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Superseniority: Post-\textit{Dairylea} Developments

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SUPERSENIORITY:
POST-DAIRYLEA DEVELOPMENTS

The validity of the assignment of artificial seniority to key union officials as a means of ensuring their continued presence on the job is an issue which has repeatedly divided the National Labor Relations Board. In Dairylea Cooperative, Inc. and Milk Drivers & Dairy Employees Local 338, the Board held that all superseniority provisions not limited to layoff and recall were presumptively invalid under section 8 of the National Labor Relations Act as unlawful encouragement of union membership. This standard marked a departure from the Board's traditional policy of noninterference with the substantive provisions of collective bargaining agreements. Post-Dairylea decisions, however, have expanded the scope of clauses which may qualify as presumptively lawful. The author examines the standards established prior to Dairylea for evaluating the impact of collective bargaining provisions on employee rights. He then analyzes the Dairylea standard and its gradual modification in subsequent cases. He concludes by evaluating each approach in terms of its impact on the flexibility of the parties in negotiating a collective bargaining agreement.

INTRODUCTION

SUPERSENIORITY, the assignment of artificial seniority\(^1\) to certain high-ranking union members, functions to protect its holders in their employment by ensuring their job security and by insulating them from the exercise of favoritism toward other employees. Because superseniority is conferred irrespective of length of service, its beneficiaries are considered to be most senior, often to the detriment of employees who have accrued greater seniority on account of longer employment. As a result, concern arises with respect to protecting employee rights under the National Labor Relations Act (NLRA).\(^2\)

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1. Seniority is defined as the length of service that determines the relative claim to jobs and prerogatives related to employment. For a discussion of seniority, see Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. Rev. 177, 196–199 (1975).


Section 7 of the NLRA protects the rights of employees to organize and bargain collectively and to engage in peaceful concerted activities, or to refrain from all such activities:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

As with all seniority provisions, superseniority is regarded as a proper subject for collective bargaining, and a significant number of employees are in fact covered by collective bargaining agreements that include superseniority clauses. Employers tend to resist the inclusion of a superseniority provision in a collective bargaining agreement for fear of creating a privileged class and placing too high a premium upon union office holding. On the other hand, unions favor superseniority clauses as an effective device for retaining key members in influential bargaining positions. Thus, superseniority is most frequently used for protection against layoffs of shop stewards and grievance committeemen, persons who initiate the grievance procedures and who are instrumental in

Section 8 of the Act enumerates several classes of employer and labor organization activities that constitute unfair labor practices:

(a) Unfair labor practices by employer
   It shall be an unfair labor practice for an employer—
   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
   . . .
   (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
   . . .

(b) Unfair labor practices by labor organization
   It shall be an unfair labor practice for a labor organization or its agents—
   (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . .
   . . .
   (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

Id. § 158 (emphasis added).

The phrase "encourage membership" has been interpreted, within the meaning of § 8(a)(3), to encompass "not only discrimination which induces workers to join a union, but also conduct which encourages employees to be 'good' union members, to support and assist the union, or to participate in union activities." NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1165 (2d Cir. 1976).

3. As a condition of employment, seniority is a mandatory bargaining subject pursuant to § 8(d) of the NLRA. 29 U.S.C. § 158(d) (1976). See, e.g., United Steelworkers Local 1070, 171 N.L.R.B. 945, 946 (1968).

4. According to a Bureau of Labor Statistics study of 1570 "major collective bargaining agreements" (collective bargaining agreements which affect 1,000 or more workers), 41% contained superseniority clauses. The total number of workers affected by the agreements studied was 6,741,750 of which 43% were covered by superseniority provisions. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2013, Characteristics of Major Collective Bargaining Agreements (1976).

promoting an advantageous bargaining relationship between union and employer.\(^6\)

Although the National Labor Relations Board has approved the use of superseniority as a proper employment practice provided that it does not infringe employee rights,\(^7\) the circumstances under which superseniority clauses are considered to be valid is a subject of continuing controversy. Prior to any decisions addressing the precise issue of the validity of superseniority provisions, the Supreme Court developed a framework within which to determine whether employee rights were infringed under the NLRA. In *NLRB v. Great Dane Trailers, Inc.*\(^8\) the Court divided conduct which discriminated on the basis of union membership into that which is “inherently destructive” of employee rights and that which has only a “comparatively slight” impact on employee interests.\(^9\) When the conduct or clause falls under the former classification, an unfair labor practice may be found without proof of improper motive and despite evidence of business justification; when it is classified within the second category, however, any presumption of illegality is rebuttable by a showing of “legitimate and substantial” business justification.\(^10\) Under this test, the Board does not interfere until a point in time after the conduct has occurred or the clause in question has been agreed and acted upon.

Several years after the Supreme Court framework had been developed, the Board decided *Dairylea Cooperative, Inc. and Milk Drivers & Dairy Employees Local 338*,\(^11\) which directly addressed the issue of superseniority. The Board decision clothed all superseniority provisions not limited on their face to layoff and recall with a presumption of illegality, irrespective of the Supreme Court dichotomy,\(^12\) on the ground that such clauses unlawfully encouraged union membership in violation of section 8 of the NLRA.\(^13\) After *Dairylea*, those parties asserting the validity of such clauses had the burden of offering justification to support a finding of legality. By establishing such a presumption, the Board

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\(^6\) *Id.*

\(^7\) See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

\(^8\) *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

\(^9\) *Id.* at 34.

\(^10\) *Id.*


\(^12\) 219 N.L.R.B. at 658.

\(^13\) *Id.*, enforced, 531 F.2d at 1166. See note 2 supra.
sanctioned interference with the substance of collective bargaining agreements during the negotiation stage, thereby deviating from its longstanding policy of self-restraint with respect to substantive collective bargaining.  

A series of decisions after Dairylea, however, has expanded the scope of superseniority clauses which qualify as presumptively valid. The rationale underlying this development has been that the provisions served to protect those parties instrumental in the bargaining process. The post-Dairylea expansion is the result of case-by-case determination, and no limit to the evolution is as yet apparent.

The Dairylea decision represented an embellishment of the basic test enunciated by the Supreme Court for evaluating the impact of collective bargaining provisions on employee rights. While the Dairylea approach has not been expressly repudiated, it must be re-examined in light of its application in subsequent decisions. Thus, while the approaches developed for evaluating superseniority provisions overlap, the Supreme Court framework, the Dairylea test, and the post-Dairylea line of decisions seem to span a discernible spectrum. With respect to the burden of proof, the range of tests extends from the Dairylea presumption of illegality to the presumption of lawfulness manifested in the Supreme Court framework and in Member Fanning’s view set out in his Dairylea dissent. As a function of the allocation of the burden of proof, the standards also vary according to the degree to which they promote flexibility in collective bargaining agreements. Dairylea appears to violate the principle that the Board should not interfere with the results of the collective bargaining process.

