1962

Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security

David R. Levett

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol72/iss1/14
TREATMENT OF MONETARY FRINGE BENEFITS AND POST TERMINATION SURVIVAL OF THE RIGHT TO JOB SECURITY*

Perhaps prompted by a misdirected quest for security, most collective bargaining agreements provide for two basic categories of benefits that are based on seniority status: monetary fringe benefits, including the right to vacation, severance, and pension pay, and job security benefits, which primarily concern the right to be laid off in reverse order of seniority and recalled in direct order of seniority within a specified department, job classification, or plant.¹ To receive either of these benefits, an employee must achieve seniority status based upon a specific length of service time and frequently must render continuous service for a minimum “qualification” period.² Collective agreements almost invariably contain an expiration or termination clause, providing that the agreement shall expire after two or three years duration. Such agreements, however, do not spell out the effect of termination or expiration of the collective contract on either job security or monetary fringe benefits that are not claimed until shortly before or after termination. In most cases the agreement between the union and the employer is renegotiated and the monetary fringe benefit and job security provisions are incorporated in the new agreement. But where no new agreement is forthcoming, because the employer ceases operations or moves his plant to a new location, the troublesome question arises whether an employee’s right to vacation or severance pay or to preferential layoff or recall survive the expiration of the collective agreement or termination of the employment relationship. In the case of claims to vacation, severance, or pension pay, courts have resolved this issue through a unique use of concepts borrowed from hornbook contract law. Although the rationale behind the application of such concepts as reliance, substantial performance, and unjust enrichment is not fully developed or at least articulated in these decisions, the results reached through their use have generally been considered fair and just among those familiar with the intricacies of collective bargaining. They thus seem relevant to the largely unsettled question of whether the right to preferential layoff and recall extends beyond the duration of the collective contract.

*An earlier version of this Comment was submitted in satisfaction of the Divisional writing requirement of the Yale Law School, Labor Law Division, 1961-1962. The Journal expresses its appreciation to Professors Clyde W. Summers and Harry H. Wellington for bringing this paper to the attention of the Editors.

¹. See Mitchem, Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mtr. L. Rev. 156 (1949).

Some agreements provide that the length of the period during which employees will be recalled on the basis of seniority is the same for all employees—either a fixed period or one of indefinite duration; others vary the length of the recall period on the basis of an employee’s accumulated seniority.

Treatment of vacation, severance, and pension pay after termination

Vacation provisions frequently provide for a vacation with pay to employees who fulfill three particular requirements. They prescribe that the employee obtain seniority status by working for a minimum period of time, usually two years, that he work a specified minimum number of hours during the vacation year, and that he be employed on the stated "qualification" date. The most commonly litigated claim to vacation pay arises where the contract is terminated before the qualification date for vacations is reached, but after the claimants have fulfilled the contractual seniority and service requirements. In such cases employees who have met the seniority and service requirements are consistently held to have earned the right to vacation pay, notwithstanding that the scheduled vacation period is not to occur until after the termination date. The rationale of these decisions is that vacation pay, like wages, is earned through continuous employee service prior to the expiration of the agreement.

In respect to termination clauses, courts generally state that:

[W]hile collective bargaining contracts are normally made for fixed periods of time, they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration. It will therefore be commonplace that rights to which employees are entitled under a collective bargaining agreement may not actually fructify in enjoyment until after the expiration of a given contract period with reference to which they may be regarded as having been earned.

