**Local 337, International Brotherhood of Teamsters, AFL–CIO[1] *and* Ronald L. Kurtz and Swift-Eckrich, Inc., Party to Contract.** Case 7–CB–8570

April 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBER OVIATT AND RAUDABAUGH

On September 30, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

The judge found that the Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act by failing and refusing to process fully the grievance of employee Ronald L. Kurtz, the Charging Party. The Respondent contends that the complaint should be dismissed in this respect[2] because its decision not to pursue Kurtz' grievance over preshift overtime to arbitration was made in good faith and was based on rational and substantial reasons. For the reasons set forth below, we find that the Respondent did not breach its duty of fair representation in violation of Section 8(b)(1)(A).

Background

The Respondent is the exclusive bargaining representative of a unit of production employees at the Employer's Quincy, Michigan facility. In February 1990, the Respondent and the Employer completed negotiations on a collective-bargaining agreement to be effective from January 21, 1990, through January 23, 1994. The role of packaging department employees was discussed at these negotiations. It is undisputed that the regular assignment of preshift overtime in the packaging department, at least prior to the 1990 negotiations, was given exclusively to employees in a classification designated ''packaging-utility'' and that another classification designated ''Packaging-Utility (Relief)'' (utility relief),[3] did not then receive regular assignments of preshift overtime. It is also undisputed that the Employer's assignment of overtime within a job classification is determined by seniority in that classification.

The theory underlying Kurtz' grievance is that at the 1990 negotiations the classifications of packaging-utility and utility relief were merged into one classification, and that Kurtz' seniority within that classification—packaging-utility—was sufficient to entitle him regularly to perform preshift overtime work. The complaint alleges that the failure to process Kurtz' grievance fully violated the Act.

Facts

In July 1985 the Employer created the packaging-utility classification. This new classification was a revision of a job classification formerly known as general labor (packaging). Its duties consisted of setup work and relieving other employees who were on break. Thereafter, in March 1988, the Employer created the new classification of utility relief. At that time, there were two distinctions between packaging-utility and utility relief employees. First, packaging-utility employees regularly performed preshift overtime setup work in the packaging department and utility relief employees did not regularly perform these duties.[4] Second, utility relief employees relieved employees in both the packaging department and in another department—the processing department—whereas packaging-utility employees relieved only employees in the packaging department. Other than these distinctions, the employees in these two classifications had the same job duties.

On February 28, 1990, the Employer posted a job opening announcement to replace utility relief employee John Renfrow, who took another position with the Employer. The Employer's employee relations manager, Kathy Steger, testified at the hearing that she erroneously posted the job announcement as a packaging-utility position (rather than the utility relief position that Renfrow had vacated) because she was under the mistaken impression that the two positions had been combined at the February 1990 negotiations into a single packaging-utility classification. Charging Party Kurtz was the successful bidder for the position. Pack-

[1] The name of the Respondent has been changed to reflect the new official name of the International Union.

[2] The Respondent filed no exceptions to the judge's finding that it violated Sec. 8(b)(1)(A) and (2) by maintaining and enforcing a seniority clause with the Employer according union stewards superseniority for terms and conditions of employment not limited to layoff and recall.

[3] Charging Party Kurtz acknowledged on cross-examination that, prior to the negotiation of the 1990–1994 bargaining agreement, the preshift overtime work that is the subject of his grievance was exclusively performed on a regular basis by packaging utility employees and that, during the period before the 1990–1994 contract, there were two distinct positions: packaging-utility and utility relief.

[4] Initially, the judge found that the job duties of these positions ''are essentially interchangeable and without meaningful distinction.'' He later acknowledged, however, that ''the only meaningful distinction between the two jobs is that a utility relief [employee] would not normally participate in pre-shift overtime set-up duties.''

aging Department Supervisor Dennis Moore did not assign preshift setup overtime work to Kurtz, however, because it was Moore's understanding that the packaging-utility and utility relief positions still were separate classifications. As a result, notwithstanding the position as posted, Moore effectively treated Kurtz as a utility relief employee having no preshift setup responsibilities.

