VERMONT LABOR RELATIONS BOARD

NORMAND J. DUBE	)	
	)	
v.	)	
	)	
CHAUFFEURS, TEAMSTERS and WAREHOUSEMEN, LOCAL No. 597, CHARLES RAYMOND, SECRETARY-TREASURER,	)	DOCKET NO. 79-51R
and	)	
CHITTENDEN COUNTY TRANSPORTATION AUTHORITY	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On August 3, 1979, Normand J. Dube (hereinafter "Complainant") filed charges of unfair labor practices with the Vermont Labor Relations Board (hereinafter "Board") against the Chauffeurs, Teamsters and Warehousemen, Local 597, Charles Raymond, Secretary-Treasurer (hereinafter "Union"), and the Chittenden County Transportation Authority (hereinafter "Employer"). Complainant charges the respondent Union violated 21 V.S.A. §1726(b)(1) and (3), and the respondent Employer violated 21 V.S.A. §1726(a)(1) and (3), by wrongfully interpreting and enforcing a "superseniority" provision of the collective bargaining agreement between the Employer and the Union.

After investigation, taking the verified allegations contained in the charges as true, the Board issued a complaint and notice of hearing on August 8, 1979.

Two hearings were held. Members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown were present at the first hearing, October 25, 1979. The second hearing was held on December 13, 1979, before members Cheney and Brown only. At both hearings, the Complainant was represented by Attorney Peter Piche.

Attorney Jonathan Axelrod represented the Union. Ralph Cramer, General Manager of the Chittenden County Transportation Authority, represented the Employer.

Requests for Findings of Fact and Memoranda of Law were filed by the Complainant and the Union on December 13, 1979, and January 18, 1980, respectively. The Employer submitted a brief statement of its position on January 7, 1980. In addition to the December 13 brief, a Supplemental Memorandum was filed by the Complainant on January 16, 1980.

FINDINGS OF FACT

1. The Employer is a municipal corporation engaged in intrastate public transportation. The Employer was created by the General Assembly of the State of Vermont on February 2, 1973, and commenced service on July 1, 1973. At all times relevant, Ralph Cramer has acted in the capacity of the Employer's General Manager.

2. The Employer is a "municipal employer" under 21 V.S.A. §1722(13).

3. The Complainant, Normand Dube, was the first person hired by the Employer in June, 1973, prior to beginning operations, and is the most senior employee by virtue of his longevity under Article IV of the collective bargaining agreement, admitted into evidence as Complainant's Exhibit C.

4. The respondent Union was certified as the exclusive bargaining agent in a unit of full-time drivers for the Employer on June 24, 1975, by this Board. In January, 1979, the Union's certification was expanded by Board order to include part-time drivers. At no time has the position of Terminal Duty been certified for inclusion in the bargaining unit by petition of either the Employer or the Union.

5. The Employer and the Union executed their first collective bargaining agreement in September, 1975. In that agreement, inter alia, the

parties ratified a clause according the Union Shop Steward top seniority not only with respect to layoff and recall, but also with respect to all contractual benefits where seniority is a consideration. Thus, under this agreement, the Shop Steward is given preference in bidding job assignments (Article II(c), Complainant's Exhibit C at 2), overtime (Article IV(b) and (c), supra at 4), and choosing vacations (Article V, supra at 5). The "superseniority" clause effecting those privileges provides:

> Stewards shall enjoy top ranking on the "seniority" roster of union members and shall be the last to be laid off in the event of a reduction in force.

6. While the "superseniority" clause remains unchanged in the third successive agreement between the Employer and the Union, it did not go unchallenged. At one of nineteen meetings regarding negotiations for their current contract which took place during the spring and summer of 1978, a secret ballot vote was taken after heated discussion among the members as to whether or not the "superseniority" clause should be retained in the "new" contract. The result of the vote is disputed. One witness, Penny Campbell, a former employee and Union member, recollected a very close vote, 12 to 10 in favor of retaining the language. Another witness (and respondent), Charles Raymond, recollected a result of "17 to 6 or 17 to 7", in favor of the clause.

7. Harold Pidgeon was hired by the Employer as a full-time driver in September, 1973, and was instrumental in forming a union among the Employer's drivers.

8. While the Union and the Employer were negotiating their first contract, there was a disruption of service due to a strike action and the Employer initially discharged ten employees, seven of which were reinstated several days later. Mr. Pidgeon was not among those initially reinstated.

He was reinstated after a Board order resolving an unfair labor practice charge which was filed on September 12, 1975.

