



Fall 9-1-1984

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Recommended Citation

Turnabout Toward Fair Play: The NLRB's Revised Approach to Union Officer Superseniority, 41 Wash. & Lee L. Rev. 1439 (1984).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol41/iss4/8>

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TURNABOUT TOWARD FAIR PLAY: THE NLRB'S REVISED APPROACH TO UNION OFFICER SUPERSENIORITY

In 1935 Congress enacted the National Labor Relations Act (NLRA)¹ to protect the rights of workers to organize and bargain collectively with an employer.² The NLRA outlined the rights and obligations of employers and employees³ and established a National Labor Relations Board (NLRB)⁴ that

1. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)).

2. See 29 U.S.C. § 151 (1982) (National Labor Relations Act is directed toward dual purpose of unburdening commerce by easing labor relations and protecting workers' exercise of freedom of association). In enacting the National Labor Relations Act (NLRA), Congress sought to equalize the bargaining power of employers and employees, thereby enhancing the ability of employees to bargain effectively with management and minimizing the impact of labor unrest on the economy. See S. REP. NO. 573, 7th Cong., 1st Sess. 1-3 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2302 (1949) (attainment of industrial peace and balancing of bargaining power between employers and employees are two principal objectives of NLRA); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 8-9 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3046, 3054-56 (1949) (two principal objectives of NLRA are reducing labor strife and bolstering employees' economic position). Congress sought to equalize the bargaining power of employers and employees by creating a regulated collective bargaining system. See 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15 (1949) (fortification and regulation of collective bargaining process is necessary predicate to equalization between employer and employee bargaining power since collective bargaining is sole means of achieving equality).

3. See 29 U.S.C. § 157 (1982) (employees have right to bargain collectively or to refrain from collective bargaining); *id.* § 158 (catalogue of unfair labor practices by employers and unions); see also *infra* note 9 (discussion of employer activities constituting unfair labor practices); *infra* note 10 (discussion of union activities constituting unfair labor practices).

4. See 29 U.S.C. §§ 153-56 (1982) (creation of National Labor Relations Board). Section 3 of the NLRA provides for a National Labor Relations Board (NLRB) as an agency of the federal government to govern the field of labor relations. *Id.* § 153(a). The NLRB consists of two principal components, the five member Board and the General Counsel of the Board. See generally Farmer, *Problems of Organization and Administration of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 353, 357-60 (1960) (discussion of roles played by Board and General Counsel). The five member Board of the NLRB regulates and conducts union representation elections and adjudicates unfair labor practice cases. 29 U.S.C. §§ 159-60. The five NLRB members serve staggered terms of five years each. *Id.* § 153(a). Congress empowered the President, upon the expiration of a member's term, to reappoint the incumbent member or to appoint a replacement subject to the advice and consent of the Senate. *Id.* §§ 153(a), 154(a). The NLRA also provides for the President, with the confirmation of the Senate, to appoint a General Counsel of the Board to supervise the investigative and prosecutorial staffs of the NLRB. *Id.* § 153(d). The NLRB operates over thirty regional offices throughout the United States and both the Board and the General Counsel have delegated substantial authority to the regional directors administering these offices. See R. GORMAN, BASIC TEXT ON LABOR LAW 7 (1976) (NLRB regional offices conduct most daily business of Board and General Counsel). The Board delegates to the regional directors only the authority to conduct and certify representation elections. See *id.* (regional directors

Congress empowered to adjudicate and prosecute complaints of unfair labor practices.⁵ As originally enacted, section 7 of the NLRA specifically recognized the employees' right to organize, affiliate with, or aid labor unions.⁶ In 1947 Congress enacted the Taft-Hartley Act,⁷ which amended section 7 of the NLRA by recognizing the employees' corresponding right to refrain from union activity.⁸ Section 8(a)(1) of the NLRA declares that any interference by an employer with an employee's rights under section 7 of the Act constitutes an unfair labor practice.⁹ Section 8(b)(2) of the NLRA deems any interference by a union with an employee's section 7 rights an unfair labor practice.¹⁰

generally conduct Board's routine election supervision functions). The Board, however, delegates substantial adjudicative authority in unfair labor practice cases to administrative law judges. *Id.* at 8-9.

5. See 29 U.S.C. §§ 160-62 (1982) (Congress vested in NLRB power to investigate and prevent unfair labor practices). Congress empowered the NLRB to investigate, prosecute, and adjudicate claims of unfair labor practices. *Id.* The NLRB General Counsel exercises the investigative and prosecutorial powers, while the five members of the Board enjoy sole control of the adjudicative function. See *id.* § 153(d) (General Counsel shall have final authority over investigation of charges and issuance and prosecution of complaints in unfair labor practice cases); *id.* § 160(a), (c) (Board shall have power upon record and findings of fact to issue orders preventing and remedying unfair labor practices).

6. National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1982)).

7. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

8. *Id.*, tit. I, § 1, 61 Stat. at 140 (1947) (codified at 29 U.S.C. § 141 (1982)). In enacting the Taft-Hartley Act, Congress formally declared that the Act's purpose was to define the rights of employers, employees, and labor organizations and to ensure that each respects the rights of the others. *Id.* The principle purpose of the provisions amending the NLRA is the balancing of the NLRA to recognize the potential for abuse of employee rights by labor organizations as well as by management. See H.R. REP. No. 510, 80th Cong., 1st Sess. ____ (1947) (amendments to NLRA are designed to make NLRA "two-sided"), reprinted in 1947 U.S. CODE CONG. & AD. NEWS 1135, 1136.

9. 29 U.S.C. § 158(a) (1982). Section 8 of the NLRA codifies various activities that Congress has deemed unfair labor practices. *Id.* Subsection (a) of § 8 outlines five unfair labor practices by employers. *Id.* § 158(a)(1)-(5). Section 8(a)(1) forbids employers from interfering with employees' rights under § 7 of the NLRA. *Id.* § 158(a)(1). Section 8(a)(2) prohibits employers from dominating or interfering with a labor union. *Id.* § 158(a)(2). Section 8(a)(3) prohibits employers from discriminating among employees on the basis of union membership. *Id.* § 158(a)(3). Section 8(a)(4) forbids employers from discriminating against employees who file complaints with the NLRB or cooperate in NLRB investigations and hearings. *Id.* § 158(a)(4). Section 8(a)(5) prohibits an employer from refusing to bargain collectively with his employees. *Id.* § 8(a)(5).

10. 29 U.S.C. § 158(b) (1982). Subsection (b) of § 8 of the NLRA codifies seven unfair union labor practices. *Id.* § 158(b)(1)-(7). Section 8(b)(1) forbids unions from restraining or coercing either employees in the exercise of their § 7 rights or employers in the selection of bargaining representatives. *Id.* § 158(b)(1)(A)-(B). Section 8(b)(2) prohibits unions from encouraging employers to discriminate among employees on the basis of union membership. *Id.* § 158(b)(2). Section 8(b)(3) prohibits unions from refusing in bad faith to bargain. *Id.* § 158(b)(3). Section 8(b)(4) outlaws secondary striking. *Id.* § 158(b)(4). Section 8(b)(5) forbids unions from charging excessive or discriminatory membership fees. *Id.* § 158(b)(5). Section 8(b)(6) prohibits unions from exacting unearned money from employers. *Id.* § 158(b)(6). Section 8(b)(7) forbids unions from picketing illegally. *Id.* § 158(b)(7).

Although interference by an employer with an employee's option to participate in or to refrain from participating in union activity is generally unlawful, the NLRB never has defined clearly the extent of interference that constitutes an unfair labor practice.¹¹ In recent years the NLRB repeatedly has considered whether the contractual granting of superseniority to union officers unlawfully interferes with an employee's rights under section 7 of the NLRA.¹² Superseniority clauses are common features in American collective bargaining agreements.¹³ Under a standard superseniority clause, an employer agrees to treat certain employees as the most senior employees in the organizational unit, regardless of the actual length of tenure of these employees.¹⁴ Since most collective bargaining agreements assign priority in layoff, recall, shift selection, and similar matters at least partly on the basis of seniority, the contractual granting of superseniority to an employee favors the beneficiary of the clause over his peers.¹⁵ The parties to an employment contract may include superseniority clauses in the contract for any of several reasons.¹⁶ For example, an employer may wish to reward highly skilled or especially efficient

11. See *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip op. at 10, 112 L.R.R.M. (BNA) 1361, 1364 (Mar. 7, 1983) (grant of job retention superseniority to union officer not performing steward functions constituted unfair labor practice), *enforced sub nom.*, *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984); *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975) (grant of superseniority to union steward for purposes other than job retention constituted unfair labor practice), *enforced sub nom.* *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976). *But see Dairylea* 219 N.L.R.B. at 658 (grant of job retention superseniority to union steward would not constitute unfair labor practice).

