The General Counsel had on at least two prior occasions refused to issue complaints against narrow superseniority clauses. Case No. F-1015, April 2, 1959, 44 L.R.R.M. 1276; Case No. SR-1603, October 24, 1961, 49 L.R.R.M. 1252.

66. 219 N.L.R.B. at 657; Supplemental Brief for Union at 3.

67. 29 U.S.C. § 158(a)(1) (1970). Section 8(a)(1) is a catch-all provision, encompassing all employer violations of employees' § 7 rights, 29 U.S.C. § 157 (1970).

68. 29 U.S.C. § 158(a)(3) (1970).

69. 29 U.S.C. § 158(b)(1)(A) (1970). Section 8(b)(1)(A) is the union's catch-all provision, encompassing all union violations named in § 8(b).

70. 29 U.S.C. § 158(b)(2) (1970).

71. 219 N.L.R.B. at 657; General Counsel's Exhibit 10: "Nanuet Sales Seniority List."

72. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) [hereinafter cited as *Radio Officers'*], *cited in* Brief for General Counsel at 8.

Section 8(a)(3), in general, makes it unlawful for an employer to encourage or discourage membership in any labor organization by discrimination in regard to any term or condition of employment. In *Radio Officers'* the Supreme Court gave an expansive definition to the term "membership." The Court stated that section 8(a)(3) protected the right of employees ". . . to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." 347 U.S. at 40. Section 8(b)(2) makes it unlawful for a labor organization to cause or attempt to cause section 8(a)(3) discrimination.

73. Brief for General Counsel at 8.

74. *Id.* at 6-7.

75. Brief and Supplemental Brief for Union.

The Board found the union's arguments unpersuasive. Viewed realistically, the only way for an employee to gain the benefits conferred by the clause is to be an enthusiastic unionist, and hence to commend himself to the union leadership for appointment to the office of steward.[76] Even assuming, *arguendo*, that allegiance to the incumbent union is not a prerequisite to steward selection, union activism in the form of steward service is indispensable in securing the provision's benefits.[77] This is sufficient, under *Radio Officers'*, to bring the clause within section 8(a)(3).[78] Broad superseniority was therefore held presumptively unlawful. Although proper justification for the use of such clauses might be forthcoming in a future case, none was presented by Local 338, and so the clause was invalidated.[79] Member Fanning, dissenting, found broad superseniority to be within the parameters of permissible union discretion as set forth in *Campbell* and *Huffman*.[80]

The Second Circuit accepted the Board's finding of encouragement of union membership as defined in *Radio Officers'* with the usual deference given administrative agency decisions.[81] The Union's failure to advance any justification for the clause before the Board was a fatal error, making it impossible for any court to overturn the Board's decision.[82]

The opinions of the circuit court and the Board, however, were not completely consistent. While not immediately apparent, the inconsistency did provide an opening wedge for unions in the latest NLRB superseniority decisions.[83] First, while the Board restricted its declaration of lawfulness to layoff and recall benefits,[84] the Second Circuit focused on the generous privileges granted the *Dairylea* steward. The court pointedly noted the wide range of advantages to which the steward acceded under the clause: "The steward's perquisites are rather more extensive and tangible than his duties."[85] It thus appeared that the court was concerned with the *quantity* of benefits granted by the clause in question, whereas the Board was concerned with the *quality* of that clause.

Second, the Board impliedly gave a broader interpretation to the meaning of "membership" under *Radio Officers'* than did the Second Circuit. Both the Board and the court agreed that superseniority encourages activity on behalf of the incumbent union when stewards are appointed.[86] However, the Board went further than this, noting that simply acting as a steward—regardless of selection procedure—was sufficient union activity to come within *Radio Officers'* and hence trigger a section 8(b)(2) violation.[87] The Second Circuit did not go this far. Here the court focused entirely on the question of appointment by the

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76. 219 N.L.R.B. at 657.
77. *Id.* at 658.
78. *Id.* at 658 n.5.
79. *Id.* at 658.
80. *Id.* at 662-63 (Member Fanning, dissenting).
81. 531 F.2d at 1166 n.7.
82. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967).
83. *See* text accompanying notes 106-34 *infra*.
84. 219 N.L.R.B. at 658.
85. 531 F.2d at 1164.
86. *Id.* at 1166; 219 N.L.R.B. at 657-58.
87. 219 N.L.R.B. at 658 & n.5.

incumbent union, and the natural tendency for the union to appoint a supporter to such a sensitive position.[88] Union activity as a steward was not mentioned. The court indicated in a circuitous manner that if the union could demonstrate, through evidence of its steward selection policies, that superseniority did not encourage activity on its behalf, then no section 8(b)(2) violation could be made out.[89]

B. A Campbell *Retrospective*

In his argument to the NLRB, the General Counsel attempted to refine *Campbell*'s undifferentiated acceptance of superseniority clauses by stressing the Supreme Court's statements on the benefits to be derived from granting stewards continuity in office.[90] Since this rationale applies only to layoff preference, the Counsel implied that *Campbell*'s validation of superseniority clauses was limited strictly to narrow provisions. This implication is misleading. Although it is true in a strict sense that a simple mention of continuous employment applies only to layoff preference, the Third Circuit made an identical statement in *Gauweiler*, and did not hesitate to apply the *Gauweiler* principle to broad seniority clauses.[91] In light of the influence which *Gauweiler* had on *Campbell*, a restrictive interpretation of *Campbell*'s remarks has little to commend it.