On or about April 19, 1990, Kurtz filed a grievance concerning the Employer's failure to assign him preshift, overtime setup work. It is undisputed that Kurtz had sufficient seniority within his job classification to receive preshift overtime assignments *if* the classification he occupied was indeed a single merged packaging-utility position. Thus, Kurtz had greater seniority than incumbent packaging-utility employee Jack Barr, who regularly was assigned preshift setup work.[5] Barr was the Respondent's chief steward at the Employer's facility.

The Employer denied Kurtz' grievance at the initial steps of the grievance procedure. It did so on the basis that, consistent with Supervisor Moore's understanding, the positions of packaging-utility and utility relief had not been merged at the February 1990 negotiations, that Kurtz occupied the position of utility relief, and that the job duties of utility relief did not include preshift, overtime setup work.[6] Under the Employer's view, because Kurtz and Barr occupied separate positions, and only Barr's position (packaging-utility) performed preshift setup work, Kurtz' greater seniority did not entitle him to perform preshift, overtime work in preference to Barr.[7]

On September 25, 1990, pursuant to article 12 of the contractual grievance procedure,[8] the Respondent conducted a grievance panel meeting to consider whether to pursue Kurtz' grievance to arbitration. The pane1 was composed of representatives of the Respondent's executive board. The panel considered evidence presented by all the parties, including Kurtz and the Employer. Kurtz testified that he was permitted to present all the relevant evidence on his own behalf that he desired and that he submitted written statements in support of his grievance. The executive board subsequently determined not to pursue Kurtz' grievance to arbitration.

## Discussion

It is well settled that a union breaches its duty of fair representation toward employees it represents when it engages in conduct affecting those employees' employment conditions which is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). It is also well settled, however, that something more than mere negligence or the exercise of poor judgment on the part of the union must be shown in order to support a finding of arbitrary conduct. *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974). Indeed, the *Vaca* Court noted that, although a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, an employee does not have an absolute right, regardless of the provisions of the applicable bargaining agreement, to have his grievance taken to arbitration. *Vaca*, 386 U.S. at 190–191.

The judge's conclusion that the Respondent breached its duty of fair representation toward Kurtz by arbitrarily failing to arbitrate his grievance stemmed from his finding that Kurtz' grievance was meritorious. Contrary to the judge, we are not convinced that Kurtz' grievance was meritorious. Nor do we subscribe to the judge's reasoning that the Respondent's failure to pursue the grievance to arbitration was based on its fear that a favorable decision would adversely affect Chief Steward Barr.

In finding that Kurtz' grievance was meritorious, the judge specifically found that the Respondent and the Employer had agreed to merge the packaging-utility and the utility relief positions at the February 1990 negotiations. The judge found, therefore, that Kurtz' greater seniority within that classification as compared to Barr entitled Kurtz to perform preshift overtime assignments over Barr, as contended in the grievance. The judge based his conclusion as to the grievance's merits on the following factors.

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[5] Kurtz had less seniority than packaging-utility employee Ralph Burger, who also was regularly assigned preshift setup work.

[6] Division Superintendent Richard Creighton testified, as did Supervisor Moore and Employee Relations Manager Steger, that the packaging-utility and utility relief positions were not merged at the 1990 negotiations and that Kurtz was properly treated from the outset as a utility relief employee. Additionally, the Respondent submitted into evidence a written statement from Creighton to Steger, in response to Kurtz' grievance. In that statement Creighton explained that the utility relief classification originally was created to assist in the Employer's operation and to protect the incumbent packaging-utility employees who ''had the original bids.'' We note, in this regard, that the General Counsel does not contend that the creation of the utility relief position as a separate classification in 1988 was in any manner discriminatory or improper.

[7] Because the Employer determined that the bid announcement mistakenly had been posted as a packaging-utility position, it offered Kurtz an opportunity during the grievance procedure to withdraw his bid. Kurtz declined to do so.

[8] Art. 12 provides for the following step 3 procedure:

> Step 3. In the event the Union and Company fail to settle the grievance in said conference, it shall be referred to arbitration upon the request of either party. The President and/or Executive Board of the local Union shall have the sole right to determine whether or not the grievance is qualified to be submitted for arbitration by the Union.
>
> The Union shall notify the Company in writing of it's [sic] intent to submit a grievance to the 337 Grievance Panel within thirty (30) days of the aforementioned Step 2 conference, for the purpose of determining the arbitrability of a grievance. This thirty (30) day period may be extended by mutual agreement between the parties.