12. See, e.g., *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip op. at 10, 112 L.R.R.M. (BNA) 1361, 1364 (Mar. 7, 1983) (grant of superseniority to union officer performing no "steward-type" function was unlawful), *enforced sub nom.*, *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984); *United Elec., Radio and Mach. Workers of Am., Local 623 (Limpc Mfg., Inc.)*, 230 N.L.R.B. 406, 408 (1977) (grant of superseniority to union officers was presumptively valid), *review denied sub nom.* *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978); *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975) (grant to stewards of superseniority for purposes other than layoff and recall was presumptively invalid), *enforced sub nom.* *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976); see also *supra* notes 6-8 and accompanying text (discussion of employee rights under NLRA § 7).

13. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. No. 2095, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1980, at 97 (1981). In a 1980 study of 1,550 major collective bargaining agreements the Bureau of Labor Statistics found that over 40% of the agreements, each covering 1,000 workers or more, contained a clause providing superseniority for union officials. *Id.*; see also Wortman, *Superseniority-Myth or Reality?*, 18 LAB. L.J. 195, 198 (1967). In a survey of 100 of the 500 largest industrial corporations in the United States in 1964, Professor Wortman found that 73% of companies responding with usable results admitted having superseniority clauses in their collective bargaining contracts. *Id.*

14. See Note, *Superseniority: Latitudes and Limitations*, 49 U. CIN. L. REV. 832, 832 (1980) (definition and general discussion of superseniority) [hereinafter cited as *Latitudes*]; Note, *Superseniority: Post-Dairylea Developments*, 29 CASE W. RES. L. REV. 499, 499 (1979) (same) [hereinafter cited as *Superseniority*]; see also Wortman, *supra* note 13, at 196-97 (examples of superseniority clauses).

15. See Note, *Latitudes*, *supra* note 14, at 832 (superseniority disadvantages senior employees not in beneficiary class).

16. See *infra* notes 17, 21-23 and accompanying text (discussion of management and union

employees with the benefit of superseniority.¹⁷ Frequently, however, superseniority clauses designate union officers and shop stewards,¹⁸ the union's on-the-job contract administration and grievance processing representatives, as members of the beneficiary class.¹⁹

Unions may insist upon superseniority for officers and stewards for several reasons.²⁰ First, superseniority clauses ensure the continued presence of union representatives on the job site.²¹ Second, the clauses provide a measure of job security for employee advocates who might otherwise fear antagonizing management.²² Third, the benefits that superseniority clauses confer act as incentives for qualified candidates to seek union office.²³ Parties challenging clauses granting superseniority to union officers and shop stewards argue that the clauses actually encourage union activism since a union would be unlikely to elect or appoint an indifferent union member to a stewardship or any important union office.²⁴ Opponents of union officer superseniority contend that since only activist union members can become officers, the clauses encourage union involvement by rewarding union activists with benefits unavailable to

motives for including superseniority clauses in collective bargaining agreements).

17. See Wortman, *supra* note 13, at 197 (management may use superseniority clauses to insulate highly skilled employees from layoff).

18. See Snow & Abramson, *The Dual Role of the Union Steward: A Problem in Labor-Management Relations*, 33 SYRACUSE L. REV. 795, 795 n.1 (1982) (explanation of shop steward's role). The union steward, or shop steward, is generally an employee elected or appointed by a union to present employee grievances to an employer and to monitor the employer's compliance with the terms and conditions of a collective bargaining agreement. *Id.* at 795 & n.1.

19. See, e.g., *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip op. at 3 n.4, 112 L.R.R.M. (BNA) 1361, 1362 (1983) (superseniority clause favoring union president, vice president, chief stewards, negotiating committee members, financial secretary-treasurer, recording secretary, and leave of absence committee members was illegal), *enforced sub nom.*, *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984); *McQuay-Norris, Inc.*, 258 N.L.R.B. 1397, 1399 (1981) (contract clause granting superseniority to local union bargaining committee members and executive officers was unlawful as applied to union guide and union trustee); *Allied Indus. Workers of Am. (Allen Group, Inc.)*, 236 N.L.R.B. 1368, 1368-70 (1978) (superseniority clause favoring union president, vice-president, bargaining committee members, chief steward, financial secretary, recording secretary, executive board members at large, and stewards was enforceable); see also Wortman, *supra* note 13, at 198. In a study of major corporation and union collective bargaining contracts, Professor Wortman found that 80% of the contracts containing superseniority clauses favored union officers and stewards among the beneficiary class. *Id.*

20. See Wortman, *supra* note 13, at 195 (discussion of reasons for union interest in superseniority provisions).

21. See *id.* (unions may desire superseniority clauses to retain stewards on job site).

22. See *id.* (unions may desire superseniority clause to insulate officers from employer intimidation).

23. See *American Can Co. (American Can II)*, 244 N.L.R.B. 736, 740 (1979) (Fanning and Truesdale, dissenting) (superseniority provisions favoring union officers reward and encourage service in union offices to benefit of all union members), *enforced*, 658 F.2d 746 (10th Cir. 1981).

24. See Note, *Superseniority*, *supra* note 14, at 499 (superseniority clauses favoring union officials raise questions of unfair labor practices). Employees objecting to union officer superseniority sometimes claim that employers and unions maintaining such superseniority clauses violate § 8(a)(1) and (3), and § 8(b)(1)(A) and (2) by interfering with employees' rights to be active or

inactive union members and non-union workers.²⁵ An employee's rights under section 7 of the NLRA include the right to be an inactive union member if the employee so chooses.²⁶ Opponents of superseniority, therefore, conclude that the inclusion of a superseniority clause in an employment contract interferes with employees' section 7 rights if the clause includes union officers and shop stewards within the beneficiary class.²⁷

The United States Supreme Court has recognized that an employee's rights under section 7 of the NLRA encompass more than the freedom to join or to abstain from joining a labor union.²⁸ In *Radio Officers' Union v. NLRB*,²⁹ the Court noted that an employee's section 7 rights are sweeping and include the right to join a union, to be an active or inactive member, or to refrain

inactive union members and by discriminating against inactive union members for union-related reasons. See *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip. op. at 14-15, 112 L.R.R.M. (BNA) 1361, 1365 (1983) (employer and union violated § 8(a)(1) and (3), and § 8(b)(1)(A) and (2) of NLRA by maintaining superseniority clause benefitting union recording secretary and secretary-treasurer), *enforced sub nom.*, Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984); see also *infra* notes 108-17 and accompanying text (discussion of NLRB's *Gulton* decision); see also *supra* notes 9-10 and accompanying text (discussion of employer and union unfair labor practices under NLRA § 8).

25. See *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 657 (1975) (General Counsel charged that superseniority clause unlawfully encouraged union activism by rewarding union stewards since only activist union members could realistically hope to win appointment as steward), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976); cf. Wortman, *supra* note 13, at 197 (increased security afforded by superseniority might encourage less senior employees to seek superseniority).

26. See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954) (employees' § 7 rights include right to be indifferent union member if employee so chooses). In *Radio Officers' Union*, the Supreme Court considered the extent of the membership interest protected by § 8(a)(3) of the NLRA which forbids employers from discriminating among employees on the basis of union membership and by § 8(b)(2) of the NLRA which prohibits unions from encouraging or coercing employers to violate NLRA § 8(a)(3). *Id.*; see 29 U.S.C. § 158(a)(3), (b)(2) (1982) (codification of employer and union unfair labor practices alleged in *Radio Officers' Union*); see also notes 9-10 and accompanying text (discussion of employer and union unfair labor practices under § 8 of NLRA). The interests that NLRA § 8(a)(3) and § 8(b)(2) protect, however, are identical to the interests protected by § 8(a)(1) and § 8(b)(1)(A) and codified in NLRA § 7 because NLRA § 8(a)(3) and § 8(b)(2) merely define a particular class of activities that constitute violations of § 8(a)(1) and § 8(b)(1)(A). See R. GORMAN, *supra* note 4, at 152 (all unfair labor practices under NLRA § 8 derive from NLRA § 8(a)(1) and § 8(b)(1)(A)); 29 U.S.C. § 157 (codification of employee rights under NLRA § 7); 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (codification of employer and union unfair labor practices under NLRA § 8).

27. See *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 657 (1975) (General Counsel argued that superseniority provision favoring union stewards interfered with employees' NLRA § 7 rights by rewarding activist union members), *enforced sub nom.* NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976).