Where the qualification date is imminent, courts allow recovery on the theory that the employee has substantially performed the obligations of the agreement and thus is entitled to full compensation for his services. Where a substantial part of the vacation year remains before the qualification date, courts nevertheless permit recovery of a pro rata share of the contractual amount on the ground that a proportion of the total is earned daily. Thus where an employer,

3. Ibid.
6. As stated in In re Wil-low Cafeterias, Inc., 111 F.2d 429, 432 (2d Cir. 1940), where employees were claiming a priority against the bankrupt for "wages," including vacation pay:

A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed.

in shutting down his entire plant, exercised his option to terminate 3 months prior to the qualification date, employees were able to recover three-fourths of their vacation salary.\(^9\)

Provisions for severance pay frequently gear the amount of such benefits to the length of the employee's service,\(^10\) and in this respect are similar to the seniority requirement for vacation benefits. But unlike vacation pay, severance pay is not conditioned upon employment on a stipulated qualification date or minimum hours of service during the year of severance. In contesting claims to severance pay after expiration or nonrenewal of the collective contract, employers have argued that the termination provision operates as a contractual time limitation on liability for severance pay. In rejecting this view, most courts and arbitrators, again applying the wage analogy, have held that the right to severance pay is earned through the rendering of services for the specific seniority period, and therefore survives the expiration of the collective agreement.\(^11\) Since such provisions "procure efficient and faithful service and con-

---


A number of federal courts have held that vacation claims were the equivalent of wages for purposes of the Bankruptcy Act. See, e.g., United States v. Munro-Van Helms Co., 39 L.R.R.M. 2598 (5th Cir. 1957); In re Wil-low Cafeterias, Inc., 111 F.2d 429 (2d Cir. 1940). But cf. United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959), reversing 254 F.2d 475 (3d Cir. 1958), where the Supreme Court, dealing with a welfare plan, held that such a benefit was not wages even though within the "wage package" at the bargaining table.


Regular Employees who have completed one (1) year or more of continuous service and who are permanently released from employment because of reasons beyond the control of the employees concerned, shall be given an allowance of one (1) week's base pay at the rate of pay at the time of release for each full year of continuous service.


Of course, the right to such pay can "arise" only during the subsistence of the contract so providing, and not after its termination; but once the right thus comes into being it will survive the termination of the agreement.

In Hercules Powder Co. v. Brookfield, supra at 543, 53 S.E.2d at 809, the company had
tinuous employment," termination or discontinuance cannot operate to deprive employees "of benefits of dismissal salary already earned"; such action would constitute a "forfeiture of plaintiff's rights amounting to a breach of contract." 12

Where the employment relationship is terminated by the employee's death, resignation, or discharge for cause, however, the employer is not liable for severance pay. 3

Retirement benefits are based upon specified age and service requirements; 14 litigation over pension plans has arisen where plant removal, contraction, or shutdown terminates the employment relationship before employees have obtained sufficient service time or reached retirement age. 10 Despite considerable

reserved an explicit right to terminate the plan, and claimed that such termination prior to actual separation from employment nullified the rights. The court responded that

[T]he right of discontinuance of the plan as to any unearned benefits was reserved by defendant. Yet, it could not be discontinued and thus deprive the plaintiff of benefits of dismissal salary already earned as of the date of its discontinuance. That would constitute not mere discontinuance of the plan, but forfeiture of plaintiff's contractual rights amounting to a breach of the contract.

Rights to severance pay have been held to survive even where the employment is terminated by means other than expiration of the agreement: Adams v. Jersey Cent. Power & Light Co., 37 L.R.R.M. 2691 (N.J. 1956) (S.E.C. order requiring the utility to sell its business); In re Elliott Grocery Co., 28 L.R.R.M. 2414 (S.D. Cal. 1951) (priority granted under Bankruptcy laws); Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N.W.2d 333 (1951) (layoff due to mechanization); Montefalcone v. Banco Di Napoli Trust Co., 268 App. Div. 636, 52 N.Y.S.2d 655 (1945) (wartime liquidation by the Superintendent of Banks).

The notion that severance benefits are earned rights is well expressed by Willard Wirtz in a recent arbitration opinion:

The services the employee performed during the cumulative six month periods were his part of the bargain. The Publisher's reciprocal commitment was to make the stipulated payments in the event of dismissal. The employee claimants in the present case had fulfilled completely their part of this bargain. To hold that the termination of the contract period terminated the Publisher's obligation to make this agreed upon deferred payment for services already rendered would be to deny a payment which had been fully earned, and to let one party escape liability where the other party had fully performed his reciprocal obligation.