First, the judge credited the testimony of James Montgomery, a steward and a member of the Respondent's negotiating team. Montgomery's credited testimony, however, does not establish that the packaging-utility and utility relief positions had been ''merged'' into one classification. Rather, Montgomery's testimony essentially is consistent with the testimony of Richard Creighton, the Respondent's division superintendent. Creighton testified that the parties simply agreed that utility relief employees would no longer relieve employees in the processing department. Consistent with Creighton, Montgomery testified that the parties agreed that utility relief employees would no longer go into the processing department and, in that regard, that their duties would be similar to packaging-utility employees. Montgomery testified that the Employer said ''there would be no more cross-transferring of departments. The relief people, the best I can recall, *would be used the same as* utility people.'' (Emphasis added.) Thus, Montgomery did not testify, as the judge found, that the parties agreed to eliminate the utility relief position and merge it into one packaging-utility position. Montgomery simply testified that the discussion at negotiations on this matter concerned whether utility relief employees would go into the processing department; and it was determined that, like the packaging-utility employees, they would not.

Second, the judge found that the Respondent, through Chief Steward Barr, specifically told unit employees at a February 25, 1990 contract-ratification meeting that the Employer and the Respondent had agreed to merge the two job classifications. It is undisputed that the relevant discussion on this issue arose from a question asked of Barr by utility relief employee Shirley Gallup. Gallup's credited testimony, however, does not support the judge's conclusion. Thus, Gallup testified at the hearing that her question to Barr at the ratification meeting was whether ''general labor and utility would be classified as the same.'' Gallup testified specifically that she did not use the term ''utility relief'' in her question to Barr. Accordingly, it appears from Gallup's testimony that the question to Barr only concerned the former distinction between packaging-utility and its previous designation as general labor.[9]

Next, the judge found that the classifications had been merged based on the initial posting of the position as packaging-utility and the understanding of several of the Employer's representatives, at that time, that the utility relief position no longer existed. In our view, this evidence does not establish that the positions were, in fact, merged. Other representatives of the Employer, including Division Superintendent Creighton and Supervisor Moore, were of the view that the positions had *not* been merged; and Steger, who posted the job bid, later concluded that she had erroneously posted the opening as packaging-utility in the mistaken belief that the positions had been merged. At most, it is fair to say that there was some confusion on this question and that there was an initial disagreement within management. However, it is also clear that there was confusion and disagreement within the Respondent's ranks as well. Thus, Steward Montgomery and Dean Archer were of the view that Kurtz' grievance was meritorious,[10] while Business Representative Bud Hilliard and Chief Steward Barr were of the view that the positions had not been merged.[11]

Finally, the judge found that the Respondent impermissibly took Kurtz' grievance out of the normal grievance-arbitration machinery and that Hilliard and the Respondent failed to assist or represent Kurtz at the grievance-panel meeting. Contrary to the judge's finding, the parties' bargaining agreement itself specifically provided for presentation of a grievance to this grievance panel. Indeed, Kurtz testified that the grievance panel was available and had been used in the past. Further, as the grievance panel consists of representatives of the Respondent's executive board and appears to be essentially a union factfinding procedure, the role of the Respondent's representatives in this process is not identical to the role of a union as an advocate in representing a grievant at arbitration, as the judge implied. Moreover, as Kurtz himself testified, he was permitted to present on his behalf all the evidence he thought was relevant.

[9] Steward Montgomery's credited testimony regarding the ratification meeting also does not support the judge's conclusion. Although Montgomery testified that Gallup's question concerned where the ''relief'' employees ''would fit in,'' Montgomery testified that the response to the question was that ''they would be used the same'' as the packaging-utility employees.

[10] Steward Archer supported Kurtz' grievance but did not testify at the hearing because of his unavailability caused by active military duty overseas.