28. See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954) (§ 7 protects employees' right to participate as actively in union as employees choose in addition to employees' right to join or abstain from joining union); *supra* note 26 (Supreme Court's discussion of membership interest under NLRA § 8(a)(3) and § 8(b)(2) in *Radio Officers' Union* implicitly expands employee rights under NLRA § 7 by allowing employees to be indifferent union members if the employees so choose); see also *supra* notes 6-8 and accompanying text (discussion of employee rights under § 7 of NLRA).

29. 347 U.S. 17 (1954).

from joining a union.³⁰ Under the rule in *Radio Officers' Union* that section 7 of the NLRA protects an employee's right to be as active or inactive in a union as the employee chooses, the section 8 prohibitions of employer and union interference with employees' section 7 rights forbid not only efforts to encourage or discourage union membership but also efforts to encourage or discourage more active involvement in union affairs by union members.³¹ Under a strict reading of *Radio Officers' Union*, any employment contract clause assigning important job benefits to a union officer or steward on the basis of the individual's position in the union seemingly would violate section 8 of the NLRA by encouraging employees to become active union members.³² The NLRB and even the Supreme Court, however, have recognized in some cases the appropriateness of according special treatment, perhaps including superseniority, to a union official on account of the union official's unique role in securing the rights of all employees.³³

In *Aeronautical Industrial District Lodge 727 v. Campbell*,³⁴ the Supreme Court first considered the validity of a contract clause granting superseniority to union officials.³⁵ In *Campbell*, three veterans of the United States military challenged a clause granting superseniority to union chairmen.³⁶ Each of the

30. *Id.* at 40; see *supra* note 26 (*Radio Officers' Union* Court's definition of membership under NLRA § 8(a)(3) and § 8(b)(2) implicitly expands employees' NLRA § 7 rights); see also *supra* notes 6-8 and accompanying text (discussion of employee rights codified by NLRA § 7).

31. See 347 U.S. at 40 (§ 7 rights include right to be as active or inactive in union as employee chooses); *supra* note 26 (Court's discussion in *Radio Officers' Union* of union membership under NLRA § 8(a)(3) and § 8(b)(2) implicitly expands employee rights under NLRA § 7).

32. *Cf.* Wortman, *supra* note 13, at 197 (less senior employees actively might seek superseniority to enhance job security). Professor Wortman suggests that young or new employees actively might seek to qualify for superseniority benefits to assure themselves of job security. *Id.* Since election or appointment to union office is a prerequisite to qualification for union officer superseniority, and since active union involvement is often a prerequisite to election or appointment to union office, clauses granting superseniority to union officers may tend to encourage employees with little temporal seniority to become more active union members than they otherwise would choose to be. See *id.*; *supra* notes 24-25 and accompanying text (superseniority provisions favoring union officers may encourage union activism by rewarding active union members). *Radio Officers' Union v. NLRB* suggests that employees' § 7 rights protects employees from coercion by an employer or union to become more active union members. 347 U.S. 17, 40 (1954). Since any employer or union interference with employees' § 7 rights constitutes a violation of § 8 of the NLRA, unions and employers may violate § 8 by maintaining union officer superseniority clauses in collective bargaining agreements. See 29 U.S.C. §§ 8(a)(1), 8(B)(1)(A) (1982) (unlawful for employer or union to interfere with employees' § 7 rights).

33. See, e.g., *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 527 (1949) (special role of union chairmen in collective bargaining process warranted special treatment with respect to seniority); *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip op. at 10, 112 L.R.R.M. (BNA) 1361, 1364 (1983) (steward's role in plant level contract administration justifies superseniority despite potential discriminatory effect of superseniority), *enforced sub nom.*, *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984); *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975) (special role of steward in contract administration process justifies limited superseniority benefits for union stewards), *enforced sub nom.* *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976).

34. 337 U.S. 521 (1949).

35. *Id.* at 528.

36. *Id.* at 522. In *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, the Court treated "union

three *Campbell* plaintiffs worked for Lockheed Aircraft Corporation before entering the armed forces during World War II, and each of the plaintiffs returned to work at Lockheed after his discharge from the service.³⁷ In 1946 Lockheed temporarily laid off a number of workers, including the plaintiffs, because the company experienced a lull in business.³⁸ Although Lockheed based its layoff decisions primarily on seniority, which Lockheed adjusted to include time that employees served in the military, the company retained several union chairmen with less accrued seniority than the plaintiffs pursuant to a superseniority clause in the collective bargaining agreement.³⁹ The plaintiffs charged that the superseniority clause infringed their right under section 8 of the Selective Service Act⁴⁰ to reinstatement without loss of seniority after an honorable discharge from the service.⁴¹ The *Campbell* plaintiffs, however, made no claim that Lockheed or the union had violated section 8 of the NLRA by maintaining and enforcing the superseniority clause.⁴² The Supreme Court noted that section 8 of the Selective Service Act requires only that an employer accord veterans the same seniority the veterans would have enjoyed if their tenure with the employer had not been interrupted by military service.⁴³ The *Campbell* Court concluded that the Selective Service Act permits an employer to make layoff decisions on a basis other than temporal seniority⁴⁴ as long as the employer decides on a reasonable basis that does not penalize veterans for their intervening military service.⁴⁵ The Court noted that Lockheed had not denied the plaintiffs any temporal seniority accrued under the Selective Service Act.⁴⁶ The Court further noted that the contract clause granting superseniority to union chairmen was not unreasonable since the clause served a legitimate employer and employee interest in maintaining continuity among

chairman" as being essentially synonymous with "shop steward." See *id.* at 527 (continuity in office of "shop stewards or union chairmen" is essential to effective collective bargaining).

37. *Id.* at 522.

38. *Id.* at 524.

39. *Id.* The superseniority clause at issue in *Campbell* provided that in the event of a layoff, Lockheed would treat union chairmen who had attained a minimal level of seniority as the unit's most senior employees during their tenure as chairmen. *Id.* at 523 n.2.

40. Selective Training and Service Act of 1940, § 8, ch. 720, § 8, 54 Stat. 885, 890 (expired 1947).

41. 337 U.S. at 524. Section 8 of the Selective Training and Service Act of 1940 provided that individuals inducted into the armed forces during the period covered by the Act would be entitled to return to their former employment without loss of seniority upon their honorable discharge from the service. Selective Training and Service Act of 1940, § 8, ch. 720, § 8, 54 Stat. 885, 890 (expired 1947). The Act provided specifically that employers should treat returning veterans as if the veterans had been on furlough or leave of absence during the time the veterans served in the military. *Id.*

42. See 337 U.S. at 522-24 (plaintiff in *Campbell* alleged that superseniority provision interfered with plaintiff's rights as veteran under Selective Training and Service Act § 8).

43. *Id.* at 525-26.

44. *Id.* at 527. The *Campbell* Court noted that the actual length of service with an employer need not be the only basis for determining seniority. *Id.*

45. *Id.* at 527-28.

46. *Id.*

the employees' grievance processing representatives.⁴⁷ The *Campbell* Court, therefore, held that Lockheed had not violated section 8 of the Selective Service Act in honoring the superseniority clause.⁴⁸ Although the Supreme Court in *Campbell* recognized that the granting of superseniority to certain union officials may serve legitimate employee interests, the Court never reached the issue whether such a grant would violate section 8 of the NLRA.⁴⁹

The NLRB first considered the issue whether a contract clause favoring certain union officials with superseniority violated section 8 of the NLRA in *Dairyalea Cooperative, Inc.*⁵⁰ In *Dairyalea*, Howard Rosengrandt, a driver employed by Dairyalea Cooperative, objected to a contract provision that allowed Peter Daniels, a union steward with less temporal seniority at Dairyalea, to outbid Rosengrandt for a particularly desirable driving route.⁵¹ Rosengrandt charged that the clause, giving the shop steward top seniority for all purposes, violated Rosengrandt's section 7 rights by rewarding Daniels' more active involvement in the union.⁵² Rosengrandt accordingly alleged that in maintaining and enforcing the clause Dairyalea had violated sections 8(a)(1) and 8(a)(3) of the NLRA⁵³ and the Milk Drivers and Dairy Employees Union had violated sections 8(b)(1)(A) and 8(b)(2) of the NLRA.⁵⁴ In ruling on Rosengrandt's complaint, the NLRB held that a clause granting stewards superseniority with respect to layoff and recall could be lawful if such a clause ensured the continued presence of the union's on-the-job representatives at the plant site.⁵⁵

47. *Id.* at 528-29.

48. *Id.* at 527-28.

49. *See id.* at 528-29 (provisions granting superseniority to union stewards may serve legitimate employee interests).