14. The role of the Board in industrial relations consists largely of maneuvering the parties to the bargaining table. Once the bargaining relationship is established, the Board’s role is limited to defining the mandatory subjects over which the parties must bargain under § 8(d), and to ensuring that the parties negotiate in good faith. Employers may be compelled to engage in collective bargaining with the employees’ bargaining representative. NLRB v. Katz, 369 U.S. 736 (1962). However, even if the employer attempts to destroy a union’s support, the Board can do nothing but bring the parties back to the bargaining table through the imposition of a bargaining order. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The Board can never compel the making of bargaining concessions, nor act as an arbiter of what is included in a collective bargaining agreement. NLRA § 8(d), 29 U.S.C. § 158(d) (1976). Because a collective bargaining agreement is privately negotiated, the Board traditionally has been reluctant to disturb its terms, except if the agreement runs afoul of the Act.


16. See notes 67–68 infra and accompanying text.

17. See note 14 supra.
A collective bargaining agreement, by its very nature, must be flexible; it is the product of trade-offs and compromises between the employer and union, often reached only after months of negotiation. The presence of a superseniority clause, as with any clause granting benefits, represents one such trade-off, for the union must have conceded a bargaining demand to the employer in exchange for superseniority. For the Board to void a provision of an agreement is to upset the delicate, bargained-for arrangement created by employer and union, and therefore, to contravene Board policy against interference with collective bargaining results.

This Note explores the development of the various approaches to evaluating superseniority clauses. It examines the relative merits and problems of each approach as it affects the ability of the parties to negotiate a collective bargaining agreement and concludes by suggesting a return to the standard originally articulated by the Supreme Court in *Great Dane*.

I. THE SUPREME COURT FRAMEWORK FOR SECTIONS 8(A)(3) AND 8(B)(2) OF THE NLRA

The Supreme Court has established guidelines for the application of Sections 8(A)(3) and 8(B)(2) of the NLRA. The Court has emphasized the importance of the collective bargaining process and the need for flexibility in agreements. The Court has also recognized the significance of superseniority clauses as they affect the parties' ability to negotiate and reach agreements.

18. "The collective bargainers can not foresee all of the problems that are sure to arise and can not provide for the innumerable details of the future administration of the bargain." 6A A. CORBIN, CONTRACTS § 1420, at 344 (1962). See also Fanning, *We Are Forty—Where Do We Go?*, 27 LABOR L.J. 3, 9 (1976).


20. The substantive terms of a collective bargaining agreement are those negotiated and agreed to by the parties in a bargained-for-exchange. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958). The Board position in *Dairylea* acts as a substantive restraint because it narrows the parties' trade-off choices and reduces the degree to which union and employer can negotiate as adversaries in reaching agreement. Moreover, the strength of the restraint is augmented by the frequency with which bargaining relationships continue from one agreement to the next: Most rights and duties remain unchanged in successive agreements. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 533 (1969). Thus, Board intervention in typical industrial practices, such as the use of superseniority, affects not merely one negotiation period between employer and union, but an entire bargaining relationship. Indeed, the superseniority clause in the *Dairylea* case had been incorporated into successive agreements for more than 30 years. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1164 (2d Cir. 1976).

Substantive restraints also inhibit the ability of the parties to accommodate unforeseen problems that arise in the bargaining relationship. The parties agree on substantive terms anticipating that modifications may be necessary. Deliberate ambiguities may remain and unforeseen contingencies will arise, but the parties plan for these by creating a structured grievance procedure, usually involving binding arbitration, which allows for modification of the bargaining relationship. See Summers, *supra* at 535.
tion and scope of sections 8(a)(3) and 8(b)(2) of the NLRA, which prohibit unlawful encouragement or discouragement of union membership. Section 8(a)(3) prohibits an employer from acting to "encourage or discourage membership in any labor organization" by use of "discrimination;" 21 section 8(b)(2) forbids a union "to cause or attempt to cause an employer to violate section 8(a)(3)" or to discriminate against an employee whose union membership has been denied or terminated for any reason other than failure to pay dues or initiation fees. 22 The purpose of these provisions was described by the Court in Radio Officers v. NLRB: 23 "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." 24

Radio Officers was the consolidation of three cases which addressed the issue of unlawful encouragement of union membership. 25 Its significance with respect to the issue of superseniority lies in the Court's determination that proof of unlawful purpose is essential to the establishment of a section 8(a)(3) or 8(b)(2) violation. 26 The Court was presented with the issues of whether effect or motive of discrimination, or both, must be furnished by the Board, and whether they may be inferred, or must be established by specific evidence. 27 The Court posited motive as an essential element of 8(a)(3), 28 but added that motive may be inferred where the employer's conduct "inherently encourages or discourages union membership" or "where a natural consequence of his action was such encouragement or discouragement." 29 Once these "cer-

21. For the pertinent language of § 8(a)(3), see note 2 supra.
22. Id.
24. Id. at 40.
25. Two cases involved failure to abide by union rules, one resulting in reduction in an employee's seniority, the other in suspension. Id. at 24-26, 28-31. The third case involved an employer's granting of wage increases and vacation benefits solely to union members. Id. at 34-36.
26. Id. at 43.
27. Id. at 42-52. See Christensen and Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269, 1286 (1968).
28. 347 U.S. at 43. The motive requirement applies to both § 8(a)(3) and § 8(b)(2) violations since § 8(a)(3) is an element of the behavior prohibited by § 8(b)(2). See note 2 supra.
29. 347 U.S. at 48-51. The Board may draw reasonable inferences on this issue from proven facts and from experience. Id. at 49.
tain types” of discrimination are shown to exist, specific evidence of motivation need not be offered since the requisite intent can be inferred from the foreseeable consequences of the discrimination.\footnote{30} Unfortunately, the Court did not indicate what “types” of discrimination supply their own proof of motivation, nor did it clarify if and when the established intent was rebuttable.

In \textit{Local 357, International Brotherhood of Teamsters v. NLRB},\footnote{31} the Court’s approach marked a subtle retreat from \textit{Radio Officers}. \textit{Local 357} involved an arrangement by which the employees were required to use the union’s hiring hall. Dispatching from the hall was to be determined according to the relative seniority of the employees, irrespective of their union or nonunion status.\footnote{32} The Court rejected the Board’s finding that union hiring halls were unlawful per se.\footnote{33} The Court acknowledged that the hiring hall arrangement encouraged union membership. Nevertheless, it refused to permit the Board to infer, in the absence of specific evidence, union discrimination against nonmembers where employees were dispatched pursuant to a negotiated agreement which was nondiscriminatory on its face.\footnote{34} The Court reasoned that unlike specific encouragement brought about by discrimination, encouragement offered by a negotiated plan which was nondiscriminatory on its face does not violate sections 8(a)(3) and 8(b)(2).\footnote{35}

\textit{Local 357} departed from \textit{Radio Officers} by refusing to infer discrimination unless the disparate treatment accorded employees was based upon their union membership.\footnote{36} Thus, while motive and effect are still provable by inference instead of direct evidence, \textit{Local 357} undercuts \textit{Radio Officers} by warning that the Board’s power to infer is not unlimited.