[11] Hilliard participated in the 1990 negotiations and testified that the parties did not agree at the negotiations to merge the packaging-utility and utility relief positions. Hilliard also testified that at the time of his initial participation in processing Kurtz' grievance at a step-two meeting in June 1990, he reviewed a rough draft of the 1990–1994 agreement, which did not contain the utility relief classification. Hilliard testified that he agreed with the Employer to change the draft to include the utility relief position consistent with his recollection of the 1990 negotiations. Steger testified that the utility relief classification erroneously had been omitted from the rough draft because the office staff, in setting forth the terms of the 1990–1994 contract, used the expiring 1987–1990 contract as a frame of reference for purposes of carrying over unchanged provisions. Because the utility relief position was not created until 1988, midterm of the 1987–1990 contract, that contract did not set forth the utility relief classification. Accordingly, it appears that the rough draft of the 1990–1994 contract erroneously failed to reflect the existence of the utility relief classification because of an error in compiling the terms of that contract as to provisions carried over from the expiring 1987–1990 contract, and not because the utility relief position was eliminated at the 1990 negotiations, as the judge found.

In sum, the bare fact that the Employer interpreted the 1990 negotiations and the resulting contract in a manner favorable to the interest of Respondent's chief steward does not, by itself, establish that the Respondent's eventual concurrence with that interpretation was undertaken in bad faith or in an arbitrary manner. Our review of the record convinces us that the Respondent did not arbitrarily fail to process a meritorious grievance or process a grievance in a perfunctory manner or in bad faith. Rather, it appears that the merits of Kurtz' grievance were debatable at best, that the Respondent processed the grievance through customary channels, and that it rationally decided that the grievance was not worthy of arbitration. In these circumstances, we find that the Respondent did not breach its duty of fair representation in violation of Section 8(b)(1)(A).[12]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 337, International Brotherhood of Teamsters, AFL–CIO, Quincy, Michigan, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and substitute the following for paragraph 1(c).

''(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Delete paragraph 2(a) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

[12] As noted, the Respondent filed no exceptions to the judge's finding that it unlawfully maintained and enforced a superseniority provision not limited to layoff and recall. There is no evidence whatsoever that this provision bore any relationship to the Employer's failure to assign preshift overtime work to Kurtz or to the Respondent's processing of Kurtz' grievance.

## APPENDIX

### NOTICE TO MEMBERS
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain, enforce, or otherwise give effect to those clauses in our collective-bargaining agreements with Swift-Eckrich, Inc., that accord union stewards superseniority with respect to terms and conditions of employment other than layoff and recall.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their right to engage in or refrain from engaging in the activities guaranteed by Section 7 of the National Labor Relations Act.

### LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

*Mary Beth Onacki, Esq.*, for the General Counsel.
*George R. Geller, Esq.*, of Farmington Hills, Michigan, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Coldwater, Michigan, on May 30, 1991. Briefs subsequently were filed by the General Counsel and the Respondent.

The proceeding is based on a charge filed December 17, 1990,[1] by Ronald L. Kurtz, an individual. The Regional Director's complaint filed February 20, 1991, alleges that Respondent Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO (Respondent or Local 337) has failed and refused, under the grievance-arbitration provision of its collective-bargaining agreement with Swift-Ekrich, Inc., of Quincy, Michigan, to process a grievance filed by Kurtz concerning the assignment of preshift overtime, because a favorable decision on Kurtz' grievance would adversely affect the amount of preshift overtime assigned to Respondent's chief steward, in violation of Section 8(b)(1)(A) of the Act. The complaint also alleges that Respondent has maintained a ''Steward's Seniority'' clause in its collective-bargaining agreement with Swift which grants superseniority to union stewards for purposes other than layoff and recall, in violation of Section 8(b)(1)(A) and (2) of the Act and it requests a ''make-whole'' remedy.

On review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is a labor organization within the meaning of Section 2(5) of the Act and it has had a collective-bargaining history with Swift-Eckrich, Inc., a manufacturer and distributor of meat products in Quincy, Michigan, that annually ships goods and materials valued in excess of $50,000 directly to points outside of Michigan. I find that the circumstances meet the Board's jurisdictional standards and that it effectuates the policy of the Act to exercise jurisdiction in a case of this nature.

[1] All following dates are in 1990 unless otherwise indicated.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent and Swift-Eckrich held negotiations for their subsequently effective 1991–1994 collective-bargaining agreement during February 1990. During these negotiations, Respondent and Swift agreed that the employees holding the job classification of ''Packaging-Utility (Relief),'' who at the time were working in both the packaging and processing departments of the plant, would no longer work in the processing department. It also appears that Respondent and Swift further discussed that the utility-relief employee would be merged into the ''Packaging-Utility'' job classification.