50. 219 N.L.R.B. 656 (1975), *enforced sub nom.*, NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976); *see* 29 U.S.C. § 158 (1982) (NLRA § 8 prohibits unfair labor practices); *supra* notes 9-10 and accompanying text (discussion of employer and union unfair labor practices under NLRA § 8).

51. 219 N.L.R.B. at 657. In *Dairyalea Cooperative, Inc.*, the NLRB found that a union steward earned roughly \$14,000 in 9 months driving a route that the steward won only by exercising the superseniority granted to him on account of his union office. *Id.* The complainant, who would have received the steward's route but for the superseniority provision in the Dairyalea contract, earned only \$12,000 driving the company's next best route during the same period. *Id.*

52. *Id.*; *see* 29 U.S.C. § 157 (1982) (codification of employee rights under § 7 of NLRA); *supra* notes 6-8 and accompanying text (discussion of history and provisions of NLRA § 7). In addition to charging that Dairyalea and the Milk Drivers & Dairy Employees Union had violated NLRA § 8(a)(1) and § 8(b)(1)(A) by interfering with employees' rights under § 7 of the NLRA, the complainant in *Dairyalea* also charged that the respondent employer had violated § 8(a)(3) of the NLRA by discriminating on the basis of union membership and that the respondent union had violated § 8(b)(2) by encouraging the respondent employer to discriminate on the basis of union membership. 219 N.L.R.B. at 657; *see* 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (1982) (codification of employer and union unfair labor practices alleged in *Dairyalea*); *supra* notes 9-10 (discussion of employer and union unfair labor practices under NLRA § 8).

53. 219 N.L.R.B. at 657; *see* 29 U.S.C. § 158(a)(1), (3) (1982) (employer unfair trade practices); *supra* note 9 (discussion of employer unfair trade practices under § 8(a) of NLRA).

54. 219 N.L.R.B. at 657; *see* 29 U.S.C. § 158(b)(1)(A), (2) (1982) (union unfair labor practices); *supra* note 10 (discussion of union unfair labor practices under NLRA § 8(b)).

55. 219 N.L.R.B. at 658. In ruling that a superseniority clause ensuring the continued presence

The NLRB, however, recognized that superseniority clauses are inherently discriminatory.⁵⁶ The NLRB, therefore, held that superseniority provisions aimed at objectives other than ensuring that union officials will be the last employees laid off and the first rehired are presumptively unlawful.⁵⁷ Since the NLRB found no adequate justification for the application of superseniority clauses to route selection procedures, the NLRB held that Dairylea and the Milk Drivers and Dairy Employees Union had violated sections 8(a)(1) and (3), and 8(b)(1)(A) and (2) of the NLRA.⁵⁸ The United States Court of Appeals for the Second Circuit enforced the NLRB's order against the union with little discussion of the merits of the NLRB's decision.⁵⁹ The Second Circuit noted only that the NLRB's inference that the union would have been unlikely to select an indifferent union member to serve as a steward was a reasonable inference since the selection of stewards was solely within the union's discretion and the stewards were to represent the union's interests before the employer.⁶⁰ The Second Circuit accordingly held that the NLRB's conclusion that steward superseniority provisions tend to discriminate against inactive union members was not subject to reversal.⁶¹ Although the NLRB's *Dairylea* decision clearly enunciated a policy that the permissible scope of superseniority was not unlimited, the Board's decision left open the question of precisely which union officials lawfully could be accorded superseniority.⁶²

of a union steward on the job site could be lawful, the NLRB in *Dairylea Cooperative, Inc.* noted that the steward's presence on the job site benefited all employees in the bargaining unit and that this collective benefit outweighed any discrimination resulting from the application of the clause in particular instances. *Id.*

56. *Id.*

57. *Id.* The NLRB noted in *Dairylea* that a party asserting the legality of a clause granting superseniority to union officials for purposes other than layoff and rehire would bear the burden of proving that the benefits of the provision outweighed any discriminatory effects. *Id.*

58. *Id.* at 659; see 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (1982) (codification of employer and union unfair labor practices); *supra* notes 9-10 and accompanying text (discussion of NLRA § 8 unfair labor practices).

59. *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1167 (2d Cir. 1976). In *NLRB v. Milk Drivers & Dairy Employees, Local 338*, the NLRB brought enforcement proceedings only against the respondent union since the employer in *Dairylea* had promptly complied with the NLRB's ruling. *Id.* at 1164.

60. *Id.* at 1165-66. In *Milk Drivers*, the Second Circuit expressly deferred to the NLRB's expertise in the field of labor relations. *Id.* at 1165 n.5. The *Milk Drivers* court suggested that courts should overturn factual conclusions of the NLRB only when the NLRB's conclusion has no rational basis in the record. *Id.* at 1165.

61. *Id.* at 1165-66. The Second Circuit enforced the NLRB's order in *Dairylea* without ever considering whether the respondent union had violated NLRA § 8(b)(1)(A) by interfering with the complainant's rights under § 7 of the NLRA. *Id.* at 1165 n.3. The Second Circuit never reached the § 8(b)(1)(A) question because the court determined that the NLRB had correctly found the union to have violated § 8(b)(2) of the NLRA by encouraging Dairylea to discriminate among its employees on the basis of union membership. *Id.*; see 29 U.S.C. § 158(b)(1)(A) (1982) (union interference with employees' rights under NLRA § 7 shall constitute unfair labor practice); 29 U.S.C. § 158(b)(2) (1982) (union encouragement of employer discrimination on basis of union membership shall constitute unfair labor practice); see also notes 6-8 and accompanying text (discussion of employee rights under NLRA § 7).

62. See 219 N.L.R.B. at 659 (contract clause granting union stewards superseniority with

In 1977, two years after *Dairyalea*, the NLRB considered for the first time whether a clause granting layoff and recall superseniority to union officers not performing steward functions would infringe unlawfully upon the section 7 rights of other employees.⁶³ In *United Electrical Radio and Machine Workers of America, Local 623 (Limpco Manufacturing, Inc.)*,⁶⁴ Anna D'Amico, a factory worker, complained that her employer, Limpco Manufacturing, had laid her off while retaining a union recording secretary⁶⁵ with less temporal seniority pursuant to a superseniority clause in a collective bargaining agreement between Limpco and Limpco's employees.⁶⁶ Patricia Jenkins, the union recording secretary, had virtually no involvement with on-the-job contract administration or grievance processing.⁶⁷ Furthermore, after an initial hearing, an administrative law judge concluded that any involvement Jenkins may have had with such matters was on a purely voluntary basis.⁶⁸ The NLRB General Counsel prosecuting D'Amico's complaint argued that under *Dairyalea* the application of a superseniority clause to a union officer is presumptively lawful only when the officer performs steward functions and the superseniority is limited to layoff and recall.⁶⁹ The General Counsel contended that since Jenkins' position as recording secretary involved no steward duties, the application of the clause to Jenkins was presumptively invalid under the rule in *Dairyalea*.⁷⁰ The General Counsel further argued that the respondents had failed to meet

respect to terms and conditions of employment other than layoff and recall was unlawful).

63. See *United Elec., Radio & Mach. Workers of Am., Local 623 (Limpco Mfg., Inc.)*, 230 N.L.R.B. 406, 408 (1977) (superseniority clause favoring union recording secretary was lawful since respondents proved that recording secretary's responsibilities related directly to representation of employees in bargaining unit), *review denied sub nom.*, *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978); see 29 U.S.C. § 157 (1982) (workers shall have right to participate or refrain from participating in union activity); *supra* notes 6-8 and accompanying text (discussion of history and substance of NLRA § 7).

64. 230 N.L.R.B. 406 (1977), *review denied sub nom.*, *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

65. See *id.* at 411. The duties of the local recording secretary in *Limpco* as outlined in the constitution and bylaws of local 623 of the United Electrical, Radio and Machine Workers consisted of keeping records of local meetings and local executive board meetings and of handling the local's correspondence. *Id.*

66. *Id.* at 406. The superseniority clause at issue in *Limpco* provided that union officers and stewards would receive the highest seniority preference in the event of a layoff, unless the union officials were incapable of performing the remaining work. *Id.* at 406 n.3.

67. See *supra* note 65 (discussion of official duties of recording secretary in *Limpco* as defined in constitution and bylaws of United Electrical, Radio and Machine Workers of America).

68. 230 N.L.R.B. at 411 (initial decision of administrative law judge in *Limpco*).

69. *Id.* at 406; see *Dairyalea Cooperative, Inc.*, 219 N.L.R.B. 656, 659 (1975) (contract clause granting union steward superseniority with respect to terms and conditions of employment other than layoff and recall was unlawful), *enforced sub nom.*, *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976); see also notes 50-62 and accompanying text (discussion of *Dairyalea*).