9. Following his reinstatement early in 1976, Harold Pidgeon was elected Shop Steward by secret ballot election. Under the Union charter and by-laws, a steward does not serve a specific term but may be removed only by a secret ballot election, which election shall be held after a petition calling for a steward election is signed by fifty-one percent of the unit.

10. Until April, 1978, Harold Pidgeon exercised his "superseniority" as Shop Steward to bid the job of his choice. Until that time he elected to bid for a driving run.

11. The policy of seniority and the procedures for its implementation under the collective bargaining agreement are set forth in Article IV (Complainant's Exhibit C at 4). That section, in its entirety, provides:

> (a) Reference on Seniority shall only pertain to union personnel.
>
> Seniority shall be the member's length of service with the Employer without interruption, except for lay-offs of less than one (1) year, sickness or accident.
>
> (b) If conditions of business are such that all men employed will not receive a full week's work, qualified employees in the order of their seniority shall be given the preference of the work available. Overtime work shall be assigned to qualified men in seniority order, if available.
>
> (c) When it becomes necessary to lay off employees, preference shall be given to employees in the order of their seniority to the work available, if qualified and available. Employees shall be rehired in the inverse order, if qualified and available. Overtime will go to senior man after all regular men have received a day's work.
>
> (d) The Employer shall maintain a seniority roster of all members covered by this agreement. This roster to be kept up to date and posted.
>
> (e) The Employer shall provide a space in a conspicuous place for the posting of this agreement and/or bulletins or letters to and for the employees.

(f) All bids on all runs will be posted from Wednesday to Wednesday to become effective the following Monday and will be given to the senior employee that qualifies. Bids will be posted every four (4) months effective January 1, 1976.

(g) The Company shall not be required to hire those referred by the Local.

(h) The Employer will allow fifteen (15) minutes at straight time rate for travel time to any Employee who finishes work at a different place than where he started.

12. Major Terminal Duty responsibilities include: opening the office of the Employer at approximately 4:00 a.m., removing the fare boxes used the previous day and placing them in a designated "money room," changing the tachograph on each bus, making sure each run is filled and starts on schedule, and occasional maintenance service calls when busses break down and no mechanic is available. Terminal Duty also involves answering the telephone and monitoring the Employer's radio frequency. The person assigned Terminal Duty, while he does not initially schedule Drivers, will call in replacement Drivers or may even drive a run himself if a Driver is late. When it is necessary to call in Drivers, the run is supposed to be offered on the basis of seniority, the most senior Driver being called first and should he refuse, the next senior Driver is called according to the seniority roster. However, testimony revealed that strict adherence to this procedure is inconsistent, and when the procedure is followed, most often the first Driver available is not particularly high on the roster. The Complainant, and most senior employee on the roster by longevity, often refused such call-ins.

13. The position of Terminal Duty had been filled on a regular basis by the Complainant for the period beginning July 1, 1975, until February 22, 1978.

14. The Complainant was employed in the position of Terminal Duty on February 22, 1978, having bid that job at some time prior to that date. On that date, an incident took place involving the Complainant and a missing fare box, causing Mr. Cramer, his supervisor and the Employer's manager to summarily fire the Complainant for "improper handling of the company receipts". (Complainant's Exhibit D at 16-17) The incident and confrontation was witnessed by Dwight Blondin and Ronald Spaulding, the Assistant Manager and Superintendent of Maintenance for the Employer. Without contesting Mr. Cramer's understanding of the incident, the Complainant asked at that time whether Mr. Cramer would accept his resignation instead of firing him. Mr. Cramer consented, verbally.

15. In fact, however, the Employer declined to accept the Complainant's letter of resignation. After an absence of approximately two weeks, the Complainant contacted Mr. Cramer and requested reinstatement to this position of Terminal Duty. Mr. Cramer consented to let him return as a Driver. The record is not clear as to whether Mr. Cramer informed the Complainant at this time that he would not be permitted to bid Terminal Duty again. The Complainant testified Mr. Cramer told him to wait until the April bids were posted, at which time he could bid for Terminal Duty.

16. Upon the Complainant's return to work in early March, 1978, Mr. Cramer issued a written statement "to whom it may concern" saying that the Complainant had been out of work for two weeks due to "personal stress and circumstances". (Complainant's Exhibit E).

17. The Complainant returned to work without any loss of seniority, at the recommendation of the Employer and by a secret ballot vote among union members.