\footnote{30} \textit{Id.} at 45, 51–52. The Court also observed that “the Act does not require that the employees discriminated against be the individuals encouraged for purposes of violations of § 8(a)(3).” \textit{Id.} at 51.


\footnote{32} \textit{Id.} at 668–69.

\footnote{33} \textit{Id.} at 673, 676.

\footnote{34} \textit{Id.} at 675–76.

\footnote{35} \textit{Id.}

\footnote{36} The dissent in \textit{Local 357} argued that “discrimination” within the meaning of § 8(a)(3) means “all differences in treatment regardless of their basis.” \textit{Id.} at 688 (Clark, J., dissenting). Implicit in such an interpretation is an assertion that once two groups of employees are treated differently, a violation is demonstrated merely by proving that the treatment encouraged or discouraged union membership. Once it is established that a discriminatory practice has the natural effect of encouraging or discouraging union membership, the requisite motive may be inferred under \textit{Radio Officers}. \textit{Id.} at 688–90.
With respect to the proper construction of sections 8(a)(3) and 8(b)(2), Local 357 also raised the problem of weighing conflicting interests in the absence of direct evidence of motive. The Court postponed its resolution of this issue until its decision in *NLRB v. Great Dane Trailers, Inc.*[^37] which formulated principles of proof of motive by establishing two categories of section 8(a)(3) violations. The first category is comprised of situations in which the discriminatory conduct is “inherently destructive of important employee rights.”[^38] Such conduct supplies “its own indicia of intent,” and an unfair labor practice may be found regardless of a showing of business justification.[^39] The second category embraces situations in which “the adverse effect of the discriminatory conduct or employee rights is ‘comparatively slight.’”[^40] Here, the Board must prove motive if the employer or union has proffered “legitimate and substantial business justifications for the conduct.”[^41]

In *Great Dane*, the Court held that section 8(a)(3) was violated when the employer refused to pay strikers the same vacation benefits accorded nonstrikers and returning strikers.[^42] The conduct fell within the second category of section 8(a)(3) violations, and the Court indicated that presumptive unlawfulness under the NLRA could be rebutted with evidence of “legitimate and substantial business justification.”[^43] However, since the employer in *Great Dane* failed to come forward with any justification, the Court affirmed the Board’s inference of unlawful motive.[^44]

*Great Dane* prescribes a test for evaluating section 8(a)(3) and 8(b)(2) violations absent direct evidence of motive.[^45] The inquiry

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[^38]: Id. at 33–34.
[^39]: Id. (quoting in part NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963)).
[^40]: 388 U.S. at 34.
[^41]: Id.
[^42]: Id. at 29.
[^43]: Id. at 34.
[^44]: Id.
[^45]: In the context of superseniority, “direct evidence of motive” is specific evidence which shows that a union’s steward selection policies are based upon a deliberate purpose on the part of the union, the employer, or both, to reward union membership through the granting of superseniority. This type of evidence is often unobtainable by the General Counsel. Consequently, where such evidence is not available, the Court permits the Board to draw inferences of unlawful motive. See Radio Officers v. NLRB, 347 U.S. 17, 48–52 (1954), and text accompanying notes 26–30 supra.

It is interesting to note that the *Great Dane* framework partially evolved from the superseniority case of *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). However, *Erie Resistor* differs factually from *Dairylea* and its progeny. Unlike *Dairylea* and the later decisions,
is essentially one of deciding whether the proffered justification sufficiently rebuts any presumption of illegality which may attach to the conduct or provision in question because of its infringement of employee rights. Arguably, the *Great Dane* test is an adequate standard for the Board to employ in evaluating any superseniority clause. Technically, the granting of superseniority constitutes "discrimination" within the meaning of sections 8(a)(3) and 8(b)(2). However, the test enables the Board to salvage collective bargaining agreements which fall literally within the 8(a)(3) or 8(b)(2) prohibitions when they are not inherently discriminatory and the employer or union presents a legitimate business justification.

Moreover, use of this framework is desirable because it fosters flexibility in collective bargaining. In other words, the test makes no affirmative specifications as to substance of superseniority clauses, and thus enables parties to tailor the clause according to the relative bargaining power and skill of the employer and union. Under the *Great Dane* approach, a superseniority provision would be treated like any other clause in a collective bargaining agreement that may be negotiated. However, unlike an approach that delineates precise boundaries within which a clause must be drawn, the Supreme Court framework introduces an element of uncertainty into negotiations since negotiators cannot be assured that the clause will pass Supreme Court muster. Nevertheless, it should be noted that whatever restraint this uncertainty injects into collective bargaining will exist under any approach, since all subsequent tests are based on the *Great Dane* formulation.

II. Dairylea

In Dairylea, a profitable milk delivery route became available at Dairylea Cooperative, Inc. Dairylea was required by the col-

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*Erie Resistor* did not involve a superseniority provision which was bargained for and embodied in a collective bargaining agreement. Rather, the employer in that case attempted to restore production during a strike by offering returning strikers 20 years superseniority against future layoffs. *Id.* at 222–24. In that case, the Court affirmed the Board's determination that the superseniority plan was inherently destructive of the right to strike, and therefore violated §§ 8(a)(1) and 8(a)(3) of the NLRA. *Id.* at 233–36. The employer offered a business justification that these additional benefits were necessary to continue operations during the strike. *Id.* at 222–23. In light of this and the absence of any direct evidence of unlawful motive offered by the Board, the Court viewed the inquiry as a matter of balancing the interests involved to determine whether the clause was "inherently discriminatory." The Court resolved the balance in favor of the strikers, finding that the superseniority plan was "inherently discriminatory." *Id.* at 235.
lective bargaining agreement to give the job to the applicant with the greatest seniority.46 Seven drivers, including a union steward and an employee with twenty-four more years of service than the steward, applied for the job. Since the steward was considered most senior under the superseniority provision, he was awarded the route.47 A charge was filed and a complaint was issued by the Board against Dairylea and the union, Local 338.48 The complaint alleged that both Dairylea and the union violated sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) of the NLRA by unlawfully encouraging union membership by providing for and enforcing a superseniority clause.53 Twice the parties waived an evidentiary hearing to establish the foundation for the existence of the provision; instead they submitted the case directly to the Board.54