The Board took this distortion one step further. Although *Campbell* found "a vast body of long-established controlling practices in the process of collective bargaining" which permitted seniority rights to be allocated according to indices other than simple temporal measurements,[92] the Board asserted that *Campbell* concerned a limited exception to the overriding seniority rule of length of service.[93] According to the Board this exception had to be justified in order to be found lawful. Therefore, taking up the General Counsel's implication, the Board decided that *Campbell*'s validation was "based" on the importance to the unit of the continued presence of the steward on the job.[94] Although the union had cited the Third Circuit cases to the Board,[95] these cases were ignored since they exposed equally plausible "bases" for *Campbell*.[96] As the *Campbell* justification did not apply to benefits other than layoff preference, and since such benefits resulted in section 8(a)(3) discrimination, clauses

88. 531 F.2d at 1166.

89. *Id.* at 1166 & n.6.

90. Brief for General Counsel at 7, Dairylea Cooperative Inc., 219 N.L.R.B. 656 (1975).

91. *See* text accompanying notes 26-30 *supra*.

92. 337 U.S. at 527.

93. 219 N.L.R.B. at 658-59. The Board's statement that *Campbell* was not concerned with the affirmative use of a seniority system for any purpose whatsoever is contradicted by *Campbell*'s notation of the use of special seniority provisions for key workers. *Compare* 219 N.L.R.B. at 658 *with* 337 U.S. at 527. *See* WILLIAMSON & HARRIS, *supra* note 51, at 101; HARBISON, *supra* note 51, at 36-37.

94. 219 N.L.R.B. at 658. In fact, the Supreme Court had spoken, not of continued presence on the job, but rather of continuity in office. 337 U.S. at 528. The distinction is important in considering superseniority for union officials. *See* Part VI *infra*.

95. Brief for Union at 9-10.

96. A careful reading of *Campbell* in conjunction with the Third Circuit cases indicates that the Supreme Court's decision could rest just as easily on the fact that it was accepting conventional uses of seniority systems, or that it was following *Gauweiler*'s rationale. Either reason could lead to validation of broad preference.

not limited to layoff were "presumptively unlawful," with the burden of rebuttal resting on the party asserting legality.[97] The circuit court followed the Board's analysis of *Campbell*, noting that the General Counsel did not challenge the "narrow" portion of the clause because, in his opinion, it was supported by the legitimate justification of keeping the same steward continuously on the job.[98]

The union had contended that broad superseniority clauses lay within the discretion *Huffman* granted unions to determine seniority gradations by yardsticks other than length of service.[99] Member Fanning, dissenting from the majority opinion, agreed with this contention, finding service as a steward within the context of the NLRA to be precisely the sort of "public service" described in *Huffman*.[100] The majority found *Huffman* inapposite,[101] for the basis of the *Huffman* decision negated the Board's contention that overriding considerations must justify departures from a strict rule of seniority measured by length of service.

C. Summary

Although few certain conclusions may be drawn from the veteran cases and *Huffman*, it is clear that the *Dairylea* line of cases has not treated them accurately. This result may in large measure be ascribed to the fact that *Dairylea* attempted to conform prior cases addressing veterans' rights under the STSA to the resolution of a dispute under the NLRA. While the statutes are, for the purposes of the issue in question, *in pari materia*, it cannot be gainsaid that the courts had different points of departure and proceeded in different directions in each line of cases. This resulted in a lack of congruence between the two streams of decisions.

Since the General Counsel was willing to let Campbell restrict his attack on superseniority to benefits in excess of layoff, it would seem that the Third Circuit's validation of broad preference is equally relevant, though not equally binding. In light of this, the Board's refusal to acknowledge the existence of the Third Circuit cases is troubling. The Board's grounding of its decision in *Campbell* unavoidably results in this inconsistency. From the Board's perspective it would be wiser to treat *Campbell* as merely a fair representation decision which limits the invalidation of superseniority under the NLRA. Then the circuit court cases could be dismissed as non-binding in a section 8(b)(2) case. The citation of *Campbell* as a directing decision permits unions to press *DiMaggio* and *Koury*, the Third Circuit broad preference cases, as equally relevant directing decisions.