70. 230 N.L.R.B. at 406; see *Dairyalea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975) (steward superseniority provisions limited to layoff and recall are lawful because such provisions promote contract administration at plant level), *enforced sub nom.* *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976); see also notes 55-58 and accompanying text (discussion of NLRB's reasoning and holding in *Dairyalea*).

their burden of proving that the application of the clause was appropriate in Jenkins' case.⁷¹ Although the administrative law judge accepted the General Counsel's arguments and found the application of the superseniority clause to Jenkins unlawful,⁷² the NLRB reversed the administrative law judge's initial decision on appeal.⁷³ The NLRB majority held that the employees' overriding interest in maintaining effective contract administration through continuity of union representation extends beyond the plant level and includes an interest in maintaining an effective operating local.⁷⁴ The NLRB found that when an officer's role is related directly to the representation of unit employees, any grant of layoff and recall superseniority to the officer is presumptively lawful.⁷⁵ The NLRB, therefore, held that the application of the superseniority clause in the *Limpco* contract to Jenkins did not violate section 8 of the NLRA because Jenkins' duties as recording secretary directly benefited all of *Limpco's* union employees by promoting the stability of the union local.⁷⁶ D'Amico petitioned the United States Court of Appeals for the Third Circuit to review the NLRB's decision and order in the *Limpco* case.⁷⁷

In 1978, the Third Circuit denied D'Amico's petition to review the NLRB's *Limpco* decision in *D'Amico v. NLRB*.⁷⁸ In denying D'Amico's petition, however, the court of appeals placed a very narrow construction on the NLRB's *Limpco* opinion.⁷⁹ The Third Circuit read the NLRB's decision as placing the burden of proof upon the respondent union to show that the contract justifiably accorded superseniority to the union recording secretary whose official duties did not relate to the collective bargaining process.⁸⁰ Although the court noted that Jenkins' official job description as recording secretary was insufficient to support the application of the contract's superseniority clause to Jenkins, the Third Circuit held that the NLRB reasonably was entitled to infer that Jenkins' implied duties were of a kind entitling Jenkins to the benefit of

71. 230 N.L.R.B. at 406.

72. *Id.* at 412 (administrative law judge's initial decision in *Limpco*).

73. *Id.* at 406-07.

74. *Id.* at 407-08. The NLRB majority in *Limpco* construed the Supreme Court's decision in *Aeronautical Indus. Dist. Lodge 727 v. Campbell* as holding that a superseniority clause providing job security for any individual representing or helping to represent bargaining unit employees is lawful. *Id.* at 407 n.8; see *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 527 (1949) (special role of union chairmen in collective bargaining process warranted special treatment with respect to seniority); see also *supra* notes 34-49 and accompanying text (discussion of *Campbell*). The *Limpco* majority therefore held that superseniority clauses could be lawful as applied to union officials other than stewards and officers performing steward functions. *Id.* at 407-08, 407 n.8.

75. 230 N.L.R.B. at 408.

76. *Id.*

77. See *D'Amico v. NLRB*, 582 F.2d 820, 826 (3d Cir. 1978) (denying complainant's petition for review of NLRB's decision and order in *Limpco*).

78. *Id.*

79. *Id.* at 824-25. In *D'Amico*, the Third Circuit read the NLRB's *Limpco* decision as holding only that a party asserting the validity of a superseniority clause which favors union officials who perform no steward functions is entitled to show some other reason why the provision should be upheld. *Id.*

80. *Id.* at 825.

superseniority.⁸¹ Until the Third Circuit's August 1978 opinion in *D'Amico*, the NLRB continued to give great deference to parties contracting for union officer superseniority.⁸² The NLRB's lenient attitude toward superseniority clauses favoring union officers reached its zenith several months before the Third Circuit's *D'Amico* decision when the NLRB issued its first opinion in *American Can Company (American Can I)*.⁸³

In *American Can I*, the NLRB held that a layoff and recall superseniority clause was lawful as applied to two union trustees and a union guard.⁸⁴ In *American Can I*, two American Can Company employees, Stanley and Donald Egan, objected to their layoff by the company.⁸⁵ The Egans complained that American Can Company and the United Steelworkers of America had violated section 8 of the NLRA by invoking a superseniority clause in the collective bargaining agreement to retain three union officers with less temporal seniority than the Egans.⁸⁶ In challenging the application of the clause to the three officers, two union trustees and a union guard, the General Counsel introduced into evidence the respondent union's constitution which included job descriptions for the offices of trustee and guard.⁸⁷ The General Counsel conceded that the superseniority clause was lawful on its face but argued that the application of the clause to the guard and the trustees was unlawful because the offices of guard and trustee as described in the union constitution did

81. *Id.* The Third Circuit noted in *D'Amico* that the union recording secretary employed by Limpcos informally assisted stewards in writing and processing grievances and advised stewards on matters of contract interpretation. *Id.* at 826. The *D'Amico* court further noted that the recording secretary attended shop meetings and assisted in devising the union's bargaining strategy. *Id.* The Third Circuit concluded that the NLRB reasonably could have inferred that these tasks were implied responsibilities of the recording secretary's office. *Id.*

82. *See, e.g., American Can Co. (American Can I)*, 235 N.L.R.B. 704, 704-05 (1978) (application of superseniority clause to union officers was presumptively valid), *rev'd on rehearing*, 244 N.L.R.B. 736 (1979), *enforced*, 658 F.2d 746 (10th Cir. 1981); *Otis Elevator Co.*, 231 N.L.R.B. 1128, 1129 (1977) (same); *Expedient Services, Inc.*, 231 N.L.R.B. 938, 940 (1977) (application of superseniority clause to union officers whose responsibilities related directly to representation of bargaining unit interests was valid).

83. 235 N.L.R.B. 704, 704-05 (1978) (superseniority provision favoring union officials was presumptively lawful and complainant did not overcome presumption by showing that official duties of beneficiary, as outlined in job description, were unrelated to advancement of bargaining unit interests), *rev'd on rehearing*, 244 N.L.R.B. 736 (1979), *enforced*, 658 F.2d 746 (10th Cir. 1981).

84. *Id.* at 704-05. According to the formal job descriptions of the trustees and the guard in *American Can I*, the trustees' duties were limited to managing the union hall and overseeing union property and the guard's only duty was to act as a sort of sergeant at arms during union meetings. *Id.* at 704.

85. *Id.* at 705 (administrative law judges initial decision in *American Can I*).

86. *Id.* The complainants in *American Can I*, charged that the respondent employer had violated § 8(a)(1) and (3) of the NLRA and that the respondent union had violated § 8(b)(1)(A) and (2) of the NLRA when the union and the employer invoked the superseniority clause to retain union officers with less seniority than the complainants. *Id.*; see 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (1982) (codification of unfair labor practices alleged in *American Can I*); see also *supra* notes 9-10 (discussion of employer and union unfair labor practices under NLRA § 8).

87. 235 N.L.R.B. at 704; see *supra* note 84 (discussion of duties of trustee and guard in *American Can I*).

not involve any contract administration duties.⁸⁸ The NLRB dismissed the Egans' complaint, holding that the application of a layoff and recall superseniority clause to any union officer is presumptively valid.⁸⁹ The NLRB further held that the General Counsel had not discharged its burden of proof merely by showing that the officers' job descriptions did not require any contract administration duties.⁹⁰ The majority's opinion in *American Can I* suggested that the NLRB would give deference to a union's determination of which officers assist the union in effectively representing the bargaining unit and that the Board would not substitute its own judgment for the judgment of a union absent proof that the union's decision was unwarranted.⁹¹ The Egans appealed the NLRB's decision to the United States Court of Appeals for the Tenth Circuit in April, 1978.⁹² In September, 1978, after the Third Circuit's *D'Amico* decision, the NLRB successfully petitioned the Tenth Circuit for permission to reconsider the Board's decision in *American Can I*.⁹³

Upon reconsideration of the Egans' complaint in *American Can II*,⁹⁴ an aggregate majority of the NLRB found that American Can Company and the United Steelworkers of America unlawfully had invoked the superseniority clause to retain two of the three union officers with shorter lengths of service than the Egans.⁹⁵ In *American Can II*, the NLRB noted a distinction between officers merely aiding in the representation of the employees in a bargaining unit and officers actually furthering the administration of a collective bargaining agreement.⁹⁶ The NLRB majority stated that in light of the Third Circuit's ruling in *D'Amico*, only officers actually furthering the administration of a collective bargaining agreement lawfully could enjoy the benefit of superseniority.⁹⁷ Since the NLRB concluded that the union duties of the two

88. 235 N.L.R.B. at 707-08 (initial decision of administrative law judge in *American Can I* discussing argument of General Counsel).