13. Such conditions are usually specifically enumerated in the provision. See, e.g., provisions cited in note 10 supra.
15. In cases of sale, Gorr v. Consolidated Foods Corp., 42 L.R.R.M. 2643 (Minn. 1958); shutdown of a division, Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958); and transferral of a strategic business to the Government, Finnell v. Cramet, Inc., 289 F.2d 49 (6th Cir. 1961), courts have read the termination provisions mechanically, and in the last cited case, court rights were considered as "expectancies." This attitude is reflected in United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959), in which the Supreme Court brushed aside an employee's claim for priority under the Bankruptcy Act, admitting that pensions were part of the total wage package, but holding that
difficulties in resolving the issue of qualification, it is uniformly held that em-
ployees who have qualified as to age and service are entitled to receive the 
stipulated payments regardless of the expiration of the contract or contracts 
under which such rights accrued. As with vacation and severance pay, the 
courts speak in terms of "vesting" and "earning"; pension plans "encourage 
career service and . . . minimize labor turnover which is so costly to industry" 
and "consideration flows to an employer as a result of such pension plans, in 
the form of a more stable and more contented labor force." In addition to 
stressing the benefits which flow to the employer, courts state that "the em-
ployer may not defeat the employees' reasonable expectations of receiving the 
promised reward." 

In upholding claims that monetary fringe benefits survive the termination 
of the collective agreement, courts and arbitrators apparently make certain 
asumptions about the intent and behavior of the parties to the collective contract. 
Because vacation, severance, and pension benefits are of value, such benefits 
are presumably substituted to some extent for wages during negotiations be-
tween the union and employer. This sacrifice by employees of wages for fringe 
benefits leads adjudicators to treat fringe benefits as earned compensation. That is, it is assumed that part of the employees' day to day services are given 
in exchange for monetary fringe benefits. Since the magnitude of the fringe 
benefit is usually correlated to the length of service, it is further assumed that 
workers are induced to remain with an employer for a longer period than they 
would in the absence of provisions for such benefits. The probable sacrifice 
the "wages" requirement of the statute was not satisfied: "[W]e deal with a statute, not 
business practice." 359 U.S. at 33.

1956); Vallejo v. American R.R. of Porto Rico, 188 F.2d 513 (1st Cir. 1951); Cantor v. 
Berkshire Life Ins. Co., 171 Ohio St. 405, 171 N.E.2d 518 (1950); Bird v. Connecticut 


19. While wartime wage ceilings were in effect, fringe benefits became a popular alter-
native to wage increases. See AARON, THE EMPLOYMENT RELATION AND THE LAW 694 
(1960). Subsequently, courts upheld the union's right to bargain over fringe benefits. 
See, e.g., Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 
960 (1949). Union negotiators have pushed their demands for fringe benefits with con-
siderable success:

A typical manufacturing employer spent 454 cents an hour, or 2.2% of his gross an-
ual payroll for his production employees' fringe benefits in 1959. This is the finding 
of the Bureau of Labor Statistics in its first comprehensive survey of fringe benefit 
costs in manufacturing.

47 L.R.R.M. 42 (1961). Whatever the accuracy of these figures, there is no longer any 
doubt that the total wage package includes some balance between fringe benefits and actual 
wage increase.