18. Mr. Cramer assigned Harold Pidgeon, Shop Steward, the position of Terminal Duty during the Complainant's absence. The main reason for his selection given by Mr. Cramer was the fact that prior to this time, Mr. Pidgeon had been out of work with a foot injury and was unable to drive extensively. Mr. Cramer considered Terminal Duty an appropriate form of "light duty" which would enable Mr. Pidgeon to return to work while filling the vacant Terminal Duty position as well.

19. In April, 1978, Harold Pidgeon bid the position of Terminal Duty. This April job bid was the first normally scheduled bid subsequent to the incident of February 22, 1978. The Complainant also wished to bid for Terminal Duty, but could not successfully because as shop steward, Mr. Pidgeon enjoyed top seniority in job picks and had already bid Terminal Duty. When the Complainant complained to Mr. Cramer about this particular effect of "superseniority", he was referred by Mr. Cramer to the "super-seniority" clause of the contract and informed that as he understood the clause, Mr. Pidgeon was entitled to first choice of job assignments.

20. Mr. Cramer also represented to the Complainant at this time that he had the right to refuse any employee bidding the position of Terminal Duty. Further, he also represented to the Union on several occasions throughout the period material to this charge that the inclusion of the Terminal Duty position in the bargaining unit is solely at the discretion of the Employer, through its agent, Ralph Cramer.

21. An employee assigned Terminal Duty normally works from 4:00 a.m. to 12:30 p.m., Monday through Friday, and from 5:00 a.m. to 9:00 a.m. on Saturday. The Saturday work is regularly scheduled overtime. In addition to the scheduled Saturday overtime inherent in this position, an employee

assigned Terminal Duty also works a substantial amount of unscheduled overtime whenever replacement Drivers are not available. Furthermore, charter work, in addition to scheduled and unscheduled overtime, is available to an employee assigned Terminal Duty by rotation based on seniority. The average weekly amount of overtime compensation paid out to an employee working Terminal Duty is $120.

22. Terminal Duty requires a greater degree of contact with management than with rank and file personnel. The employee working Terminal Duty shares an office with Assistant Manager Blondin, and is in close proximity to the office of Manager Cramer, as well. Contact with the Drivers is limited to the radio and as Drivers begin their shifts in the morning, generally the busiest time of the workday for the employee working Terminal Duty.

23. While there is a Driver's lounge at the "shop" on Industrial Avenue, where the management offices and maintenance services are located, the Drivers generally congregate and associate informally at the St. Paul Street terminal, where shift turnovers occur.

24. Three former Drivers of the Employer, Alan Daudin, Penny Campbell and John Flanders, testified as to their experience and perceptions of the affect the combination of Shop Steward and Terminal Duty on the administration of the collective bargaining agreement. Witness Daudin testified that although he had not expressed his concerns to the Union or the Employer directly during his tenure, he generally felt inhibited in exercising his rights under the grievance procedure because of Mr. Pidgeon's place of duty, fearing management would overhear his complaints given in confidence to his union representative. Mr. Daudin felt it necessary to telephone Mr. Pidgeon, rather than discuss union business in person. On the nature of the position,

he testified that it was his impression that an employee working Terminal Duty was out of touch with the Drivers in the sense that he "didn't know what was happening in the streets", and that Terminal Duty was a "plush job" due to the substantial amount of overtime available in that position. Because of those overtime opportunities, Mr. Pidgeon may be reluctant to take an advocacy position which may displease management. As the least senior employee during his tenure with the Employer, Mr. Daudin worked an average of three and one-half hours overtime per week.

25. Witness Campbell also testified that she did not feel free to discuss union business, including grievances, at the Industrial Avenue shop. Ms. Campbell was active in trying to eliminate the exercise of "superseniority" for any reason under the contract except layoff because of the extensive benefits afforded the Shop Steward solely on the basis of "superseniority". Ms. Campbell testified that in her opinion, a "good" union representative was not afraid to "make waves" in pursuing employee interests and complaints. Mr. Cramer informed Ms. Campbell at a company picnic in July, 1978, that the position of Terminal Duty was included in the bargaining unit solely at his discretion. Since Mr. Pidgeon's continued bid at Terminal Duty hinged on the Employer's approval, Ms. Campbell testified that she seriously doubted that Mr. Pidgeon was willing or able to effectively represent his fellow workers without jeopardizing his own well-being.

26. Witness Flanders also felt the combination of Shop Steward and Terminal Duty was improper because of the managerial pressures inherent in the Terminal Duty position. For example, he recalled an incident where Mr. Pidgeon, while in the position of Terminal Duty, was required to testify against a fellow Union member at an unemployment compensation hearing. At this hearing, Mr. Pidgeon testified as to the reasons for discharging former

employee, Dale Whitney. Only Mr. Pidgeon, working Terminal Duty at that time, was capable of testifying as to Driver Whitney's tardy arrival times.