89. *Id.* at 705. In *American Can I*, the NLRB relied upon the NLRB's decision in *United Elec., Radio & Mach. Workers of Am., Local 623 (Limpro Mfg., Inc.)* as authority for the proposition that provisions granting layoff and recall superseniority to union officers are presumptively lawful, regardless of the duties and responsibilities involved in the office. *Id.* at 704; see *Limpro*, 230 N.L.R.B. 406 (1977), *review denied sub nom.*, *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

90. *Id.* at 704. In dismissing the complaint in *American Can I*, the NLRB gave no indication of what sort of evidentiary showing would satisfy the General Counsel's burden of proof that a superseniority clause had been unlawfully applied to a union officer. *Id.* at 704-05.

91. 235 N.L.R.B. at 704-05.

92. See *American Can Company (American Can II)*, 244 N.L.R.B. 736, 736 (1979) (NLRB's discussion of procedural posture in *American Can II*), *enforced*, 658 F.2d 746 (10th Cir. 1981).

93. See *id.* (*American Can II* procedural facts as outlined by NLRB).

94. *Id.*

95. *Id.* at 738. In *American Can II* the NLRB found that although American Can Company had retained two union trustees while laying off other more senior employees, the company had retained only one of the two trustees because of the trustee's office. *Id.* at 737. The NLRB found that the company had retained the second trustee for reasons unrelated to the individual's union office. *Id.* at 737 n.5.

96. *Id.* at 737.

97. *Id.* at 738 (respondent union and respondent employer in *American Can II* unlawfully accorded superseniority to union guard and trustees, since neither officer represented employees

trustees and the guard did not involve administration of the collective bargaining agreement, the Board majority held that the application of the clause to the trustees and the guard constituted a violation of section 8 of the NLRA.⁹⁸

Although a majority of the five NLRB members agreed in *American Can II* that the application of the superseniority clause to one of the trustees and the guard was unlawful, the three members of the majority offered differing rationales in support of this conclusion.⁹⁹ Members Jenkins and Penello stated their view in a separate concurring opinion that union officer superseniority is justified only when necessary to insure the continued presence at the job site of the union's on-the-job contract administrators.¹⁰⁰ Since the clause at issue in the *American Can* cases accorded superseniority to all union officers regardless of whether the officers performed any steward functions, Members Jenkins and Penello would have found the clause unlawful on its face.¹⁰¹ Member Murphy, the third member of the aggregate majority in *American Can II*, stated her view in a separate concurrence that superseniority clauses may be lawful not only as applied to union officials performing steward functions, but also as applied to any union officer whose functions result in the furtherance of the collective bargaining relationship.¹⁰² Member Murphy, therefore, would have found the superseniority clause in the *American Can* contract lawful on its face.¹⁰³ Additionally, under the approach enunciated

in grievance processing or administration of collective bargaining agreement); See D'Amico v. NLRB, 582 F.2d 820 (3d Cir. 1978) (relied upon by NLRB in *American Can II*).

98. *Id.* In *American Can II*, the NLRB found that the respondent employer had violated NLRA § 8(a)(1) and (3) and that the respondent union had violated § 8(b)(1)(A) and (2) of the NLRA by maintaining the superseniority clause at issue. *Id.*; see 29 U.S.C. § 158(a)(1), (3), (B)(1)(A), (2) (1982) (codification of employer and union unfair labor practices alleged in *American Can II*); see also *supra* notes 9-10 (discussion of employer and union unfair labor practices under NLRA § 8).

99. 244 N.L.R.B. at 737.

100. *Id.* at 739 (Jenkins & Penello, concurring). In a concurring opinion in *American Can II*, Members Jenkins and Penello expressed the view that *Dairyalea Cooperative, Inc.* established a two part test for determining the legality of a superseniority clause favoring union officials. *Id.* First, under Jenkins' and Penello's reading of *Dairyalea*, the official must contribute to the representation of employee interests. *Id.* Second, the official's union responsibilities must involve primarily on-the-job activities. *Id.*; see *Dairyalea Cooperative, Inc.*, 219 N.L.R.B. 656, 658 (1975) (collective bargaining agreement lawfully may accord superseniority to union steward because of steward's special role as on-job contract administrator and grievance processor), *enforced sub nom.*, NLRB v. Milk Drivers & Dairy Employees, Local 338, 531 F.2d 1162 (2d Cir. 1976); see also *supra* notes 50-62 and accompanying text (discussion of *Dairyalea* case).

101. 244 N.L.R.B. at 739 (Jenkins & Penello, concurring). In addition to finding the superseniority clause in *American Can II* unlawful on its face, Members Jenkins and Penello indicated that in their view, *American Can* Company had unlawfully applied the provision to the trustee and the guard at issue since the offices of union trustee and guard did not involve primarily on-the-job responsibilities. *Id.*

102. *Id.* at 740 (Murphy, concurring). Under the standard outlined by Member Murphy in her separate concurrence in *American Can II*, any clause granting job retention superseniority to a union officer apparently would be presumptively lawful. *Id.*

103. *Id.* (Murphy, concurring). Since the superseniority clause at issue in *American Can II* applied only to union local officers and grievance processors, Member Murphy stated in her

by Member Murphy, the NLRB General Counsel would bear the burden of showing that any such clause was applied unlawfully to a particular officer.¹⁰⁴ In *American Can II*, Member Murphy concluded that the General Counsel had met its burden of proving that the union improperly applied the superseniority clause to the guard and the steward.¹⁰⁵ Member Murphy therefore joined Members Jenkins and Penello in holding that American Can Company and the United Steelworkers union had violated section 8 of the NLRA.¹⁰⁶ In enforcing the NLRB's order against the respondent company, the Tenth Circuit expressed no explicit preference between the two conflicting rationales of the aggregate majority.¹⁰⁷

In *Gulton Electro-Voice, Inc.*,¹⁰⁸ the NLRB settled the question of which of the views of the aggregate majority in *American Can II* would prevail as the ultimate Board policy on union officer superseniority.¹⁰⁹ In *Gulton*, William Schock, an employee at Gulton Electro-Voice's Buchanan, Michigan plant,

separate concurring opinion in the case that she would have found the provision lawful on its face. *Id.*

104. *Id.* (Murphy, concurring). Under Member Murphy's standard in *American Can II*, the General Counsel would meet his initial burden of proving that a superseniority provision was unlawfully applied to a particular union officer if the General Counsel proved that the officer's duties did not contribute meaningfully to the implementation of the union's contract. *Id.*

105. *Id.* (Murphy, concurring). In *American Can II*, Member Murphy concluded that the General Counsel had met his initial burden of proving that the guard's and one of the trustees' duties were not reasonably related to the implementation of the collective bargaining agreement when the General Counsel offered in evidence the official job descriptions of the trustee and the guard. *Id.*; see *supra* note 84 (discussion of trustee's and guard's job descriptions in *American Can* cases). Member Murphy further concluded that the respondents failed to rebut the General Counsel's evidence with any proof that the guard or the trustee actually furthered the implementation of the contract. 244 N.L.R.B. at 740.

106. 244 N.L.R.B. at 740 (Murphy, concurring). Members Fanning and Truesdale dissented from the NLRB's decision in *American Can II*. *Id.* (Fanning & Truesdale, dissenting). Members Fanning and Truesdale stood by the NLRB's earlier position in *American Can I* that provisions granting superseniority to union officers are presumptively lawful and that evidence of the officers' official job descriptions is inadequate to overcome the presumption of legality. *Id.*; see *American Can Co.* (*American Can I*), 235 N.L.R.B. 704, 704 (1977) (application of superseniority clause to union officers was presumptively lawful and evidence of officer's official job descriptions did not overcome presumption), *rev'd on rehearing*, 244 N.L.R.B. 736 (1979), *enforced*, 658 F.2d 746 (10th Cir. 1981); see also *supra* notes 89-91 and accompanying text (discussion of NLRB's holding in *American Can I*).

107. *NLRB v. American Can Co.*, 658 F.2d 746, 753 (10th Cir. 1981). In *American Can*, the Tenth Circuit reviewed the NLRB's decision in *American Can II* under the substantial evidence standard of judicial review. *Id.* at 752-53; see also Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1982) (reviewing court shall set aside agency findings unsupported by substantial evidence on record). Since the Tenth Circuit concluded that the NLRB's decision and order were supported by substantial evidence, the court found no need to establish any rule for determining the legality of superseniority clauses favoring union officers. 658 F.2d at 753. The Tenth Circuit, however, did suggest that the party seeking enforcement of such a superseniority clause should bear the burden of proving that the clause serves a justifiable purpose. *Id.* at 757.