From the perspective of unions under attack, *Campbell* offers little in the way of affirmative defense. The Board's treatment of *Campbell* may be distinguished, particularly with the aid of *Huffman*, but this is about all that can be hoped for. While *DiMaggio* and *Koury* may be pressed for their precedential

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97. 219 N.L.R.B. at 658.
98. 531 F.2d at 1166 n.7.
99. Brief for Respondent Union, esp. at 11-13, Dairylea Cooperative Inc., 219 N.L.R.B. 656 (1975).
100. 219 N.L.R.B. at 663 (Member Fanning, dissenting). *See* text accompanying note 57 *supra*.
101. 219 N.L.R.B. at 658 n.7.

value, circuit court cases are more easily ignored than those of the Supreme Court. Even if forced to acknowledge these decisions, the Board may distinguish them as pre-section 8(b)(2) cases, or counter with the Second Circuit's enforcement of *Dairylea*.

It is undeniable that superseniority for union personnel has some adverse effect on employee rights, since extra seniority benefits for one employee must mean a diminution in benefits to another or others.[102] Under the *Great Dane* paradigm, however, this adverse effect is not dispositive of legality unless it is inherently destructive of employee rights. Both the NLRB and the Second Circuit refused to make findings of per se illegality in *Dairylea*.[103] Broad superseniority clauses are merely presumptively unlawful, with the burden of rebuttal resting on the party asserting legality.[104] By implication, the adverse effect of broad superseniority clauses on employee rights is "comparatively slight." Assuming no conscious intent to use broad superseniority as a means of encouraging union activism in the rank and file, legitimate and substantial business justifications will protect such clauses from attack.[105] Thus the dispositive issues in future cases will be the question of encouragement of union membership, the justifications advanced for superseniority, and the Supreme Court's conception of where the line between union activity and conditions of employment is to be drawn.

IV
JUSTIFYING SUPERSENIORITY

A. Rebutting the Inference of Encouragement of Membership

The fact most commonly cited, when applicable, in answer to the *Dairylea* presumption is that stewards are elected by their constituents, rather than appointed by union officers, as was the *Dairylea* steward.[106] Until recently, this argument was universally dismissed as inapposite to the concerns expressed in *Dairylea*.[107] The Board had noted that service as a steward was itself sufficient

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102. This will occur unless the favored employee happens to have the greatest seniority anyway.

103. The General Counsel urged before the Board that broad superseniority was "inherently destructive" of employee rights. Brief for General Counsel at 8-9, Dairylea Cooperative Inc., 219 N.L.R.B. 656 (1975). This claim was abandoned before the Second Circuit, the NLRB noting that, in some other case, a union might be able to establish some justification for such a clause. Brief for NLRB at 15 n.6, NLRB v. Teamsters Local 338, 531 F.2d 1162 (2d Cir. 1976).

104. 219 N.L.R.B. at 658; 531 F.2d at 1166.

105. For reflections on the burden of rebutting the presumption of illegality, see Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1328 (1968). The authors posit that, the injury to employee interests being admittedly slight, substantial economic justifications will always outweigh them. *Id.* The real question is thus whether courts will accept proffered justifications as legitimate and substantial. *See* Janofsky, *New Concepts in Interference and Discrimination Under the NLRA*, 70 COLUM. L. REV. 81, 96 (1970).

106. W.R. Grace & Co. and Teamsters Local 701, JD-854-76 at 8; Local 1331, UAW, JD-801-76 at 4; Allied Supermarkets, Inc. and Teamsters Local 337, JD-230-76 at 6-7; Martin Marietta Aerospace and Local 766, UAW, JD-(SF)-39-76 at 9-10; Respondent Union's Exceptions at 30-31, Local 623, UE, JD-245-76.

107. W.R. Grace & Co. and Teamsters Local 701, JD-854-76 at 8; Local 1331, UAW, JD-801-76

union activity to trigger a violation under *Radio Officers'*.[108] Thus the mode of selection—election by the rank-and-file or appointment by the union hierarchy —was of little consequence. The Second Circuit disagreed, however, stating that if the union could, through evidence of its steward selection policy, rebut the inference of encouragement of support of the incumbent union, then the union would prevail.[109] The Board has at last relented, accepting the Second Circuit's approach in the most recent superseniority cases. NLRB decisions handed down in December 1976 approach the Second Circuit's position in the two areas of prior incongruity.[110]

In *Local 780, IATSE* the superseniority clause gave the steward protection not only against layoff, but also against downgrading of job classification.[111] A three-member panel of the Board[112] overturned the decision of the Administrative Law Judge[113] and upheld the clause on two grounds. First, the panel majority stressed the limited benefit which the clause conferred, in distinction to the extremely broad range of perquisites granted the *Dairylea* steward.[114] Second, the Board emphasized the tenuous connection between union activity and accession to benefits under the clause. The panel noted that all members of the bargaining unit, whether or not union members, participated in the selection of stewards by vote.[115] Stewards were not required to belong to the union.[116] The stewards played a role in applying and interpreting the labor agreement, but they did not otherwise act as union agents in such matters as collection of dues.[117] Thus Local 780's superseniority preference "is not tied to membership in, adherence to, or agency on behalf of any union, but rather is derived from the position of steward, which is available to all unit members, union and nonunion alike."[118] Although the Board had earlier stated that steward service was sufficient to trigger a section 8(b)(2) violation,[119] this prior position was ignored. *Dairylea* was declared inapplicable to Local 780's superseniority

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at 4; Allied Supermarkets, Inc. and Teamsters Local 337, JD-230-76 at 6-7; Martin Marietta Aerospace and Local 766, UAW, JD-(SF)-39-76 at 9-10.