The Board found that by maintaining and enforcing the superseniority clause, the employer had violated sections 8(a)(1) and 8(a)(3) and that Local 338 had violated sections 8(b)(1)(A) and 8(b)(2) of the NLRA.55 The Board determined that the on-the-job benefits flowing from the clause could be obtained only if an employee was a "good, enthusiastic unionist,"56 thereby tying job

46. The agreement provided that "[t]he steward shall be considered the Senior employee in the craft in which he is employed." Dairylea Coop., Inc. and Milk Drivers & Dairy Employees Local 338, 219 N.L.R.B. 656, 657 (1975). The parties agreed that the provision gave the steward superseniority with respect to layoff and recall, as well as contractual benefits such as assignment of overtime, selection of vacation period, and work assignment. Id. at 657.
47. Id.
48. Id. at 656.
50. 29 U.S.C. § 158(a)(3) (1976). For the pertinent text of this provision, see note 2 supra.
51. 29 U.S.C. § 158(b)(1)(A) (1976). For the pertinent text of this provision, see note 2 supra.
52. 29 U.S.C. § 158(b)(2) (1976). For the pertinent text of this provision, see note 2 supra.
53. 219 N.L.R.B. at 657.
54. The Board remanded the case for hearing before an Administrative Law Judge to allow the parties to justify the superseniority clause. Id. at 659 n.9. The parties again waived a hearing on the ground that no evidence was available as to the intent of the drafters of the clause. Id. at 661. Dairylea and the union had originally entered into the agreement containing this clause in 1937. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1164 (2d Cir. 1976).
55. 219 N.L.R.B. at 659. In addition, the Board held that by awarding the route to the union steward, the company had discriminated against other employees in violation of §§ 8(a)(1) and 8(a)(3), and that the union had violated §§ 8(b)(1)(A) and 8(b)(2). Id. See note 2 supra.
56. Id. at 658.
rights and benefits to union activities. The Board held that superseniority provisions not limited to layoff and recall were presumptively unlawful and that the provision in the *Dairylea* agreement violated the NLRA.\(^{57}\)

Local 338 argued that seniority is a matter of contract, ratified by Dairylea employees. Therefore, the contractual nature of the provision precluded a finding of unlawfulness, irrespective of the purpose served by the provision.\(^ {58}\) The union also contended that there was no basis for finding the alleged violation under 8(b)(2) absent a showing of union motive to encourage or discourage union membership.\(^ {59}\)

The Board countered these arguments by stating that the only realistic way an employee could gain preference to job benefits was through enthusiastic union support.\(^ {60}\) In his dissent, Member Fanning challenged this conclusion as unwarranted because it was based on the dubious assumption that the union rewards members by making them stewards on the basis of their allegiance to the union, rather than on their merit and ability. In Fanning's view, "it is unrealistic to assume that the Union values an easy and self-serving enthusiasm over merit and ability in selection for a post upon which its own continued well being and future vitality depend."\(^ {61}\) In response to this argument, the majority noted that a union will never choose an employee who is uninterested in the union's success for such a sensitive post.\(^ {62}\) Moreover, the Board provided a second argument in opposition to Fanning's contentions. Assuming arguendo, that union activities played no role in selection of union stewards, the Board pointed out that these activities were a determinative factor in employee access to benefits under the clause. Participation in union activities such as stewardship was a prerequisite to obtaining certain preferences under the disputed clause; without such participation, the significance of

\(^{57}\) *Id.* It should be noted, however, that the Board refused to find clauses which went beyond layoff and recall per se unlawful since there may be an adequate justification forthcoming. The Board also noted that the burden of rebutting the presumption rests with the party asserting the legality of the clause. *Id.*

\(^{58}\) *Id.* at 657.

\(^{59}\) *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Id.* at 662 (Fanning, Member, dissenting).

\(^{62}\) *Id.* at 657–58. The steward's duties included reporting violations of the collective bargaining agreement by the employer and enforcing union rules. The union maintained sole discretion in the selection of the steward. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1166 (2d Cir. 1976).
merit and ability was minimal. For these reasons, the majority inferred unlawful encouragement of union membership.

Dissenting Member Fanning argued that the only reasonable conclusion or inference to be drawn from the evidence was that the superseniority clause encouraged or rewarded service as a steward, rather than illegally encouraging union membership. Fanning claimed that recognition of a steward's service by means of a seniority system was entirely lawful. He concluded by stating that there was no evidence of any discrimination in the selection of stewards, and no basis for a conclusion that measuring seniority by service to the bargaining unit as a steward violated the NLRA as a matter of law. Since Fanning thought that the union steward selection process would not operate in a manner that would encourage union membership, he seemed to be advocating that a very strict burden of proof be met by the General Counsel—that improper motive be shown by direct evidence and not by inference:

To find a violation of the law when both the apparent purpose and effect of an act are lawful, it is not enough that there could be some hidden and unlawful purpose or possible unlawful effect. That hidden purpose must be bared, the likelihood of that conjectured effect proven. I believe that we can all agree that it is unjust and unreasonable to clothe outwardly lawful conduct with a semblance of illegality woven wholly from conjecture and supposition.

Thus, according to Fanning, there was a clear absence of proof that the NLRA had been violated.

The Second Circuit enforced the Board's order, although it found violations of only three sections of the Act, 8(a)(1), 8(a)(3) and 8(b)(2). The court emphasized the Board's ability as trier of fact to draw reasonable inferences from the evidence presented. Because the Board's holding appeared both reasonable and fair,

63. 219 N.L.R.B. at 658.
64. As Member Fanning noted, the inference drawn by the majority is extraordinary in light of the fact that employees were already required to be union members under a lawful union-security clause. Id. at 662 (Fanning, Member, dissenting). The possibility remains, however, that in agreements without a union-security clause there may be senior nonunion employees who will suffer because of super-senior union stewards.
65. Id. at 662 (Fanning, Member, dissenting).
66. Id. (Fanning, Member, dissenting).
67. Id. at 663 (Fanning, Member, dissenting).
68. Id. at 662 (Fanning, Member, dissenting).
69. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1166–67 (2d Cir. 1976). Since the court sustained the Board's order under § 8(b)(2), it felt that it was unnecessary to consider the § 8(b)(1)(A) violation. Id. at 1165 n.3.
the court sustained the Board's conclusion that disparate treatment with respect to benefits accorded stewards and nonstewards unlawfully encouraged union membership. The court also suggested that unions, in order to attract qualified personnel, grant union salaries or non-job-related benefits instead of superseniority. Admittedly, such benefits would also encourage union membership. However, the court of appeals noted that encouragement of union membership does not in and of itself violate the Act, since the union may proffer "evidence of legitimate and substantial business justifications." Absent direct evidence of motive, the Board may infer from the evidence before it that a certain superseniority clause has a discriminatory effect not mitigated by the apparent purpose served by the clause. Thus, any superseniority clause not limited on its face to layoff and recall is presumptively unlawful under Dairylea, and the burden of rebutting that presumption falls upon the party asserting the legality of the provision.