108. 266 N.L.R.B. No. 84, 112 L.R.R.M. (BNA) 1361 (Mar. 7, 1983), *enforced sub nom.*, Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

109. See *infra* notes 114-17 (discussion of NLRB's holding in *Gulton*).

objected when Gulton laid off Schock while retaining a union official with less temporal seniority.¹¹⁰ After investigating Schock's complaint, the NLRB General Counsel charged Gulton and the International Union of Electrical, Radio and Machine Workers with violating section 8 of the NLRA by maintaining and enforcing a superseniority clause in favor of certain ineligible union officials.¹¹¹ Although Schock's initial complaint focused upon the retention of a union negotiating committee member, the General Counsel objected to the superseniority clause only as applied to the union's recording secretary and financial secretary-treasurer, neither of whom performed any steward duties.¹¹² After the General Counsel's restructuring of the charge and after the stipulations of the various parties, the NLRB in *Gulton* considered only the narrow legal issue whether an employment contract lawfully may contain a provision granting superseniority in layoff and recall to union officials who perform no grievance processing or on-the-job contract administration functions.¹¹³ Overruling the earlier NLRB decision in *Limpco*, the NLRB held in *Gulton* that any grant of superseniority to union officers who perform no steward functions violates section 8 of the NLRA by discriminating among employees for union-related reasons.¹¹⁴ In *Gulton*, the NLRB echoed the view expressed by Members Jenkins and Penello in *American Can II* that superseniority is justifiable as applied to union stewards only because a steward must be present on the job to perform his union duties.¹¹⁵ Since the NLRB concluded that this rationale is inapplicable to officers who

110. *Gulton Electro-Voice, Inc.*, No. 7-CA-18952, slip op. at 4-5 & 5 n.4 (N.L.R.B. Div. of Judges Jan. 7, 1982) (administrative law judge's initial decision in *Gulton*), *rev'd*, 266 N.L.R.B. No. 84, 112 L.R.R.M. (BNA) 1361 (Mar. 7, 1983), *enforced sub nom.*, Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

111. *Id.* at 5. In *Gulton*, the NLRB General Counsel specifically charged the respondent union with violating NLRA § 8(b)(1)(A) and (2) and the respondent employer with violating § 8(a)(1) and (3) of the NLRA. *Id.* at 1; see 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (1982) (codification of unfair labor practices alleged in *Gulton*); see also *supra* notes 9-10 (discussion of employer and union unfair labor practices under NLRA § 8).

112. *Gulton Electro-Voice, Inc.*, No. 7-CA-18952, slip op. at 5 n.4 (N.L.R.B. Div. of Judges Jan. 7, 1982) (administrative law judge's initial decision in *Gulton*), *rev'd*, 266 N.L.R.B. No. 84, 112 L.R.R.M. (BNA) 1361 (Mar. 7, 1983), *enforced sub nom.*, Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984). The parties in *Gulton* filed stipulations limiting the administrative law judge's inquiry to the legality of the challenged superseniority clause as applied to the respondent union's recording secretary and financial secretary-treasurer. *Id.* at 2 n.2.

113. 266 N.L.R.B. No. 84, slip op. at 1-2, 112 L.R.R.M. (BNA) 1361, 1361 (Mar. 7, 1983), *enforced sub nom.*, Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

114. *Id.* at 2, 112 L.R.R.M. (BNA) at 1361.

115. See *id.* at 10, 112 L.R.R.M. (BNA) at 1364 (steward superseniority is justifiable only because stewards need to maintain on-job presence to carry out responsibilities of office); cf. *American Can Co. (American Can II)*, 244 N.L.R.B. 736, 739 (1979) (Jenkins & Penello, concurring) (superseniority is lawful as applied to stewards only because stewards must be present on job site to fulfill union office), *enforced*, 658 F.2d 746 (10th Cir. 1981).

perform no grievance processing or plant-level contract administration functions, the Board refused to permit the use of the superseniority device to protect the entire spectrum of the collective bargaining process.¹¹⁶ The NLRB thus held that the superseniority clause in *Gulton* was unlawful on its face and that the respondent employer and the respondent union had violated sections 8(a)(1) and (3), and 8(b)(1)(A) and (2) of the NLRA.¹¹⁷ NLRB decisions subsequent to *Gulton* consistently have followed the rule established in *Gulton* that layoff and recall superseniority is lawful only as applied to individuals performing steward functions.¹¹⁸

The NLRB's recent reversal in superseniority policy probably represents little more than a change in NLRB personnel.¹¹⁹ The membership of the NLRB changes frequently.¹²⁰ Additionally, since the NLRB rarely exercises its formal or informal rulemaking powers under the Administrative Procedure Act,¹²¹ NLRB policy is susceptible to substantial variation as the political ideology

116. 266 N.L.R.B. No. 84, slip op. at 10, 112 L.R.R.M. (BNA) at 1364. In *Gulton*, the NLRB did not specifically determine whether clauses granting superseniority to union officers are presumptively lawful or unlawful. See *id.* at 13, 112 L.R.R.M. (BNA) at 1364-65 (NLRB will find lawful only superseniority provisions limited to officers who must be on job to perform union duties). The tenor of the NLRB's decision, however, suggests that the party asserting the validity of such a clause would bear the burden of proving that the beneficiary officer's union responsibilities require that the officer maintain an on-the-job presence. See *id.* at 2, 112 L.R.R.M. (BNA) at 1361 (collective bargaining agreement may not accord superseniority lawfully to individuals performing no steward-type functions).

117. *Id.* at 13-14, 112 L.R.R.M. (BNA) at 1365; see 29 U.S.C. § 158(a)(1), (3), (b)(1)(A), (2) (1982) (§ 8 unfair labor practices committed by respondents in *Gulton*); see also *supra* notes 9-10 (discussion of employer and union unfair labor practices under NLRA § 8).

118. See, e.g., Local 826, Int'l Union of Elec., Radio & Mach. Workers (Otis Elevator), 268 N.L.R.B. No. 12, slip op. at 5, 114 L.R.R.M. (BNA) 1249, 1250 (Oct. 27, 1983) (under *Gulton* precedent, superseniority clause was applied unlawfully to union financial secretary who performed no steward functions); Niagara Mach. & Tool Works, 267 N.L.R.B. No. 112, slip op. at 9, 114 L.R.R.M. (BNA) 1076, 1078 (Aug. 26, 1983) (contract provision unlawfully accorded superseniority to union executive board members performing no substantial in-plant union tasks), enforced, No 84-4005, No. 65 (2d Cir. Oct. 12, 1984) (available on LEXIS Genfed library, Cir. file); Design & Mfg. Corp., 267 N.L.R.B. No. 77, slip op. at 4, 114 L.R.R.M. (BNA) 1028, 1029 (Aug. 25, 1983) (respondents unlawfully applied superseniority clause to union officials performing no steward functions).

119. Cf. Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982). In a statistical study of NLRB unfair labor practice decisions and NLRB member characteristics during the period from 1954-77, Professors William Cooke and Frederick Gautschi concluded that the political composition of the NLRB plays a significant role in the disposition of unfair labor practice cases by the NLRB. *Id.*; see *infra* notes 124-28 and accompanying text (discussion of changes in political composition of NLRB between *Limpro* and *Gulton* decisions).

120. See *supra* note 4 (5 NLRB members serve staggered terms of 5 years each). Since June, 1977, when the NLRB decided *United Elec., Radio & Mach. Workers of Am. (Limpro Mfg., Inc.)*, 11 individuals have served as members of the NLRB. See CONG. Q.'S FEDERAL REGULATORY DIRECTORY 1979-1984 (discussion of NLRB membership changes and biographical sketches of members from 1977-83).