27. Witnesses for the respondent Union, Rupert St. Francis, James Walters and Bernard Barron, contrary to the Complainant's witnesses, all testified as to the convenience of the combination of Shop Steward and Terminal Duty. In their experience, Mr. Pidgeon was more accessible in the position of Terminal Duty than when he served as Shop Steward and drove full-time. All three witnesses felt Mr. Pidgeon's prior experience as a full-time Driver made him sufficiently aware of rank and file concerns.

28. Witness Barron, fired by the Employer on May 30, 1979, attributed his reinstatement to the successful representation of his grievance by Mr. Pidgeon.

29. The duties, activities and privileges of Shop Steward are set forth in Article II of the collective bargaining agreement (Complainant's Exhibit C at 2-3) which provides in pertinent part:

> (a) The Employer recognizes the right of the Union to designate a Shop Steward and one alternate to exercise the function of Steward in the absence of the Steward concerned. Stewards are only in bargaining unit.
>
> The authority of Stewards and alternates so designated by the Union shall be limited to and shall not exceed the following duties and activities:
>
> (1) The collection of dues, when authorized by appropriate Local Union action so not to interfere with the normal duty shift.
>
> (2) The investigations and presentation of grievances in accordance with the provisions of Article IX.
>
> (3) The transmission of such messages and information which shall originate with and are authorized by the Local Union or its officers, provided such messages and information
>
> (1-A) have been reduced to writing, or

(2-A) if not reduced to writing are of a routine nature and do not involve work stoppages, slow-downs, refusal to handle goods, or any other interference with the Employer's business.

(4) Processing job bids in accordance with Article V. (sic)

and

(c) Stewards shall enjoy top ranking on the seniority roster of union members and shall be the last to be laid off in the event of a reduction in the working force.

30. Charles Raymond, Secretary Treasurer and Business Agent of the respondent Union testified that "superseniority" for Shop Stewards was a longstanding practice within the Union. It was included in most all of respondent's contracts as a means of rewarding the steward for his efforts in administering a contract and ensuring accessibility to Union representation.

31. While "maybe three to five new people" complained to him about Mr. Pidgeon's ability to effectively represent them, Mr. Raymond testified that the employees contacting him could deliver little more than "hearsay" to back up their charges.

32. At the 1978 Union meeting at which time negotiations and the continued inclusion of the "superseniority" clause was debated in view of the N.L.R.B. Dairylea decision, 219 N.L.R.B. No. 656, 531 F.2d 1162 (1976), no counsel for the Union was present to advise members as to the law on this issue. Mr. Raymond did not comment at that time as to the legality of the clause, but chose to let the members resolve the issue by a secret ballot vote. (See Infra, Fact #6)

33. The Complainant charges that he has been damaged to the extent of overtime opportunities extended to others in the position of Terminal Duty, since February, 1978.

OPINION

I

JURISDICTION

We must consider a jurisdictional issue first. The Union contends the instant charges are time-barred, arguing that the Complainant was denied the bid of Terminal Duty more than six months prior to filing this complaint. Are the allegations here time-barred from our consideration under 21 V.S.A. §1727(a), which provides in pertinent part?:

> No complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the board unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. The board may waive the six-month period if it finds that (a) the aggrieved person did not understand that an unfair labor practice had been perpetrated against him; or (b) the offending person had actively concealed his or its perpetration of that unfair labor practice.

We conclude they are not, for two reasons. First, although the Complainant opposed the respondents' enforcement of "superseniority" soon after his return to work in March, 1978, it does not automatically follow that he understood that an unfair labor practice had been perpetrated against him. Because of the union's contrary position, and the necessity to hire private counsel, we find he did not understand that an unfair labor practice may have been committed. This finding is reinforced where the ability of the Complainant's Union representative to serve his constituents is challenged. Moreover, the conduct precipitating the instant charges continues, as does its affect on all the members of the bargaining unit.

In another unfair labor practice, we were required to rule on whether a complaint was moot due to the cessation of the complained of conduct, a

teachers' strike. See Board of School Commissioners of the City of Rutland et al. v. Rutland Education Association, et al., 2 VLRB 250 (1979). There, we commented that "the act does not require the Board to play hide and seek with those guilty of unfair labor practices," supra at 284. Also in that decision, we were satisfied that a continuing dispute existed between the parties, a dispute which if the Board declined jurisdiction was "capable of repetition, yet evading review." For these same reasons, we decline to dismiss this case as time-barred.