The Dairylea standard can be analyzed as serving a two-fold purpose. First, it imposes a burden upon those who seek to uphold any superseniority clause not limited to layoff and recall as a means of protecting against undue infringement of employees' section 7 rights. The court was troubled by "the widely disparate treatment accorded stewards and nonstewards" under the agreement and the fact that "[t]he steward's perquisites [were] rather more extensive and tangible than his duties." Furthermore, since the steward's position was not threatened, the union could not offer what the General Counsel and the court agreed was a legitimate justification for the exercise of superseniority in a layoff situation: that "a union may find itself powerless to supply any

70. Id. at 1165. The court cited Judge Friendly's proposition that "[t]he Board knows the facts of life in the labor world better than we ever can; we ought not upset its conclusion as to 'encouragement' unless we can say this is without rational basis." Id. at 1165 n.5 (quoting NLRB v. Miranda Fuel Co., 326 F.2d 172, 184 (2d Cir. 1963) (Friendly, J., dissenting)).

71. 531 F.2d at 1166.


73. 531 F.2d at 1165–66. The Second Circuit noted the burden of imposing upon the General Counsel the requirement that he produce detailed evidence of the union's policy for selecting stewards. The court reasoned that to permit the inference of unlawful encouragement of union membership absent specific evidence would not automatically invalidate the clause. The union could still rebut the inference or offer a Great Dane justification for the clause. Id. at 1166 n.6.

74. Id. at 1166.

75. Id. at 1164.
real representation if it is unable to maintain the same steward continuously on the job.\textsuperscript{76} Thus, \textit{Dairylea} presented the court with a situation in which the degree of infringement of employee rights could not be justified by the substantial preference accorded the union steward: the preference was not directly related to the steward's duties of representation and served primarily to reward union membership.

Second, the \textit{Dairylea} presumption serves to distinguish unequivocally between superseniority clauses limited to layoff and recall, and all others. The result of providing negotiators with such a presumption is that substantive restraints upon collective bargaining stemming from uncertainty are reduced, because negotiators have some guidance as to what types of superseniority clauses will be approved. Nevertheless this effect of minimizing uncertainty applies only to that narrow class of superseniority provisions limited to layoff and recall. Beyond that, any clauses must meet the \textit{Great Dane} standards. As a result, the \textit{Dairylea} goal of reducing uncertainty is not effectuated. Moreover, the fact that the negotiators bear the burden of offering justification for all clauses not limited to layoff and recall reduces the flexibility of the parties in making compromises to arrive at an agreement.

\textbf{III. POST-\textit{DAIRYLEA} DECISIONS}

In \textit{Dairylea}, the Board deliberately left open the possibility of union or employer justification for the use of superseniority beyond layoff and recall.\textsuperscript{77} Subsequent cases involving the validity of superseniority clauses have addressed the scope of those provisions that must be justified under the \textit{Dairylea} standard. The result has been a progressive dilution of \textit{Dairylea}, or alternatively, the expansion of the type of clauses that will be validated upon Board review. In fact, the Board has found all the superseniority clauses reviewed to be presumptively legal, except those all-encompassing provisions that grant superseniority for all available benefits.\textsuperscript{78} This retreat from the strict \textit{Dairylea} standard is evident in two major respects. First, the Board has been willing to sanction superseniority clauses that protect stewards from demotion

\textsuperscript{76} \textit{Id.} at 1166 n.7.
\textsuperscript{77} 219 N.L.R.B. at 658.
and allow them to bump laterally\textsuperscript{79} employees with greater actual seniority.\textsuperscript{80} Second, the Board has broadened the class of employees who benefit from superseniority by permitting lateral bumping to be exercised by recording secretaries and union officers.\textsuperscript{81}

Initially, the Board acted to prevent interpretations of \textit{Dairylea} which would deny a union steward his job classification in the event of layoff. This is evident in both \textit{Motion Picture Laboratory Technicians Local 780 (McGregor-Werner, Inc.)}\textsuperscript{82} and \textit{Hospital Service Plan and Local 32, Office and Professional Employees.}\textsuperscript{83} Both cases involved superseniority clauses which were properly limited to layoff and recall. However, the union stewards exercised their superseniority to displace a more senior employee by bumping laterally, thereby enabling the stewards to retain their job classifications.\textsuperscript{84}

The General Counsel argued in both cases that the exercise of superseniority to permit a steward to retain his same grade level exceeded the scope of the \textit{Dairylea} standard, which sanctioned superseniority only to the extent necessary to guarantee retention of the steward on the job.\textsuperscript{85} The Board rejected the General Counsel’s arguments in each case. In \textit{McGregor-Werner}, the Board determined that the right to bump laterally serves the legitimate purpose of encouraging the continued presence of the steward on the job.\textsuperscript{86} The Board employed the same rationale in \textit{Hospital Service Plan}, reasoning that “[t]o require a steward to exercise his superseniority only to take the lowest rated job rather than be laid off would hardly aid in retaining stewards.”\textsuperscript{87}

In \textit{Parker-Hannifin Corp. and District 8, International Association of Machinists and Aerospace Workers,}\textsuperscript{88} the Board again ac-

\textsuperscript{79} Lateral bumping refers to the displacement of an employee to a lower labor classification. C. Randle \& M. Wortman, \textit{supra} note 5, at 510.

\textsuperscript{80} \textit{E.g., Parker-Hannifin Corp. and Dist. 8, Int'l Ass'n of Machs. and Aerospace Workers, 231 N.L.R.B. 884 (1977); Hospital Serv. Plan and Local 32, Office and Professional Employees, 227 N.L.R.B. 585 (1976); Motion Picture Laboratory Technicians (McGregor-Werner, Inc.), 227 N.L.R.B. 558 (1976).}


\textsuperscript{82} 227 N.L.R.B. at 558–59; 227 N.L.R.B. at 558.

\textsuperscript{83} 227 N.L.R.B. at 558–59; 227 N.L.R.B. at 585.

\textsuperscript{84} 227 N.L.R.B. at 559.

\textsuperscript{85} 227 N.L.R.B. at 586.