During the February 25, 1990 contract ratification meeting, when asked by then utility-relief employee Shirley Gallup if the utility-relief employees would be included in an upcoming job evaluation program, Respondent, through its agent, chief union steward Jack Barr, replied that the utility-relief employees would be classified as utility employees and would be included in the job evaluation program.

After the contract was ratified, Kurtz bid on a job described on the bid sheet as ''Packaging Utility.'' Because he wanted to confirm that the bid was for a utility job and not utility-relief in accordance with the parties agreement to merge the two job classifications, Kurtz asked two company representatives, Kathy Steger, employee relations manager, and Janice Riester, Steger's secretary, if the job bid was posted correctly. Both confirmed the bid to be a utility job posting and stated their understanding that the utility-relief position no longer existed.

Kurtz received the utility job in March 1990 and, about 2 weeks later, requested to work preshift overtime as a utility employee in the packaging-utility department. At the time of Kurtz' request, chief steward Barr was working preshift overtime in the packaging utility department as a utility employee; however, preshift overtime is awarded to employees based on job seniority and qualifications and Kurtz has more seniority than Barr. The record also shows that Kurtz performs the same job duties and has frequently interchanged job duties with Barr.

Near the time of Kurtz' request to work preshift overtime, Barr told Kurtz that he had arranged with Swift to keep his job separate from the other utility employees in the packaging department. Although Manager Steger and Plant Superintendent Tom Dykehouse told Kurtz that no such agreement had been made and said that if Kurtz has more seniority than Barr then he was entitled to the preshift overtime assignment, Kurtz' request to work preshift overtime was denied.

On or about April 19, Kurtz filed a grievance over the denial. This grievance was denied at the first step and Kurtz appealed to the second step. At the second-step meeting on or about June 7, 1990, Kurtz and Respondent's agent, Business Representative Bud Hilliard, reviewed a draft contract copy which admittedly contained no reference to the utility-relief job classifications. Hilliard admittedly could have made a Local 337 determination on Kurtz' grievance at that meeting, however, because Chief Steward Barr was involved, Hilliard suggested that the grievance be taken to a special panel hearing at the Local 337 union hall in Detroit. Respondent, through it representative, Steger, then agreed in Kurtz' presence that the utility-relief job classification would thereafter be added to the contract (despite the parties' apparent previous agreement to merge the utility and utility-relief job classifications).

Thereafter, on September 25, a panel hearing was held in Detroit at the Local 337 union hall. The panel was comprised of representatives of the local union executive board. At the panel meeting, Respondent Agent Hilliard refused to answer Kurtz' questions concerning events which took place at the previous second-step meeting, specifically those relating to Hilliard's contract review of the job classifications and subsequent agreement to include the utility-relief job in the contract. The panel subsequently sent Kurtz a written denial of his grievance.

Otherwise, it is undisputed that article 14, section 14.06 of the collective-bargaining agreement between Respondent and Swift-Eckrich provides as follows:

> *Stewards Seniority*. Stewards shall be granted superior seniority for all purposes including layoff, rehire and shift preference if such is required by the Local Union provided the Steward has the ability to perform the work.

## III. DISCUSSION

The Respondent admits that the ''Stewards seniority'' clause in the collective-bargaining agreement is violative of the Act. Respondent's counsel asserted in his opening statement and asserts again on brief that this provision has been rescinded. The fact asserted, however, is not a matter of record. No stipulation regarding this matter was agreed to and, despite counsel's assertions that this matter would be proven, no probative evidence was introduced that would show if or when this violative provision actually was deleted from the agreement. Otherwise, Respondent represents that the provision was changed *after* and in response to the issuance of the complaint and therefore it is apparent that the ''Steward's seniority'' clause had not been rescinded when the alleged violation pertaining to the Charging Party's grievance occurred.

On this record, the clause in dispute is shown to have been in effect at all pertinent times and it is clear that superseniority clauses which are not on their face limited to layoff and recall are presumptively unlawful. See *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), and, accordingly, I find that Respondent is shown to have violated Section 8(b)(1)(A) and (2) of the Act in this respect, as alleged.