II

"SUPERSENIORITY"

While not bound by N.L.R.B. precedent, this Board and the Vermont Supreme Court have consistently looked to federal decisions interpreting the National Labor Relations Act when interpreting similar provisions of our own Municipal Employee Labor Relations Act. Ohland v. Dubay, 133 Vt. 300 (1975), In re: Southwestern Vermont Education Association, 136 Vt. 490 (1978).

Dairylea Cooperative, Inc., 219 N.L.R.B. No. 656, 531 F.2d 1162 (1976), is the leading "superseniority case." "Superseniority" has been defined and explained as:

> "A position on the seniority list ahead of where the employee would be placed solely on the basis of years of continuous service. Such favorable treatment is usually reserved for union stewards, in order to retain proper union representation for those employees who remain on the job in the event of a layoff. Superseniority would be provided for in a collective bargaining agreement." Government Employee Relations Report, Reference File, Glossary, 91:25

In Dairylea, the National Board held that while the enforcement of "superseniority" for the shop steward beyond layoff and recall may not be a per se violation of the Act, its existence creates the legal presumption

of "inherently discriminatory conduct." The Second Circuit Court of Appeals concurred and enforced the order.

In this case, we are required to determine: did the Employer in enforcing the "superseniority" clause here 1) interfere with, restrain or coerce the Complainant and its other employees in the exercise of their protected rights; 2) discriminate against the Complainant with regard to the payment of overtime to encourage membership in the respondent Union. We must also determine whether the Union 1) restrained or coerced the Complainant from exercising his rights guaranteed under 21 V.S.A. §1721 et seq. and 2) caused the Employer to discriminate against the Complainant in violation of 21 V.S.A. §1726(a)(3).

The facts in Dairylea involved the selection of milk routes rather than overtime opportunities, but the clause in question was similar to that of the instant case. It was interpreted by the parties as giving the shop steward preference in bidding for lucrative milk routes over a union member with greater longevity who would otherwise have been senior to the complainant. The rationale expressed by the Court of Appeals in finding the preferential bidding allowed by "superseniority" discriminatory was based on the U.S. Supreme Court ruling in Radio Officers Union v. N.L.R.B., 347 U.S. 17 (1954). That case held discrimination in regard to any term or condition of employment which not only encourages employees to be union members but also to be "good" union members, is violative of the Act; for, every employee is equally guaranteed the right to refrain from union activity. The Complainant maintains Dairylea is controlling.

The Union offers three major defenses to the charges of maintenance and enforcement of a "superseniority" clause. First, the Union maintains

the Complainant was denied his requested bid for an additional reason unrelated to Mr. Pidgeon's "superseniority," specifically, in the Employer's mind, the Complainant had demonstrated that he could not be entrusted with company funds.

Second, the Union argues that the use of steward "superseniority" was proper in this case because the incumbent shop steward utilized his "superseniority" to bid on a job which would enable him to better serve his constituents. In this regard, the Union argues it has met the burden of proving the administration of the collective bargaining agreement is furthered, not frustrated, by the combination of shop stewardship and Terminal Duty. It contends the greater accessibility to co-workers that is provided in the position of Terminal Duty is the major, allowable, union justification for the use of "superseniority" beyond layoff and recall. Teamsters Local 20 v. N.L.R.B., 610 F.2d 991 (1979), 102 LRRM 3080 (D.C. Cir. 1979).

The third defense offered by the Union is the fact that the shop steward in this case was elected by all the members of the bargaining unit. This fact, the Union claims, distinguishes the instant case from Dairylea and its progeny where in Dairylea, the steward was appointed and

> ... the only way, realistically speaking, an employee could gain such preference with respect to on-the-job benefits was to be a faithful and enthusiastic union adherent ... I.A.T.S.E., Local 780 (McGregor-Werner), 227 N.L.R.B. No. 558 at 559 (1976).

Here, the Union contends,

> ... (T)he employees in the unit choose their stewards. Further, stewards function solely in application and interpretation of the contract, but do not collect dues or act in any other was as agents for the Union. Accordingly, the superseniority preference granted to a steward here 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. (Id. at 559).

In addition to its by-laws requiring election of stewards, the Union argues that it (the Union) may have waived employees' statutory rights here with the longstanding practice of contracting "superseniority" clauses, the membership vote to retain the present clause, and the ratification of the contract with the "superseniority" clause unchanged.