\textsuperscript{86} 231 N.L.R.B. 884 (1976).
cepted the steward retention argument for preventing steward demotion. In that case, the steward used his superseniority to bump a more senior employee to a lower labor classification.\textsuperscript{89} The record established that the steward could have avoided layoff by accepting the lower classification himself.\textsuperscript{90} The General Counsel argued that the superseniority clause in \textit{Parker-Hannifin} violated the \textit{Dairylea} standard because it enabled the steward to obtain the better of two available jobs without legitimate justification based on the steward’s duties. The steward would have remained an active employee at the plant in any event.\textsuperscript{91} Moreover, the steward received a substantial economic benefit of over three thousand dollars a year by virtue of his new position.\textsuperscript{92} In reliance upon its decisions in \textit{McGregor-Werner} and \textit{Hospital Service Plan}, the Board upheld the legality of the superseniority provision, and held that superseniority which permits a steward to maintain his status—or nearly equivalent status—in the event of a slowdown is not presumptively unlawful.\textsuperscript{93} The economic gain realized by the steward in \textit{Parker-Hannifin} was justified on the ground that it was incidental to the aim of protecting the steward from layoff.\textsuperscript{94}

The Board in \textit{McGregor-Werner}, \textit{Hospital Service Plan}, and \textit{Parker-Hannifin}\textsuperscript{95} consistently rejected the argument that superseniority may be invoked only to prevent an actual layoff. The rationale is that superseniority which, in the event of layoff, permits a steward to retain his particular job or classification and protects him from downgrading is a reasonable means to accomplish the legitimate end of keeping him on the job.\textsuperscript{96} This rationale departs from \textit{Dairylea}. As Member Jenkins reiterated in his dissent in \textit{Parker-Hannifin}, \textit{Dairylea} sanctioned superseniority clauses limited to layoff and recall in recognition of three factors: “(1) the role the steward plays in the day-to-day administration of the collective bargaining agreement, (2) the fact that his performance in-

\begin{footnotesize}
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\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} \textit{Id}.
\item \textsuperscript{91} \textit{Id.} at 884–85.
\item \textsuperscript{92} \textit{Id.} at 885.
\item \textsuperscript{93} \textit{Id}.
\item \textsuperscript{94} \textit{Id}.
\item \textsuperscript{95} \textit{See also} Expedient Services, Inc. and Int’l Ass’n of Machs. and Aerospace Workers Local 1306, 231 N.L.R.B. 938 (1977).
\item \textsuperscript{96} Motion Picture Laboratory Technicians Local 780 (McGregor-Werner, Inc.), 227 N.L.R.B. 558, 559 (1976); Hospital Serv. Plan and Local 32, Office and Professional Employees, 227 N.L.R.B. 585, 586 (1976); Parker-Hannifin Corp. and Dist. 8, Int’l Ass’n of Machs. and Aerospace Workers, 231 N.L.R.B. 884, 884–85 (1976).
\end{itemize}
\end{footnotesize}
ures to the benefit of all the employees, and (3) the fact that his presence on the job is necessary for such performance."97 The downgrading of a steward does not in and of itself impede him in the effective performance of his official duties, nor does preventing a steward from taking a lower paying job benefit directly all of the unit's employees.98 The majority in Parker-Hannifin acknowledged that a superseniority clause which prevents the downgrading of a steward grants more protection than that which is strictly necessary to protect him from layoff. A steward could still perform his official duties as long as he remained on the job in any capacity.99 Nevertheless, the majority conceded that "such [a] strict application of Dairylea . . . ignores the realities of collective bargaining and the working relationship between employer and employees. The difficulties in negotiating, drafting, and administering a collective bargaining agreement must of practical necessity permit a degree of flexibility, albeit limited, in the formulation of superseniority clauses."100

The Board's willingness to modify the impact of Dairylea is also evidenced in United Electrical, Radio and Machine Workers Local 623 (Limpco Manufacturing Co.).101 In Limpco, a union's recording secretary bumped a more senior employee during a layoff under a superseniority clause that was applicable to union officers as well as stewards. The General Counsel argued that Dairylea made it unlawful to extend superseniority to individuals not directly involved in the initiation and processing of grievances.102 A Board majority disagreed. It expressly decided that Dairylea did not establish the principle that superseniority is presumptively valid only when the individual is engaged in the function of processing or adjusting grievances at the workplace.103 The Limpco majority expanded the policy enunciated in Dairylea that superseniority limited to layoff and recall was presumptively valid because it furthered the "effective administration of bargaining agreements . . . by encouraging the continued presence of the steward on the job."104 The majority concluded that the official

97. 231 N.L.R.B. at 885 (Jenkins, Member, dissenting).
98. Id. at 886 (Jenkins, Member, dissenting).
99. Id. at 884.
100. Id. at 885.
102. Id. at 406–07.
103. Id. at 407–08.
responsibilities of a recording secretary bore a direct relationship
to the effective and efficient representation of the unit employees,
thus entitling the secretary to the benefit of the same presumption
offered stewards by Dairylea.\textsuperscript{105}

Members Jenkins and Penello claimed in dissent that the ma-

jority had unnecessarily broadened the beneficiary class of super-

seniority clauses.\textsuperscript{106} They viewed the grant of superseniority to a
recording secretary as an unjustifiable benefit simply to the imme-
diate beneficiary, rather than as a benefit to all employees. They
further maintained that under Dairylea, only the processing of
grievances and the enforcing of the collective bargaining agree-
ment on the job protected the section 7 rights of employees.\textsuperscript{107}
The dissenters feared that the effect of the Limpco decision would
be to create the opportunity for a union to give every union mem-
ber or activist an office it considered crucial to the collective bar-
gaining process, and thereby legitimize a grant of superseniority
status to that person.\textsuperscript{108}

This fear was realized in a case decided several months after
Limpco—Otis Elevator Co. and Local 489, International Union of
Electrical, Radio and Machine Workers, AFL-CIO.\textsuperscript{109} In reliance
upon its decision in Limpco, the Board allowed fourteen union
officers to invoke superseniority and to bump laterally when lay-
offs reduced a bargaining unit from one hundred and forty-four to
thirty-five employees.\textsuperscript{110} The General Counsel, arguing that the
superseniority clause violated Dairylea, claimed that the employer
and union had failed to show that all union officials had been in-
volved in grievance processing or that fourteen officers were nec-

essary in a thirty-five employee unit.\textsuperscript{111} The Board disagreed with
the General Counsel's argument. Following the reasoning in
Limpco,\textsuperscript{112} the Board majority held that the officers were entitled
to superseniority because in their official capacities they promoted
the overall administration of the bargaining agreement and con-

\begin{thebibliography}{112}
\bibitem{105} 230 N.L.R.B. at 407–08. In Limpco, the recording secretary maintained records of
membership and meetings, handled correspondence for Local 623, posted notices of meet-
ings, aided in obtaining reimbursement for stewards for time lost to their union duties,
informally participated in processing grievances, attended meetings to formulate bargain-
ing ideas, and aided in organizing pickets during a strike.
\bibitem{106}  Id. at 409–10 (Jenkins & Penello, Members, dissenting).
\bibitem{107} Id. (Jenkins & Penello, Members, dissenting).
\bibitem{108} Id. (Jenkins & Penello, Members, dissenting).
\bibitem{109} 231 N.L.R.B. 1128 (1977).
\bibitem{110} Id. at 1129.
\bibitem{111} Id.
\bibitem{112} See text accompanying notes 104–05 \textit{supra}.
\end{thebibliography}
tributed to the ability of the union to represent the unit efficiently and effectively.\textsuperscript{113} The fact that there were fourteen officers in a thirty-five man unit was, therefore, immaterial.\textsuperscript{114}