21. See, e.g., In re Wil-Low Cafeterías, Inc., 111 F.2d 429 (2d Cir. 1940); Cantor v. 
Berkshire Life Ins. Co., 171 Ohio St. 405, 171 N.E.2d 518 (1960); New York City Omnibus 
Corp. v. Quill, 73 N.Y.S.2d 289 (1947), aff'd, 297 N.Y. 832, 78 N.E.2d 859 (1948); AARON,
of wages, performance of daily services, and continuous performance by employees as the basis for the conclusion that monetary fringe benefits are earned and survive termination suggest the application of either the concept of reliance or the notion of substantial or complete performance of bargained-for services. In making these assumptions about reliance and performance, courts and arbitrators have ignored the possibility that in any given case the fringe benefits were not necessary to induce an employee to render his services or to remain continuously at his job.

Another factor repeatedly stressed in the cases dealing with post-termination rights is the element of managerial enrichment. Such emphasis suggests that recovery after the expiration date is not strictly a contractual one based upon the agreement itself, but, in traditional contract terms, is quasi-contractual. The courts and arbitrators, however, have not distinguished between the two. Provisions which scale fringe benefits to length of service presumably benefit the employer by encouraging career service and reducing costly labor turnover.22


22. GANDER, LABOR TURNOVER: CALCULATION AND COST (1960). This study details the costs of turnover, and the following outline details the major points:

I. Recruitment Costs
   1. Advertising
   2. College Recruiting
   3. Employment Agency Fees
   4. Brochures
   5. Prizes and awards to employees
   6. Public Relations activities

II. Selection and Placement Costs
   1. Letters of application
   2. Application blanks
   3. Interviewing
   4. Line Management Interviewing
   5. Medical Examinations
   6. References
   7. Psychological Testing
   8. Applicant's travel expenses
   9. Security and credit investigation
  10. Personnel Department overhead

III. On The Job Costs
   1. Putting the man on the job
   2. Company Badge
   3. Safety Glasses
   4. Indoctrination and training
   5. Break in costs

IV. Cost of Separating Incumbent
   1. Exit interviews
   2. Severance pay
   3. Social Security Tax Costs
   4. Increased unemployment insurance costs
   5. Intangible costs

The study also concludes that the relationship between mobility estimates and turnover is
To the extent that continued service produces increased efficiency in particular job operations and develops new industrial skills an employer is further benefited by such provisions. Courts and arbitrators, in advancing the concept of employer enrichment or receipt of bargained-for performance, have been willing to accept the assumption behind enrichment without considering the possibility that an employee’s diminished productivity in later years may outweigh the benefits previously conferred upon the employer and that particular fringe benefits may have been unnecessary to induce an employee to render his services.

Although monetary fringe benefits are often considered “earned” and “accrued,” they differ in several respects from accrued wages. While both wages and fringe benefits may be earned only by rendering services for a specified period, the right to payment of fringe benefits is also conditioned upon the occurrence or non-occurrence of specific events. Thus, severance pay and vacation pay, even though earned, are not due if the termination of the employment relationship is the result of the employee’s death, resignation, or discharge for cause. Under some pension plans, retirement rights become worthless if the employee dies before he reaches retirement age. Contingencies which defeat the right to earned fringe benefits seem to be events which are related to the very function of the particular fringe benefit. Thus, the severance benefit is not payable if the employment relationship does not terminate. Moreover, these events appear to be triggered by the employee; unilateral managerial action, such as cessation of business or wrongful discharge, does not defeat the claims of employees who have met the required conditions.

Zdanok v. Glidden

The reasoning of the majority and dissenting opinions in a recent decision of the Court of Appeals for the Second Circuit—Zdanok v. Glidden—presents the various viewpoints taken toward the survival of job security rights upon the occurrence of termination and plant removal. Since 1949 the Glidden


24. See, e.g., In re Wil-Low Cafeterias, Inc., 111 F.2d 429 (2d Cir. 1940): If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him. . . . It can make no difference whether the discharge was due, as here, to a cessation of business by the employer, or was wrongful. Id. at 432.