In an 8(b)(1)(A) case of this nature, where the union is alleged to have breached its duty of fair presentation with regard to the processing of an employee's grievance, the General Counsel has an initial burden to establish that the employee's grievance was not clearly frivolous in order to be entitled to a provisional make-whole remedy. If the General Counsel establishes that nexus between the union's unlawful conduct and the remedy, the burden of proof shifts to the union to establish that the grievance was not meritorious. *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988). The Board further said that it would apply these rules to all cases where the union violates Section 8(b)(1)(A) by failing to properly process an employee's grievance and it overruled any prior decisions that might conflict with that decision.

Here, the General Counsel has presented evidence, through the credible testimony of James Montgomery (who was a union steward and part of the negotiating team), which

shows that Respondent and Swift-Eckrich agreed to merge the job classifications during the February 1990 contract negotiations. Also by admissions attributable to Respondent through its stewards Montgomery and Dean Archer, and the testimony of Charging Party Kurtz and employee Shirley Gallup, Respondent reiterated its agreement with Swift that the job classifications were merged at the February 25, 1990 contract ratification meeting.[2]

Several company supervisors, including Steger, Reister, and Dykehouse, also initially stated to Kurtz their understanding of the merge, the job classifications, and the job bid sheet under which Kurtz obtained his position listing the job vacancy as ''Packaging-Utility.'' Moreover, according to Kurtz and Union Steward Archer, Respondent's agent, Hilliard, agreed with Swift representative Steger at the second-step grievance meeting *to separate* the job classifications, an action which would not have been necessary had the job classification merger not occurred.

Otherwise, the General Counsel's witnesses have persuasively shown that the job duties involved in Packaging-Utility and Utility Relief are essentially interchangeable and without meaningful distinction.

The Company's own documentation describes the packaging-utility duties as follows:

> Handles trash and tears down, secures hooks on the K.S.I. conveyor and substitutes when unexpected absenteeism occurs within the plant. Assists in department clean up, good housekeeping and sanitation and may be assigned to any job in the plant.

This was the job description Kurtz bid on and was awarded.

The utility ''relief'' duties, created prior to the contract's last negotiations, were the same except that they did not ''normally'' perform daily preshift setup tasks (such as preparing a handcleaning preparation) which tasks necessarily require overtime because they start before each regular shift starts. The packaging ''relief'' people previously were required to substitute in the semiskilled hot dog packaging job in the processing department and this function was discussed and admittedly eliminated during negotiations.

Thus, in substance, the only meaningful distinction between the two jobs is that a utility relief would not normally participate in preshift overtime setup duties.

Despite the company representatives subsequent disclaimers, it is clear that Steger, the Company's employee relations manager, believed the positions were the same when she acted on the posting and it was not until a contrary position was taken by Division Superintendent Crieghton, after the grievance was filed, that she took the position that she had made a mistake. The Company thereafter asserted that the position Kurtz bid on and was awarded should have been a relief position which would have put him in a different classification than union steward Barr and thereby eliminated his seniority over Barr for purposes of bidding for preshift overtime.

It is clear that Kurtz had seniority over chief steward Barr and that as a practical matter they had identical and interchangeable job duties, there is little question that Kurtz' request to work preshift overtime had apparent validity and that his grievance appeared to be meritorious. The evidence also indicates that Respondent made an agreement to merge the job classifications during negotiation but that after Respondent declined to further process Kurtz' grievance because a favorable decision would have adversely affected the amount of preshift overtime assigned to chief steward Barr. Business Agent Hilliard refused to make a decision on Kurtz' grievance at the second-step grievance meeting and suggested that the grievance go before a special panel of Local 337 business representatives because of Chief Steward Barr's involvement.

A union's right to act as the exclusive representative of the employee unit carries a corresponding duty on the union to ''serve the interests all members without hostility or discrimination, to exercise its discretion with good faith and honesty and to eschew arbitrary conduct.'' *NLRB v. Operating Engineers Local 139*, 796 F.2d 985, 992 (7th Cir. 1986), and cases cited therein. Here, Respondent took Kurtz' grievance out of the normal grievance-arbitration procedure and treated it differently.

Moreover, when the matter proceeded to the special Detroit panel the union representatives did nothing to assist or represent Kurtz and, in fact, Union Agent Hilliard declined to respond to two questions that Kurtz referred to him during the meeting.