As in \textit{Limpco}, Members Jenkins and Penello dissented. They asserted that union officers whose presence is not necessary for on-the-job adjustment of grievances ought not be allowed to invoke superseniority under \textit{Dairylea}.\textsuperscript{115} Moreover, the dissenters noted that a ratio of two union representatives to every three rank-and-file employees vividly illustrated their prediction that any union member could be given an office deemed crucial to collective bargaining, and thereby gain an unwarranted degree of job security by invoking superseniority.\textsuperscript{116}

Indeed, \textit{Limpco} and \textit{Otis Elevator} appear to give unions and employers the opportunity to circumvent \textit{Dairylea} by merely designating a certain union member as necessary to the efficient and effective representation of the unit employees. In light of McGregor-Werner, Hospital Service Plan, and Parker-Hannifin, \textit{Limpco} and \textit{Otis Elevator} reveal the Board's willingness to dilute the \textit{Dairylea} standard to accommodate the need for flexibility in negotiating and administering collective bargaining agreements. Although the Board in \textit{Dairylea}—after weighing the discriminatory effects of superseniority against its benefit to the unit as a whole—would have sanctioned superseniority when it encouraged the steward's continued presence on the job,\textsuperscript{117} the Board's post-\textit{Dairylea} decisions implicitly acknowledge that the \textit{Dairylea} standard may not represent a proper balance.

A review of the above cases reveals that several common strands are apparent in the post-\textit{Dairylea} decisions. Each of the

\textsuperscript{113} 231 N.L.R.B. at 1129.
\textsuperscript{114} \textit{Id.} at 1130. The union officials in this case were acting as de facto stewards since the union had eliminated the position of steward in the midst of massive layoffs. Five union stewards lost their superseniority and were laid off. Consequently, five other employees with greater actual seniority were allowed to remain on the job. The Administrative Law Judge considered this a good faith effort on the part of the union to limit the adverse effect on other employees due to the exercise of superseniority. \textit{Id.} at 1129. Dissenting Board members Jenkins and Penello discounted the role of the officers as "de facto stewards" because the record did not indicate that formal notice of this change in duties was ever conveyed to either the employees or the employer. \textit{Id.} at 1131 (Jenkins & Penello, Members, dissenting).
\textsuperscript{115} \textit{Id.} at 1130-31 (Jenkins & Penello, Members, dissenting). The dissenters noted that \textit{Dairylea} sanctioned superseniority for officers involved in the on the job adjustment of grievances. \textit{Id.} at 1131 (Jenkins & Penello, Members, dissenting).
\textsuperscript{116} \textit{Id.} (Jenkins & Penello, Members, dissenting).
\textsuperscript{117} 219 N.L.R.B. at 658.
cases relied upon the rationale advanced in *Dairylea* for upholding superseniority provisions: namely, that superseniority should be used to encourage the continued employment of the steward to promote efficient administration of the collective bargaining agreement. It is ironic that although the *Dairylea* Board relied upon this rationale to narrow the scope of presumptively valid superseniority provisions, the post-*Dairylea* Board has employed the same rationale to expand that scope by broadening both the class of beneficiaries and the range of superseniority benefits which may be conferred upon those beneficiaries.

With respect to the class of beneficiaries who may properly receive superseniority benefits, the test has become whether the employee plays a significant role in the effective administration of the collective bargaining agreement. Thus, the inquiry is not limited to whether the individual holds the official position of steward; rather, as evidenced in *Otis Elevator*, those employees who act as de facto stewards can qualify for superseniority benefits. And, as is apparent from *Limpco*, superseniority may also be extended to one not engaged in processing or adjusting grievances on the job. Moreover, in evaluating the validity of the types of benefits conferred by a particular superseniority clause, the Board has departed from a strict reading of *Dairylea*. The retention of key union officials on the job as a justification for the exercise of superseniority does not dictate that the individual accept a lower job classification to avoid layoff. Furthermore, according to *Parker-Hannifin*, the fact that the individual might receive an economic gain does not invalidate the provision, provided that the gain is incidental to the larger purpose of ensuring the individual's continued employment.

Perhaps implicit in this expansion of *Dairylea* is a recognition by the Board that negotiators need more guidance with respect to the use of superseniority clauses. It is clear at this point that those clauses, such as the one in *Dairylea*, that enable a union member to use his superseniority to gain preference in all contractual benefits will be invalidated since they go beyond the benefits that are

119. *Id.* See note 114 *supra*.
120. 230 N.L.R.B. at 407.
121. 231 N.L.R.B. at 885–86.
necessary to keep the steward on the job.\textsuperscript{122} Furthermore, as a result of a wider range of superseniority provisions receiving approval by the Board, labor and management have more Board assurance upon which they can rely in negotiating a superseniority clause. To this extent, the expansion of the \textit{Dairylea} presumption may contribute to certainty in the collective bargaining process. Yet the enlargement of the scope of clauses which are approved by the Board signifies further deviation from Board policy of non-interference with substantive collective bargaining.\textsuperscript{123} The degree to which this type of interference by the Board may curtail the flexibility of the parties in reaching an agreement is mitigated, however, by the Board's propensity to approve nearly all types of superseniority provisions. Thus, in some respects parties have greater freedom to choose which types of clauses are most appropriate in light of their needs, bargaining power, and skills, without being forced to bargain with a view toward whether sufficient justification can be devised to convince the Board of the validity of a particular provision under \textit{Dairylea}.