108. 219 N.L.R.B. at 658 & n.5.

109. 531 F.2d at 1166 n.6.

110. Auto Warehousers, Inc. and Teamsters Local 47, 227 N.L.R.B. No. 100 (1976) [hereinafter cited as *Teamsters Local 47*]; Hospital Service Plan and Local 32, Office and Professional Employees, 227 N.L.R.B. No. 88 (1976) [hereinafter cited as *Hospital Service Plan*]; Local 780, IATSE, 227 N.L.R.B. No. 79 (1976).

111. 227 N.L.R.B. No. 79, slip op. at 4.

112. Cases brought before the NLRB are normally decided by three-member panels. Only important questions or novel issues, such as those in *Dairylea*, are heard before the full five-member Board.

113. Local 780, IATSE, Case 12-CB-1619, JD-315-76, (Administrative Law Judge Thomas R. Wilks) May 18, 1976.

114. 227 N.L.R.B. No. 79, slip op. at 4-5.

115. *Id.* at 5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Dairylea*, 219 N.L.R.B. at 658. *See* text accompanying notes 86-89 *supra*. Administrative Law Judge Wilks had relied on this language in *Dairylea* in rejecting Local 780's election argument at the trial level. JD-315-76 at 8-9.

In a prior decision, USA, Local 2374, JD-269-76, Judge Wilks had upheld a similar clause, as justification had been presented for it.

policy.[120] Member Fanning concurred for the reasons set out in his *Dairylea* dissent.[121]

In a footnote to the *Local 780, IATSE* decision Chairman Murphy noted that she would find no violation even had there been a union-security clause in the contract. In that case, employees would have to join the union in any event and there would thus be "no undue encouragement of employees to join or adhere to the Union."[122] This factual situation was tried the same day, and the same panel which heard *Local 780, IATSE* distinguished *Dairylea* once again. In *Hospital Service Plan*[123] the superseniority clause also prevented the downgrading of stewards' job classifications.[124] Even though the stewards served in a union shop,[125] *Local 780, IATSE* was held controlling,[126] with Member Penello joining Chairman Murphy in applying the *Local 780, IATSE* rationale. Member Fanning concurred once again for the reasons stated in his *Dairylea* dissent.[127]

The panel majority added to its holding an explanation of the meaning of layoff preference, putting a gloss on the Board's holding in *Dairylea*. The panel declared that steward superseniority must permit lateral bumping to retain job classification, for otherwise a steward would be entitled to no greater priority than any other employee.[128] This statement is clearly incorrect. As Administrative Law Judge Melvin Welles explained in his opinion in the *Hospital Service Plan* case,[129] superseniority in *Dairylea* applied to the extent necessary to keep stewards employed.[130] If the steward were fifty-first in seniority in a one hundred member unit and fifty employees were laid off, a valid narrow clause, under *Dairylea*, would cause the fiftieth employee to be laid off so that the steward could be retained.[131] Thus, although unwilling to admit its inconsistency, the Board extended the boundaries of permissible superseniority clauses.

The most recent approach apparently follows the Second Circuit in looking to the quantity of benefit conferred by the clause. Six days after *Local 780, IATSE* and *Hospital Service Plan* were decided, the same three-member Board

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120. 227 N.L.R.B. No. 79, slip op. at 5.

121. *Id.* at 8.

122. *Id.* at 7 n.7.

123. 227 N.L.R.B. No. 88 (1976). Local 780, IATSE and *Hospital Service Plan* were both decided on December 23, 1976.

124. 227 N.L.R.B. No. 88, slip op. at 4.

125. This fact was not mentioned in the Board's or Administrative Law Judge's opinions. It was disclosed by Local 32's counsel to the author.

126. 227 N.L.R.B. No. 88 at 4.

127. *Id.* at 5.

In Union Carbide Corp. and Local 8-891, Oil, Chemical and Atomic Workers Int'l Union, 228 N.L.R.B. No. 141 (1977), decided after preparation of this Note, the employer unilaterally refused to enforce a contractual provision which gave elected stewards shift and departmental superseniority. Respondent employer's defense that the clause ran afoul of the *Dairylea* rule was not accepted, and § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), and § 8(a)(1) violations were made out. In her concurring opinion, Chairman Murphy noted that union officers whose "functions relate in general to furthering the bargaining relationship," *id.*, slip op. at 12, should enjoy the same superseniority benefits as stewards. *See* Part VI *infra*.

128. *Id.* at 4.

129. JD-284-76.

130. *Id.* at 7.