The Employer's position in response to the charges here were submitted as "remarks," without supportive legal arguments. Because of the lack of argument accompanying the presumed defenses offerred by the Employer, we cannot be certain how the statements refute the interference charge but it is certain that the Employer "firmly believe(s) that we have the right to take the terminal duty position out of the collective bargaining unit." The only other "remark" of the Employer would seem to offer an affirmative defense for the discrimination charge. It is the position of the Employer that the Complainant may be disqualified from bidding Terminal Duty because of his prior mishandling of company monies, thus making him unqualified for the position.

In our opinion, the principles set forth in Dairylea are determinative of the "superseniority" issue in this case and have not been changed significantly by subsequent cases on this point. The N.L.R.B. and Court cases since Dairylea have tended to reinforce the Court's decision that unless the union can provide a substantial and legitimate business justification for the clause, "superseniority" will be deemed violative of the Act. "Substantial and legitimate" justifications which have been interpreted as acceptable uses of "superseniority" have without exception, been those instances where the extension of that privilege operated to ensure or improve representation

of unit employees in matters of contract administration. See e.g.: Teamsters Local 20 v. N.L.R.B., supra, (Steward "superseniority" benefits that assure "greater accessibility" to co-workers, thus benefitting all employees with better representation is not precluded by Dairylea.); Limpco Manufacturing Company 230 N.L.R.B. No. 59, (1977), ("Superseniority for union officers was permissable, although they were not generally responsible for contract administration in the same manner as stewards. The Board held effective employee representation goes beyond grievance processing.); and Otis Elevator Company, 231 N.L.R.B. No. 183 (1977), ("Lateral bumping" of less naturally senior employees for union stewards was lawful because it guaranteed the continued presence of union representatives to enforce the contract.) It is significant however, that in both Limpco and Otis Elevator, "superseniority" was used in layoff situations, and variations of the generally accepted use of this privilege for job retention purposes were being tested. There, the Board was concerned with who was entitled to "superseniority" protection, rather than the scope of its application in situations other than layoff.

Notwithstanding those cases which approved "superseniority" to enable effective contract administration, the Board continued to hold unlawful its application for "all purposes" under the collective bargaining agreement, including bidding and job assignment preference. See e.g.: Auto Warehousers, Inc., 227 N.L.R.B. No. 100 (1976), (Broad "superseniority" clause discriminated against employees with more longevity, by denying them job preference and overtime opportunities); W.R. Grace and Company, 230 N.L.R.B. No. 37 (1977), (Maintenance and enforcement of "superseniority" clause allowing stewards preference for assignment of delivery routes with Saturday and holiday overtime not justifiable. Fact that stewards were elected, rather than

appointed, did not distinguish broad application of clause here from Dairylea); and Allied Supermarkets, Inc., 233 N.L.R.B. No. 84 (1977), (Union failed to establish that "superseniority" for job bidding purposes furthered the effective administration of the collective bargaining agreement, notwithstanding the facts that stewards were elected, the clause had been ratified by bargaining unit members, and the union by-laws did not require supportive participation in union activities.) C.f. International Harvester, N.L.R.B. Advice Memorandum, 93 LRRM 1251 (1976), (In a plant with more than 3,000 employees, there would be times when it would better serve the bargaining unit, rather than the union, to schedule grievance committeemen and stewards overtime they wouldn't otherwise be entitled to.) and, Automobile Workers, Local 1331 (Chrysler Corporation), 228 N.L.R.B. No. 186 (1977), (Grievance committeemen, in addition to shop stewards, permitted to exercise "superseniority" for weekend and overtime assignments because of their duties as grievance counselors).

While it is true that the incumbent shop steward in this case was elected, we disagree with the Union's contention that this fact somehow constitutes a waiver of individual employees' statutory rights. The Union relies on I.A.T.S.E., Local 780, (McGregor-Werner), supra. However, the distinction made in I.A.T.S.E. Local 780, on this point was only one of three reasons the Board found no violations. In that case, although a "superseniority" clause existed which extended that privilege to shift preferences, the clause had been rendered inoperative by past practice as no shift preference had ever been granted on the basis of "superseniority." Also of major significance in I.A.T.S.E., Local 780, was the fact that the steward in that case exercised "superseniority" privileges in a layoff situation.

The shift change was not based on a preference to work certain hours but was for job retention purposes. It was for all of the above reasons that the Board found Dairylea inapplicable. The fact that the shop steward in I.A.T.S.E., Local 780, and in this case was elected, standing alone, is not controlling.