Another result of the post-\textit{Dairylea} expansion is that it adversely affects a greater number of individual rank-and-file members who hold high actual seniority. This "demotion" effect upon the rank-and-file is nevertheless consistent with the justification for superseniority recognized in the post-\textit{Dairylea} cases, that is, the necessity of protecting the continued presence of key union officials on the job.\textsuperscript{124} The reason that the Board considers such protection necessary, despite the adverse effect upon the rank-and-file, grows out of the Board's longstanding recognition of the role that union negotiators play in the collective bargaining process. As collective bargaining functions, union negotiators serve to represent and promote the interests of rank-and-file members.\textsuperscript{125} The more effective the union representatives are, the more adequately they can protect the collective interests of the rank-and-file. The continuity of key union members on the job enhances the opportunity of union negotiators to establish rapport with management representatives and to develop increased skills and bargaining power, all of which promote more effective union representation for rank-and-file members. Thus, while the use of superseniority

\begin{enumerate}
\item \textsuperscript{122} See note 78 \textit{supra} and accompanying text.
\item \textsuperscript{123} See note 14 \textit{supra} and accompanying text.
\item \textsuperscript{124} NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1166 n.7 (2d Cir. 1976).
\item \textsuperscript{125} Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).
\end{enumerate}
provisions may "demote" a few individuals who have higher actual seniority, rank-and-file members as a group benefit from more effective union representation.

IV. CONCLUSION

Despite the expansion of the Dairylea standard, the Board still adheres to Dairylea as a controlling decision. The standard was established to protect employee rights and to provide a presumption upon which negotiators could rely. Yet, in light of the longstanding Board policy of noninterference with the substance of collective bargaining, as well as the need for both flexibility and guidance in negotiations, Dairylea may not represent the most desirable accommodation of these goals. The shortcomings of Dairylea become apparent when analyzed in relation to alternative approaches.

At the one extreme stands Member Fanning's view that a stiff burden of proof should be imposed upon the General Counsel arguing to invalidate superseniority clauses. Fanning would void a superseniority clause only if unlawful purpose were shown by direct evidence; no inference would be permitted.126 This standard is not only unduly burdensome, but also disregards the principles of proof enunciated by Great Dane.127 Moreover, such a standard seems to render a collective bargaining provision sacrosanct simply because it is part of a contract. Matters such as seniority are required to conform to the NLRA,128 and Fanning's view dilutes the protection afforded by the Act. On the other hand, the approach affords the maximum flexibility in contrast to a presumption which makes it more difficult for negotiators to accommodate the variations in seniority practices within individual plants. This flexibility is maximized because under Fanning's view, the Board would give full force to its traditional policy of self-restraint.

A high degree of flexibility is still available to negotiators under the Supreme Court framework. More protection is given to employee rights, however, because under the standards established by Great Dane, the General Counsel may prove improper motive by inference. Moreover, the approach does not contem-

126. See notes 67-68 supra and accompanying text.
127. See notes 37-45 supra and accompanying text.
plate Board interference with collective bargaining by mandating the types of superseniority provisions which are valid.

The Supreme Court framework is still in effect, despite the Board's decision in Dairylea. In fact, the principles of proof outlined by Great Dane are used to determine whether any justification proffered for a superseniority provision going beyond layoff and recall is sufficient to rebut a presumption of illegality. Unlike Great Dane, however, Dairylea reduces bargaining flexibility and acts as a substantive restraint on negotiation in two respects. First, the presumption of illegality attaches to a wide array of superseniority clauses under Dairylea. Thus negotiators must bargain not knowing whether they will be able to rebut the Dairylea presumption. This uncertainty may compel them to limit their superseniority provisions to layoff and recall, regardless of whether a broader clause would be more appropriate for the respective parties. Second, the Board's decision constitutes a deviation from its policy of self-restraint in that Dairylea specifies which clause the Board prefers and sets up machinery to enforce that preference.

Cases subsequent to Dairylea implicitly recognize the problems inherent in Dairylea. Specifically, the cases reflect an attempt to provide negotiators with a guide to the types of superseniority clauses that the Board will approve. The Board has expanded the legal boundaries for superseniority clauses by applying the rationale that superseniority is necessary to protect the continued presence of union officials on the job. Although Board guidance fulfills the Dairylea goal of providing negotiators with a clear-cut rule upon which they can rely, the concomitant of this increased guidance is increased Board interference with the substance of collective bargaining. At first blush, it would appear that increased interference would reduce flexibility in negotiation further than in Dairylea. Yet, the fact that negotiators can safely rely on such a wide array of clauses now sanctioned by the Board at least gives negotiators some freedom to tailor the provision according to the respective power, needs, and bargaining skills of the parties. Nevertheless, despite the benefits afforded by the post-Dairylea decisions, there is no assurance that new types of superseniority clauses that may arise in future collective bargaining agreements will be approved by the Board. This uncertainty acts

129. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162, 1166 (2d Cir. 1976).
to reduce the flexibility of negotiators to draft new clauses which might be better suited for the particular parties involved.

In light of the above problems with *Dairylea* and its progeny, it may be desirable for the Board to return to the Supreme Court framework. If the Board chose to revert to *Great Dane*, employee rights would be protected to the same extent as accorded by *Dairylea* since each case requires that a justification be offered for the superseniority provision at issue. At the same time, the Board could reaffirm its policy of noninterference with the substance of collective bargaining and thus not upset the delicate balance struck by the negotiating parties. It is interesting to note that as a result of the post-*Dairylea* expansion, the Board in a recent superseniority case has employed the kind of analysis characteristic of the Supreme Court framework. In *Perfection Automotive Products Corp.*, \(^{130}\) the agreement contained a clause which, like the clause in *Dairylea*, granted superseniority to a union steward for all purposes. However, the steward derived no benefit from this provision because of his already high actual seniority. Nevertheless, the Board, in apparent disregard of its customary reasoning under the *Dairylea* framework, found the clause unlawful because of "the inherent tendency of such clauses to discriminate against employees for union-related reasons."\(^ {131}\) Dissenting Member Fanning accused the majority of adopting a per se approach and finding a violation because of the mere existence of the clause.\(^ {132}\)

At least implicitly, the Board had merely employed the *Great Dane* test that invalidates provisions which have an inherent tendency to reward union membership regardless of any union or employer justification.\(^ {133}\)

The Board's deviation from its traditional policy of noninterference with the substance of collective bargaining in its evaluation of superseniority clauses, as well as its difficulty in reaching a resolute stance on how to determine the validity of these provisions,\(^ {134}\) highlights the sensitivity of the issue of superseniority in

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131. *Id.* at 1069 (Fanning, Member, dissenting).
132. *Id.*
133. *See* text accompanying notes 38-39 *supra*.
the context of current labor relations. Sufficient latitude is needed for unions and employers to accommodate their interests as well as the competing interests among the various unit employees. When a collective bargaining agreement represents a reasonable accommodation of the interests of employer, union, and individual employees, the Board should intrude only to protect employee rights guaranteed by the Act. This is the degree of flexibility that should be permitted in light of the inherent difficulties to negotiating superseniority provisions, as evidenced by the post-\textit{Dairylea} cases.

\textbf{JAMES S. STEPHENSON}

\footnote{135. See Clark, \textit{The Duty of Fair Representation: A Theoretical Structure}, 51 Tex. L. Rev. 1119, 1155–60 (1973).}