131. *Id.*

panel adopted summarily the Administrative Law Judge's decision in *Auto Warehousers, Inc. and Teamsters, Local 47*, striking down the superseniority provision.[132] Local 47's collective bargaining contract contained a broad superseniority clause virtually identical to the one invalidated in *Dairylea*.[133] Although Local 47's stewards were elected,[134] the Board made no attempt to distinguish *Dairylea* on this basis.

Therefore, although election of stewards will facilitate a finding of legality of superseniority clauses not restricted to layoff and recall, in accordance with *Local 338*, the clause must nevertheless be relatively restrictive in scope in order to be upheld. To defend expansive clauses unions must therefore present legitimate and substantial justifications for their operation.

B. Legitimate and Substantial Business Justifications

Although it is impossible to anticipate all of the justifications which could be raised in defense of any specific broad clause without knowing the particulars of the labor contract and setting, several arguments have general application.

The first was raised by the Board itself. The majority noted that "the inconvenience and other disadvantages of being a steward may very well in some situtions discourage employees from accepting the position."[135] Since grievance-processing is one of the major functions of labor organizations, unions could argue that superseniority is necessary to attract qualified employees to the post of steward. Both the NLRB and the Second Circuit dismissed this potential argument on the ground that alternative inducements from the union—a salary or other non-job benefits—are available to produce the same result.[136] However, this argument should be pressed in conjunction with the argument in Part V, *infra*, on the permissible boundaries of the application of internal union rules.

The second justification is an expansion of the first. If it is necessary to add employment emoluments to the steward's office in order to get employees to serve at all, a fortiori it is necessary to add such benefits in order to have the highest-caliber personnel serve as stewards. Encouraging the best individuals to serve as grievance representatives enhances the legitimate objective of upgrading the quality of enforcement of labor agreements.[137] The NLRB, supported by the Third Circuit, has approved of this objective. In *Bethlehem Steel Co. (Shipbuilding Division)*[138] the employer made unilateral changes after the

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132. 227 N.L.R.B. No. 100 (1976), decided December 29, 1976. A slight technical modification of the Administrative Law Judge's order was made.

133. JD-493-76 at 3.

134. *Id.* at 8 & n.24. The union retained the power to remove the steward, though this had never been done. The union could also discontinue the practice of having employees petition for the election of a new steward. *Id.*

135. 219 N.L.R.B. at 659.

136. 531 F.2d at 1166; 219 N.L.R.B. at 659.

137. *Cf.* 337 U.S. at 528.

138. Bethlehem Steel Co. (Shipbuilding Div.), 133 N.L.R.B. 1347 (1961), supplemental decision and order, 136 N.L.R.B. 1500 (1962), *rev'd on other grounds and remanded sub nom.* Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963), second supplemental decision and order, 147 N.L.R.B. 977 (1964).

termination of its contract with the union. Abrogation of seniority rights afforded by a narrow superseniority clause was declared violative of section 8(a)(5)[139] of the NLRA.[140] The Board noted approvingly that the effect of such rights was to make "better qualified union representatives" available to the employees.[141]

The superseniority in *Dairylea* extended to overtime assignment, vacation period selection, assignment of driver routes, and choice of shifts, hours, and days off.[142] All of these, with varying degrees of directness, have an impact on the ability of a steward to fulfill his union duties. It is at least arguable that the greater the discretion granted the steward to tailor the details of his own employment to fit his union responsibilities, the greater will be his effectiveness in fulfilling those responsibilities. If a steward can choose the time and place he works, he can be where a steward is most needed at the most critical times. Thus, at least in one respect, broad superseniority is merely an extension of narrow superseniority. Naturally, the effectiveness of this argument will depend on how the steward has in fact used his seniority privileges. If his choices have been made so as to enhance his role as a grievance representative, this argument should certainly be pressed. If, however, superseniority has been used for personal considerations without regard to the steward's official capacity, little is to be gained from raising this point.

The fourth argument is also related to the manner in which the steward has carried out his responsibilities. Member Fanning, dissenting in *Dairylea*, argued that service as a steward is precisely the sort of civil voluntary service around which *Huffman* contemplated seniority rules might revolve.[143] *Campbell* emphasized the "special position in relation to collective bargaining" which stewards fill "for the benefit of the whole union."[144] As Member Fanning noted, it would be difficult to discover, within the context of the NLRA, service more directly related to the interests of the bargaining unit than grievance representation.[145] Although the *Dairylea* majority rejected the dissent's claim of public service status,[146] the argument is worth raising if the steward's work in a particular unit has been arduous or particularly praiseworthy.

The great majority of labor contracts provide that stewards will suffer no loss in pay for work time spent handling grievances.[147] If no such provision is written into the contract, employment compensation by way of extra seniority privileges would be appropriate. Even when such provisions appear, they often limit the amount of time which is compensable.[148] If a steward's duties frequently require him to spend time away from work in excess of this limit, the same justification would apply.