In this case, no layoff situation existed. Assurance of continued union representation is not at issue. Although there was testimony that some employees found Mr. Pidgeon more accessible in the Terminal Duty position, there was also testimony which evidenced a reluctance and inhibition to pursue employee grievances in an area predominantly used by management. The record also shows that while every Driver must spend some time at the Industrial Avenue shop where the shop steward is located, the hours of Terminal Duty are such that Mr. Pidgeon is in before all the other Drivers, is most busy as Drivers do arrive, and has ended his shift before the majority of the workforce. On balance, the record does not reveal that the maintenance and enforcement of the "superseniority" clause here serves to enhance the shop steward's ability to efficiently represent his constituents. On the contrary, the record shows that this particular combination of Terminal Duty and shop stewardship serves to divide the unit. The Union has failed to justify the inherent discrimination which results from the exercise of the "superseniority" clause here. For all of the above reasons, we conclude the Union has committed the unfair labor practices charged in violation of 21 V.S.A. §1726(b)(1) and (3).

III

EMPLOYER DISCRIMINATION

The Employer and the Union maintain the Complainant was denied Terminal

Duty because he was unfit for the position because of previous dishonesty demonstrated during the fare box incident, a reason unrelated to the steward's exercise of "superseniority." The Complainant, however, counter-charges that the Employer can not now assert that reason. He contends there is no evidence on record that he or the Union was ever given notice of disciplinary action as a result of the incident. On the contrary, he was "rehired" without any loss of seniority and told upon returning to work that he could bid Terminal Duty at the next regular bid interval, April, 1978. (However, his bid was unsuccessful because of Mr. Pidgeon's exercise of "superseniority.") Thereafter, complainant's "displacement" from the bid of his choice was based solely on the respondents' enforcement of steward "superseniority," and not for any other reason. Since the Employer failed to conduct a fair and objective investigation before imposing disciplinary action, Complainant contends he cannot be denied the right to have the Terminal Duty job by right of seniority. Grief Brothers Cooperage Corp., 42 L.A. 553 (1964). See also: In Re: Madison Bus Co., 52 L.A. 723 (1969) and Pick-N-Pay Supermarkets, 52 L.A. 832 (1969). By this analysis, we are urged to find the Employer is barred from now asserting the Complainant was unfit for Terminal Duty.

We disagree. We are sufficiently persuaded that the Employer's reasons for asserting veto power over the Complainant's bid for Terminal Duty were based on legitimate business concerns. While it is not our intent or purpose to assess the Complainant's fitness for the position he sought, we do infer from the facts a legitimate reason for the Employer's action. The Employer's response to the fare box incident was first one of anger, betrayal and disbelief. The Complainant was first fired on the spot, the most extreme

disciplinary action available. The Employer then reconsidered and allowed the Complainant to resign. After a period of two weeks, during which time he told no other employees or Union representatives of the incident, the Employer rehired the Complainant with a recommendation to the Union that the Complainant's seniority be restored. Ultimately, the Complainant was not disciplined at all. Complainant never grieved the two weeks "layoff." The cases cited by the Complainant are ones in which the due process rights of the grievant were violated in a disciplinary action.

On these facts, the assertion of the Employer that the Complainant will not be allowed to bid Terminal Duty on a regular (rather than substitute) basis is well within management rights, protected by the collective bargaining agreement. Article IV, section (f), "Seniority," gives the Employer the right to evaluate each employee's qualifications before approving job bids.

> All bids on all runs will be posted from Wednesday to Wednesday to become effective the following Monday and will be given to the senior employee that qualifies. (emphasis added)

True, Complainant never had a hearing on his qualifications, but that omission was by his election, not Employer deprivation. We assume, without deciding that here, Complainant would be entitled to a grievance hearing on his fitness for the position, should he be rejected for Terminal Duty by management after a successful bid consistent with this opinion. Whether or not he is entitled to such a hearing, we think would be properly subject to determination in subsequent grievance proceedings should they occur. Moreover, an arbitrator might award damages in that hearing. Accordingly, we cannot sustain a charge of discrimination against the Employer.

For these same reasons, we conclude that the Complainant is not entitled to recover the damages sought from the Employer. The denial of Terminal Duty

to him was within management rights apart from any "superseniority" issue. While damages were awarded in Dairylea, no issue was raised there concerning the Complainant's fitness for the job.

However, with respect to the rest of the bargaining unit, the Employer has no affirmative defense against a charge of discrimination with intent to encourage union membership. The Employer's maintenance and enforcement of the "superseniority" clause for purposes other than layoff and recall reinforce the Union's message that an employee should strive for the office of shop steward in order to be eligible for lucrative job bids. This behavior does constitute an unfair labor practice in violation of 21 V.S.A. §1726(a)(3).