In summation, I find that Union Agent Hilliard changed his initial interpretation of the involved job description, accepted, without question, an agreement with the employee based on its chief steward's objection and the fact that the chief steward's apparent domination of preshift overtime would be adversely affected by a ruling in the Charging Party's favor.

Under these circumstances, the Union has deprived an employee it represents from overtime opportunities and it has failed to demonstrate that its actions, or failures to act, were for the benefit of the bargaining unit as a whole. The Union accepted a charging company interpretation that favored the interest of its chief steward, incidentally affected by an admittedly illegal steward's seniority provision that was in effect in the collective-bargaining agreement and the Union, thereby abdicated the Union's responsibility to the Charging Party and other employees. See *Electrical Workers IBEW Local 26*, 264 NLRB 251 (1982). Accordingly, I conclude that the General Counsel has shown that the Respondent's actions in these respects have violated Section 8(b)(1)(A) of the Act, as alleged.

The General Counsel also has presented sufficient evidence to show that Kurtz' grievance was not clearly frivolous. The Respondent Union has failed to show it made an effort to investigate or pursue the favorable information available from other stewards such as Archer and Montgomery. Moreover, it otherwise appears that from an objective standpoint there is no difference in the positions (the hourly pay rate was not different and was not a factor). As noted

[2] Steward Archer signed and filed Kurtz' grievance report (G.C. Exh. 5). He also wrote and signed two other documents (G.C. Exhs. 3 and 6) addressed ''To whom it may concern,'' which purport to be his description of these pertinent events. It otherwise was established that at the time of the hearing he had been called to active duty in the military and was stationed overseas in connection with the Persian Gulf crises. The receipt of these exhibits into evidence is not challenged in brief and I otherwise find that Archer was properly shown to be unavailable, and I conclude the documents are inherently reliable and properly admissible.

the only different factor is the regular assignment of preshift duties, the very subject of the overtime opportunity dispute. I therefore also find that the grievance had merit and should have been pursued in a nondiscriminatory manner by the Respondent. Accordingly, the General Counsel has met his overall burden under *Mack-Wayne*, supra, and I find that a make-whole remedy is justified.

## CONCLUSIONS OF LAW

1. Respondent Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

2. Swift-Eckrich, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent and the Employer have a collective-bargaining agreement and it will effectuate the purposes of the Act to assert jurisdiction herein

4. By failing and refusing to fully process the grievance of employee Ronald L. Kurtz in the interest of the unit membership as a whole, the Respondent Union breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

5. By maintaining and enforcing a seniority clause with Swift-Eckrich, Inc., according union stewards superseniority for terms and conditions of employment not limited to layoff and recall, Respondent Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

## REMEDY

Having found that the Respondent Union has engaged in unfair labor practices in violation of the Act, it will be recommended that it be ordered to cease and desist therefore and that it take certain affirmative action to effectuate the policies of the Act.

Inasmuch as it is found that the steward superseniority clause in dispute is unlawful, it is ordered that Respondent Union cease and desist from maintaining and enforcing such clause in its bargaining agreement with Swift-Eckrich, Inc. Because the record shows that Ronald L. Kurtz was denied participation in overtime work he was entitled to on the basis of his position and seniority because of Respondent's failure and refusal to fully process his grievance, he is entitled to a make-whole remedy for reimbursement of backpay for any loss of overtime earnings he may have suffered by payment to him a sum of money equal to that which he normally would have earned from the date of the grievance to the date of resolution of this matter, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] otherwise, I find it unnecessary to recommend issuance of a broad compliance order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

## ORDER

The Respondent, Local 337, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or otherwise giving effect to those clauses in its collective-bargaining agreements with Swift-Eckrich, Inc., that accord union stewards superseniority with respect to terms and conditions of employment other than layoff and recall.

(b) Failing in its duty to fairly represent all employees by arbitrarily, and without lawful and legitimate reason, failing or refusing to fully process grievances in the interest of unit membership as a whole or otherwise discriminate against employees.

(c) Interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act in any like or related manner.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Make Ronald L. Kurtz whole for any loss of overtime earnings he may have suffered as a result of having failed to properly represent his interest in the manner set forth in the remedy section of this decision and otherwise pursue his grievance in good faith with all due diligence.

(b) Post at its business offices, meeting halls, and all places where notices to members customarily are posted copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''