Finally, although promotions are sometimes granted on a strict seniority

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139. 29 U.S.C. § 158(a)(5) (1970).
140. 136 N.L.R.B. at 1503.
141. *Id.*
142. 219 N.L.R.B. at 657.
143. *Id.* at 663 (Member Fanning, dissenting). *Cf.* text accompanying note 57 *supra*.
144. 337 U.S. at 527.
145. 219 N.L.R.B. at 663 (Member Fanning, dissenting).
146. *Id.* at 659.
147. P-H IND. REL. ¶ 53,186.
148. *Id.*

basis, the more frequent method is for seniority to play a major role with other determinants such as merit, efficiency, and ability, also entering into the selection process.[149] The same holds true for the other employee prerogatives dealt with in *Dairylea*.[150] One of the primary reasons for superseniority is to protect stewards against recrimination by employers.[151] However, if employer discretion still exists with respect to promotions and other employee prerogatives, the protection against possible recrimination is ineffectual. To ensure most effectively against discrimination, and hence to secure stewards who will diligently press their fellow employees' grievances, it is necessary to reduce employer discretion over the steward's job rights to a minimum. Advancing stewards to the head of seniority lists during their term of office, as to *all* the employment prerogatives in which seniority plays a role, accomplishes this objective. Indeed, this method seems to adhere more closely to the general purposes of the NLRA than the unchallenged practice of maintaining narrow superseniority privileges for stewards even after their term of office has ended.[152] Limiting superseniority to the term of office makes it clear that such benefits are part and parcel of service on behalf of one's fellow employees. Naturally, additional justifications which exist due to the peculiarities of the particular union-management relationship and setting should be pressed.

Courts will not necessarily regard justifications as legitimate and substantial merely because they are put into the record. The NLRB and Second Circuit rejected suggested justifications in *Dairylea*.[153] Unions seeking to defend expansive clauses should therefore not restrict their argument to one of justification. A secondary line of defense, based on the interface between internal union rules and job rights and benefits, should be added.

V

Scofield v. NLRB:[154] The Boundaries of Union Discretion

The *Dairylea* Board held the broad superseniority clause before it illegal because it tied "job rights and benefits to union activities, a dependent relationship essentially at odds with the policy of the [NLRA]."[155] Although it is clear that the general thrust of the NLRA is to insulate job rights from union activities,[156] the boundary between the two is, in reality, more permeable than prophylactic.

In *Scofield v. NLRB* the Supreme Court considered the validity of court suits brought by a union to enforce the payment of fines levied against members who exceeded work production ceilings. The Court distinguished between internal and external enforcement of union rules: unions are free to enforce their rules within the confines of the union organization, but they are prohib-

149. P-H Ind. Rel. ¶ 53,520 and ¶ 53,522.
150. M. Stone, Labor-Management Contracts at Work 35, 167 (1961).
151. Wortman, *supra* note 2, at 199.
152. *See generally* P-H Ind. Rel. ¶ 53,521.
153. 219 N.L.R.B. at 659; *accord*, 531 F.2d at 1166.
154. 394 U.S. 423 (1969).
155. 219 N.L.R.B. at 658.
156. Radio Officers' Union v. NLRB, 347 U.S. at 40.

ited from inducing the employer to use employment emoluments to enforce those rules.[157] The *Scofield* court found that, even though the rule under consideration had an impact outside the boundaries of the union organization, the rule vindicated a legitimate union interest. Therefore, its enforcement did not violate the NLRA unless some impairment of a statutory labor policy could be shown.[158] In light of the treatment accorded section 8(b)(2) in *NLRB v. Allis-Chalmers Manufacturing Co.*,[159] however, it is clear that the line which *Scofield* attempted to draw between internal and external enforcement is relatively meaningless.

In *Allis-Chalmers* the Supreme Court upheld the collection of fines against union members who crossed picket lines.[160] Mr. Justice Brennan's opinion stressed that, insofar as the internal affairs of a union are concerned, the only effect of section 8(b)(2) is to forbid a union from securing the discharge of a member employee from work for reasons other than the failure to pay dues.[161] Since union fines can be enforced through court action, they can be collected through garnishment of an employee's pay, in states where garnishment is permitted.[162] Thus a union's internal rules can affect a member's employment benefits. It is not up to the courts to prescribe the method of enforcement of union rules.[163]

The distinction which *Scofield* attempted to draw therefore rests not on internal vs. external enforcement, but rather on whether a statutory labor policy is impaired by the particular rule under consideration.[164] An example of such an impermissible rule given by the *Scofield* Court is a requirement that members exhaust union remedies before filing unfair labor practices charges with the NLRB.[165] The rule is contrary to the public policy of keeping employees free from coercion against making complaints to the Board.[166] Although broad superseniority does have some slight adverse effect on the rights of employees who must sacrifice emoluments to the steward,[167] the labor policy impaired—tying job rights to union activity—does not rise to the same level as the overriding policy against coercion to prevent the vindication of employee rights.[168]

Indeed, it is doubtful whether a labor policy is impaired at all by such provisions. In discussing narrow superseniority, the Board declared that its lawfulness was grounded on the fact that it served the legitimate statutory purpose of furthering the effective administration of bargaining agreements by en-