121. 5 U.S.C. §§ 553, 556-57 (1982) (agency rulemaking procedure under Administrative Procedure Act); see National Labor Relations Act, 29 U.S.C. § 156 (1982) (NLRB shall have

of the NLRB membership changes.¹²² Of the NLRB members taking part in the Board's *Limpro* decision, only dissenting Member Jenkins remained on the NLRB when the Board decided *Gulton*.¹²³ Additionally, Member Jenkins was the only member of the aggregate majority in *American Can II* to con-

power to make, amend, and rescind rules according to procedure established in Administrative Procedure Act). Section 551(4) of the Administrative Procedure Act (APA) defines a rule as a particular statement by an agency of law, policy, or procedure that the agency will apply only prospectively. 5 U.S.C. § 551(4). Section 553 of the APA establishes the minimal procedure which agencies are required to follow when making, amending, or rescinding rules. *Id.* § 553. Section 553 of the APA requires at the very least that an agency publish notice of any proposed rulemaking in the Federal Register 30 days before the effective date of the proposed rule and that the agency allow interested individuals to submit comments before the agency takes any final action. *Id.* § 553. Although § 6 of the NLRA empowers the NLRB to issue rules under § 553 of the APA, the NLRB rarely makes rules in accordance with the APA § 553 provisions. *See id.* § 156 (NLRB shall have power to issue, amend, and rescind rules in accordance with APA); K. DAVIS, ADMINISTRATIVE LAW TEXT 152-53 (3d ed. 1972) (NLRB never exercised rulemaking power under NLRA § 6 before 1970). Instead, the NLRB defines substantive law and policy on a controversial case by case basis through the adjudication of particular disputes. *See* K. DAVIS, *supra* at 152-53 (NLRB effectively generates "rules" through adjudication of particular cases). Although the Supreme Court has held that administrative agencies generally may exercise some discretion in determining whether to formulate policy through rulemaking or adjudication, the Court on at least one occasion has rebuked the NLRB for relying excessively on adjudication as a means of promulgating substantive law. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (NLRB may announce new principles through adjudication rather than rulemaking as long as NLRB's decision to do so does not constitute abuse of discretion); *SEC v. Chenery Corp.* (Chenery II), 332 U.S. 194, 202-03 (1947) (SEC enjoys discretion to proceed by rulemaking or adjudication in formulating agency policy and interpreting substantive law). *But see* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion) (NLRB may not circumvent APA rulemaking requirements by making substantive law in context of adjudicatory proceedings); *see generally* Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982 (1980) (discussion of advantages and disadvantages of NLRB's implicit policy of rulemaking by adjudication).

122. *See* Cooke & Gautschi, *supra* note 119, at 549 (political composition of NLRB significantly influences disposition of NLRB unfair labor practice cases). The NLRB's tendency to change course as the Board's political make-up changes is particularly evident in a line of cases addressing the question whether the NLRB should invalidate union representation elections on account of pre-election misrepresentations by employers or unions. *See* *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (NLRB generally will not set aside election results on account of misrepresentations since employees are able to recognize and discount propaganda), *overruling* *General Knit of Cal., Inc.*, 239 N.L.R.B. 619, 620 (1978) (NLRB should set aside election results when one or more parties make material pre-election misrepresentations since such misrepresentations may affect outcome of election), *overruling* *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1311-13 (1977) (NLRB should not police content of pre-election misrepresentations since propaganda seldom sways employee votes), *overruling* *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962) (NLRB should set aside election whenever party makes material misrepresentations at time that prevents other parties from disproving statement).

123. *Compare* *United Elec., Radio & Mach. Workers of Am. (Limpro Mfg., Inc.)*, 230 N.L.R.B. 406 (1977) (Chairman Fanning, Members Murphy & Walther; Members Jenkins & Penello, dissenting), *review denied sub nom.* *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978) *with* *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, 112 L.R.R.M. (BNA) 1361 (Mar. 7, 1983) (Chairman Miller, Members Jenkins, Hunter & Zimmerman), *enforced sub nom.*, *Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).

tinue with the NLRB through the *Gulton* decision.¹²⁴ Two of the three members joining Member Jenkins in the NLRB's *Gulton* decision were appointees of an administration which many critics have regarded as pro-management or even anti-union.¹²⁵ Many commentators have characterized the NLRB members who decided *Gulton* and subsequent cases as unconcerned with the interests of organized labor.¹²⁶ Although political considerations may have played a substantial role in the NLRB's decision in *Gulton*, the NLRB's new approach to contractual superseniority nevertheless is grounded soundly in public policy.¹²⁷

The NLRB's *Gulton* decision correctly recognizes that the rights of organized labor derive from the rights of employees.¹²⁸ Accordingly, when a union's exercise of union rights interferes with the rights of an employee the union must yield unless the benefit of the union's actions to all employees in the organizational unit substantially outweighs the harm to the disadvantaged employee.¹²⁹ In *Gulton*, the NLRB distinguished between superseniority clauses favoring stewards and superseniority clauses favoring union officers whose

124. Compare *American Can Co. (American Can II)*, 244 N.L.R.B. 736 (1979) (Members Jenkins, Penello & Murphy; Chairman Fanning & Member Truesdale, dissenting), enforced, 658 F.2d 746 (10th Cir. 1981) with *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, 112 L.R.R.M. (BNA) 1361 (Chairman Miller, Members Jenkins, Hunter & Zimmerman), enforced sub nom., Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984).

125. See N.Y. Times, Sept. 8, 1982, at 26, col. 4 (AFL-CIO President Lane Kirkland charges that Reagan Administration is insensitive to workers); *Reagan NLRB Tilts Toward Management*, Wall St. J., Aug. 2, 1982, at 17, col. 2 (critics charge that Reagan appointees to NLRB decide cases with anti-union bias). Member Hunter was appointed to the NLRB by President Reagan and was confirmed by the Senate in September, 1981. See CONG. Q.'S FEDERAL REGULATORY DIRECTORY 1983-84 379-80 (biographical summary of NLRB Member Robert Hunter). President Reagan appointed Interim Chairman Miller to a recess appointment in December, 1982 pending the confirmation of Donald Dotson's appointment to a full term as NLRB chairman in early 1983. See Wall St. J., Dec. 24, at 6, col. 5 (news report of President's announcement).

126. See *Reagan's NLRB Tips Toward Management*, Bus. Wk., July 6, 1981, at 27-28 (discussion of Reagan NLRB appointments anticipating vocal union opposition to appointment of Member Hunter); *Reagan NLRB Tilts Toward Management*, Wall St. J., Aug. 2, 1982, at 17, col. 2 (quoting ILGWU General Counsel Max Zimny as charging that Member Hunter's decisions on NLRB reflect anti-union bias).

127. See *infra* notes 128-31 and accompanying text (discussion of arguments supporting NLRB's decision in *Gulton*).

128. Cf. *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. No. 84, slip op. at 11-12, 112 L.R.R.M. (BNA) 1361, 1364 (Mar. 7, 1983) (individual employee rights override union objectives unless union objectives substantially aid union in representing all unit employees' interests), enforced sub nom., Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984); see notes 108-17 and accompanying text (discussion of *Gulton*).

129. Cf. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). In *Huffman*, the Supreme Court held that when Congress granted labor unions the exclusive right to represent all employees in a bargaining unit, Congress impliedly imposed a corresponding duty to represent all employees in the unit fairly. *Id.*; see § 29 U.S.C. § 159(a) (1982) (representative designated by majority of unit employees shall be exclusive representative of all employees in bargaining unit); cf. also *Reagan NLRB Tilts Toward Management*, Wall St. J., Aug. 2, 1982, at 17, col. 2 (quoting NLRB Member Hunter) (Congress enacted NLRA "to protect employees, not to insure the protection of labor organizations").

union duties do not require an on-the-job presence.¹³⁰ Although the latter class of superseniority clauses genuinely may assist a union in representing the employees in an organizational unit, the NLRB noted that unions may achieve the same advantages in employee representation by other means less destructive of individual employee rights.¹³¹ In 1947, Congress recognized that the unchecked power of organized labor can be as destructive of employee rights and of the public interest as can the unchecked power of management.¹³² In enacting the Taft-Hartley Act, Congress sought to establish a delicate balance in labor relations between the often conflicting interests of employers, employees, and labor organizations.¹³³ In *Gulton*, the NLRB restored Congress' delicate balance to the formerly skewed field of contractual superseniority.

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130. 266 N.L.R.B. No. 84, slip op. at 10, 112 L.R.R.M. (BNA) at 1364; see *supra* notes 108-17 and accompanying text (discussion of NLRB's decision in *Gulton*).

131. See 266 N.L.R.B. No. 84, slip op. at 12-13, 112 L.R.R.M. (BNA) at 1364 (advantages achieved by superseniority in *Gulton* may be achieved by other less costly means such as paying union officials for services rendered to union).

132. See Labor Management Relations (Taft-Hartley) Act, ch. 120, tit. I, § 101, 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 157 (1982)); see also *supra* note 8 (discussion of legislative history of Taft-Hartley Act).

133. See *supra* note 8 (discussion of Taft-Hartley legislative history); see also 29 U.S.C. § 157 (1982) (codification of employee rights under NLRA § 7); *supra* notes 6-8 and accompanying text (discussion of employee rights under NLRA § 7).