IV

EMPLOYER INTERFERENCE AND DOMINATION

We sustain the charge of interference, not only for the reasons given in our discussion of Employer discrimination (Part III, infra), but also because we find that the Employer's position regarding the inclusion of the Terminal Duty position in the unit constitutes interference with its employees' rights protected under the Muncipal Employee Labor Relations Act. The highly desirable nature of Terminal Duty makes the Employer's position highly suspect. The Employer, by asserting the right to remove this position from the unit not only interferes with individual employee rights guaranteed under the Act, but also flirts with a finding of interference with, and an attempt to dominate, the administration of an employee organization in violation of 21 V.S.A. §1726(a)(2). The record reveals that the position of Terminal Duty has been filled by bargaining unit members continuously since the execution of the first collective bargaining agreement between the Union

and Employer in 1975. However, this Board's certification order of June 24, 1975, of which we take official notice, records the parties stipulation that the bargaining unit designated would consist of "the full-time bus drivers employed by the Chittenden County Transit Authority." Neither the certification nor the March 3, 1975, petition for election of a collective bargaining representative refers to the position of Terminal Duty. Nonetheless, the Employer maintains the disturbing assertion that it can place or pull that position in and out of the unit at its discretion. The Employer claims authority to do so by a "verbal understanding" with the Union. It offers no legal authority for this position. Moreover, there is evidence before us questioning the appropriateness of the inclusion of Terminal Duty in the bargaining unit. There is credible evidence to indicate the position of Terminal Duty is managerial in nature. The appropriateness of the inclusion of Terminal Duty in the unit is even more suspect where that position was never represented on the Union's petition or authorization cards, and no attempt has been made by the parties to seek modification of the original unit certification.

We do not mean to suggest that the record overwhelmingly compels us to find Terminal Duty as a managerial rather than "rank and file" position. On the contrary, where the Terminal Duty Position requires a substantial amount of driving, we find facts supportive of either determination. It is not the absence of a final determination on this position which concerns us the most. Past practice would seem to support its continued inclusion in the bargaining agreement by virtue of the Union's and Employer's acquiescence through the life of three collective bargaining agreements. Instead, it is

the uncertainty engendered by the Employer regarding the status of this position that serves to supply management with an inappropriate means of influence over the bargaining unit.

ORDER

For all the foregoing reasons and consistent with the findings of fact and conclusions of law stated here and pursuant to the powers vested in the Vermont Labor Relations Board by 21 V.S.A. §1727(d) to prevent unfair labor practices, it is hereby ORDERED:

I. That the Respondent Union, Chauffeurs, Teamsters, and Warehousemen Local 597, Charles Raymond, Secretary-Treasurer, shall cease and desist from

1. Maintaining, enforcing, or otherwise giving effect to those clauses in its collective bargaining agreement with the Respondent Employer, Chittenden County Transportation Authority, according the shop steward "superseniority" with respect to terms and conditions of employment other than layoff and recall;

2. Causing or attempting to cause the Respondent Employer to discriminate against its employees in violation of 21 V.S.A. §1726(a)(3); and

3. In any like or related manner restraining or coercing the employees of the Employer in the exercise of their rights guaranteed by 21 V.S.A. §1721 et seq.

II. That the Respondent Employer, Chittenden County Transit Authority, shall cease and desist from

1. Maintaining and enforcing the collective bargaining agreement provisions with Respondent Union, Chauffeurs, Teamsters and Warehousemen Local 597, Charles Raymond, Secretary-Treasurer, according the shop steward "superseniority" with respect to terms and conditions of employment other than layoff and recall;

2. Discriminate against any employee qualified for the position of Terminal Duty in assigning Terminal Duty or any other term and condition of employment other than layoff and recall by according top seniority to the shop steward where the shop steward

does not have top seniority in terms of length of employment;

3. In any like or related manner interferring with, restraining, or coercing employees in the exercise of their rights guaranteed by 21 V.S.A. §1721 et seq.; and

4. Attempting to dominate or interfere with the administration of the Respondent Union organization by threatening to remove the position of Terminal Duty from the bargaining unit.

III. That the position of Terminal Duty, by virtue of the past practice of the Union and the Employer, be included in the bargaining unit and the parties shall so stipulate and file their stipulation with this Board within thirty days from the issue of this order. Or, at the petition of either party, a hearing shall be held before this Board for the purpose of determining the appropriateness of the inclusion of the position of Terminal Duty in the bargaining unit pursuant to 21 V.S.A. §1721(b)(1).

Dated this ____ day of March, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

Robert H. Brown

Order affirmed Nov 1981