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157. 394 U.S. at 428-29.
158. *Id.* at 432.
159. 388 U.S. 175 (1968).
160. *Id.*
161. *Id.* at 184-85.
162. *Cf.* LMRA § 302(c)(2), 29 U.S.C. § 186(b)(2)(c)(2) (1970).
163. 388 U.S. at 192.
164. Atleson, *Union Fines and Picket Lines*, 17 U.C.L.A. L. REV. 681, 744-45 (1970); Silard, *Labor Board Regulation of Union Discipline After* Allis-Chalmers, Marine Workers *and* Scofield, 38 GEO. WASH. L. REV. 187, 190-93 (1969). *See* 394 U.S. at 432.
165. 394 U.S. at 429-30.
166. *Id.* at 430.
167. *See* text accompanying notes 102-05 *supra*.
168. *Cf.* Atleson, *supra* note 164, at 752-53; NLRB v. Marine Workers, 391 U.S. 418, 424 (1968).

couraging the continued presence of the steward on the job.[169] Thus, narrow superseniority has a proper aim, and any discrimination it creates is simply an incidental side effect of a more general benefit accorded all employees.[170] The same may be said of broad seniority. Getting the best individuals to serve as stewards, having them on the job when their services *qua* stewards are most required, easing their concerns over employer discrimination and loss of pay for time spent handling grievances, all serve the legitimate aim of furthering the effective administration of labor contracts. The imposition on other employees' job rights and benefits is greater—though under *Allis-Chalmers* and *Scofield* such an imposition should not matter—but so is the benefit which redounds to all employees.[171] Since narrow superseniority, under *Campbell*, applies to open as well as to union shops, broad superseniority should have universal application as well.[172]

Two objections may be raised against analogizing superseniority to the fines in *Scofield*. First, *Scofield* is addressed to union rules which are internal in the sense that they govern the relationship between the union and its members.[173] Seniority is essentially a matter of contract between the union and the employer.[174] Although union rules may, in both situations, intrude on employees' employment circumstances, the origin of that impact differs. Second, garnishment involves the courts in the assessment process. Consideration is not paid directly to the union organization or to a union member, and takes place only after a judicial intervention.

The Board and Second Circuit have already overcome the first objection. Seniority preference for stewards is improperly characterized as an element in the union's contract with the employer. It is, rather, primarily a method of maintaining the union's own organization.[175] As such it is part of the internal set of relationships between the union and its members which may be enforced under the guidelines set out in *Scofield*.

As to the second objection, it is quite true that the judicial intervention will not take place in precisely the same manner as it does in garnishment. But substantive concerns about violations of union members' rights are unfounded. A judicial intervention has, in effect, already taken place. By the Board's own reasoning, broad superseniority serves a legitimate statutory purpose.[176] This

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169. 219 N.L.R.B. at 658.

170. *Id.*

171. It might be objected that, unlike the fines in *Allis-Chalmers* and *Scofield*, the sacrifice of employment emoluments to the steward may involve a very substantial monetary loss. For example, the steward in Dairylea earned roughly $2,000 more over a nine month period than the employee he out-bid for a new driver route. 219 N.L.R.B. at 657. This is immaterial. Under NLRB v. Boeing Co., 412 U.S. 67 (1973), the size of the monetary imposition on the union member is irrelevant. *Id.* at 73-74.

172. Local 780 of the IATSE operates in an open shop. JD-315-76 at 3.

If Minneapolis Star & Tribune Co., 109 N.L.R.B. 727 (1954), is still viable after *Scofield*, the validation of narrow superseniority in *Campbell* should serve to distinguish it. In *Minneapolis Star*, the union dropped an employee to the bottom of the seniority list for his failure to attend strike meetings and serve picket duty. This was declared an unfair labor practice. *Campbell*, however, validates a generally applied seniority forfeiture for the sake of effective collective bargaining.

173. 394 U.S. at 430.

174. *See* text accompanying note 18 *supra*.

175. 531 F.2d at 1167; 219 N.L.R.B. at 659.

176. *See* text accompanying notes 169-71 *supra*.

should suffice to bring the forfeiture of seniority privileges within the *Scofield* design. Even if it does not, by presenting an argument based on *Scofield* when a complaint is issued against superseniority, unions will force a judicial intervention identical to that which took place in *Allis-Chalmers*. Under the national labor laws, no meaningful difference exists between superseniority and the method of assessing union members approved in *Allis-Chalmers*.[177]

The NLRB and the Second Circuit adhered to the general policy of the NLRA of insulating employment status from union activity in *Dairylea*. However, although the decision has this general policy to commend it, it is contrary to the thrust of recent interpretive Supreme Court decisions.

Since the benefits to be derived from broad steward superseniority cannot be obtained in any other way,[178] a challenge to such preference would undercut the right of unions to assess their membership.[179] Such a challenge is at odds with section 8(b)(1)(A) of the NLRA, which protects the right of labor organizations to set their own rules with respect to the retention of membership.[180]

VI
SUPERSENIORITY FOR UNION OFFICIALS

A related question raised by *Dairylea* is that of superseniority for union officials who are not on-the-job grievance representatives. Here the issue is not preference as to *all* employment benefits, but rather whether union officials who work full-time may enjoy layoff preference. Such provisions are quite common,[181] appearing in major agreements of the United Auto Workers,[182] the United Steelworkers,[183] and the International Union of Electrical, Radio and Machine Workers.[184] In *Local 623, UE* Administrative Law Judge Eugene Goslee construed *Dairylea* to authorize narrow superseniority for union stewards and no one else.[185] Since Judge Goslee maintained that the *only* valid reason for superseniority is continuity in the stewardship, layoff preference for union officials was held unlawful.[186]

Although it is understandable that the General Counsel would challenge broad superseniority clauses in light of their direct effect on employees' job rights and benefits, it is rather surprising that this attack would extend to nar-

177. It must be noted that this addresses only the national labor laws, not state garnishment statutes. If an objection is raised under these statutes—an unlikely situation, given the self-executing nature of superseniority systems—particularized defenses must be raised.

178. *See* text accompanying notes 142 and 149-52 *supra*.

179. Cases holding that employees may resign from a union and thereby relieve themselves of certain membership obligations, Machinists Booster Lodge 405 v. NLRB, 412 U.S. 84 (1973) and NLRB v. Textile Workers Granite State Board, 409 U.S. 213 (1972), are inapposite to superseniority, since superseniority applies to open as well as to union shops. *See* note 172 *supra* and accompanying text.

180. NLRA § 8(b)(1)(A).

181. Wortman, *supra* note 2, at 199.

182. BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (CBNC) 21:12.

183. *Id.* at 29:39.

184. *Id.* at 23:15.

185. JD-245-76 at 6.

186. *Id.*

row clauses benefiting officials, in light of the past treatment accorded such clauses. *Gauweiler* specifically validated narrow preference for union officials as well as stewards.[187] *Campbell* spoke approvingly of continuity in office for "shop stewards or union chairmen."[188] A certain amount of confusion may exist due to terminology; a grievance representative may be called a steward, a chairman, or any other name. But the direction of *Campbell* is clear. The Court quoted approvingly from the *Termination Report of the National War Labor Board*, which supported seniority preference for "shop stewards and other local union officials."[189]

The NLRB misrepresented *Campbell* in stating that *Campbell*'s validation of narrow superseniority was based on the "continued presence of the steward *on the job*."[190] The validation was in fact based on the necessity for "continuity *in office*" for union chairmen, in light of their special role in the collective bargaining process.[191] The Board's misrepresentation permitted Judge Goslee's holding, but *Campbell*'s rationale applies to union officials as well as it does to stewards. Even the House of Representatives' Majority Report on the Taft-Hartley Act approved of giving "union officials preferred treatment in laying off workers and calling them back."[192] *Bethlehem Steel* approved of layoff preference for "union officers, shop stewards and grievance committee members."[193]

If courts will not view these precedents as binding, unions must attempt to legitimize the extension of seniority benefits to officers with justifications similar to those offered above for broad steward superseniority. The success of these efforts will in large measure depend on the centrality of the role the particular officer plays in administering the bargaining agreement. The importance of the official in the smooth functioning of the agreement will also determine whether a statutory purpose is enhanced or impaired by the grant of seniority benefits, and thus whether superseniority is permissible under *Scofield*.

VII
CONCLUSION

In *Dairylea Cooperative Inc.* the NLRB invalidated a long-standing collective bargaining practice which had not previously been challenged. As no justifications for the practice were presented to the Board, the slight adverse effect superseniority worked on employee rights triggered a section 8(b)(2) violation. Relying on *Dairylea*, Administrative Law Judges have struck down similar or related superseniority clauses. Although the most recent Board decisions

187. 162 F.2d at 451.
188. 337 U.S. at 527.
189. *Id.* at 528 n.5.
190. (Emphasis added). 219 N.L.R.B. at 658. The confusion may be due to the fact that *Dairylea* dealt with a union steward, and the question of preference for other officials did not arise.
191. (Emphasis added). 337 U.S. at 528. *See id.* at 527.
192. H.R. REP. No. 245, 80th Cong., 1st Sess. 28-29 (1947).
193. 133 N.L.R.B. at 1361 (1961).

have expanded slightly the area of lawful operation of superseniority, all but the most restrictive of such clauses remain presumptively unlawful.

Under the paradigm established in *Great Dane Trailers*, legitimate and substantial justifications for a superseniority clause will outweigh this slight adverse effect. Several justifications apply to most clauses, and these should be presented alongside justifications peculiar to the clause in question. If courts are unwilling to accept these justifications as legitimate and substantial, unions should argue that, under *Scofield*, superseniority falls within the realm of internal union rules protected from judicial interference by section 8(b)(1)(A).

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