Company and Local 852 of the Teamster's Union had negotiated two-year contracts. The last agreement ran from December 1, 1955 to November 30, 1957, and provided for layoff in reverse order of seniority, recall rights for a period of three years following layoff for those employees who had accumulated five years of seniority, and a non-contributory pension plan with early retirement for those with high seniority. On May 16, 1957 the Elmhurst employees were notified of impending discontinuance of operations; on September 16 the company gave written notice of its intention to terminate the agreement on the expiration date, and began to cut back production for the purpose of removing its machinery from the Elmhurst, New York plant to Bethlehem, Pennsylvania. The work at the new location was substantially similar to that at the old and required the use of many of the same machines. Five employees, each of whom had accumulated more than five years' seniority and had been laid off prior to the expiration date claimed that there was an implied condition that their individual recall rights would survive the termination of the collective bargaining agreement. The Second Circuit, in reversing the district court, held that employees could enforce their contractual recall rights after termination of the collective contract and after the employer had removed his operations to another location. The court rested its holding on an analogy to retirement rights of employees who qualified prior to expiration.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested rights"... we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant... the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance... their rights in it were vested and could not be unilaterally anulled.

Having established that recall rights survived termination, the court rejected the Company's contention that recall rights did not follow the plant. The language in the agreement referring to the Elmhurst address, the court believed, merely served the purpose of identification rather than embodying any geographical limitation on the employees' recall rights.

Chief Judge Lumbard, in his dissenting opinion, cited a case upholding a union's right to bargain away seniority rights in support of the conclusion that

26. 288 F.2d at 104.
27. Id. at 103.
28. Id. at 104. The provision reads:

Agreement between Durkee Famous Foods Division of the Glidden Company, No. 23—Elmhurst, New York, and General Warehousemen's Union, Local 852 [of Teamsters]... December 1, 1955 to November 30, 1957... for and on behalf of [the Company's] plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York... .

185 F. Supp. at 448 n.27.
recall rights, based on seniority, were not "vested" and thus did not survive the termination of the agreement. He pointed to the fact that the contract contained neither an express provision for post-termination recall rights, nor provisions granting employees the right to "follow the work."

The two major questions raised by Glidden are whether recall rights survive termination of a collective contract and whether such rights survive plant relocation. Because there is no available body of doctrine here, but that peculiar adaptation of contractual principles used in vacation, pension, and severance cases, the answer to these questions should depend upon the extent to which the right to recall is similar to employee's rights to severance, vacation, or pension pay, or more specifically, similar in respect to those factors—sacrifice, expenditure of effort by the employee, and enrichment of the employer—which have led courts to conclude that a vacation, severance, or pension right is earned.

Given the dearth of studies dealing with collective contract negotiations, it cannot be determined with certainty that union representatives sacrifice wages or monetary fringe benefits in return for job security rights. It has been suggested, however, that there is some substitution of such rights for wages or other fringe benefits. Since job security rights are of value to employees it is likely that union representatives would be willing to sacrifice pecuniary benefits of lesser value in return for such rights and that an employer, aware of the value of seniority rights to employees, would demand sacrifices in exchange

29. 288 F.2d at 105. The case cited was Elder v. New York Central R.R., 152 F.2d 361 (6th Cir. 1945).
30. 288 F.2d at 105.
31. Ibid. The district court had earlier dismissed the employees' contention on the ground that the collective agreement gave the employees no right to follow the work, before or after termination. 185 F. Supp. at 441. Judge Palmieri stressed the absence in the agreement of a commonly found provision granting transfer rights or multiplant seniority, the reference in the agreement to the original location and to department and plant seniority, and the absence of a history of removal rights upon past transfer of operations. Id. at 448-49.
32. The fact that monetary fringe benefits are normally reduced to a cash figure at the bargaining table is generally cited as proof of such sacrifice. Cf. authorities cited in note supra.
33. "The discovery that workers and unions are importantly motivated by nonpecuniary considerations . . ." is alluded to in CHAMBERLAIN, COLLECTIVE BARGAINING 366 (1951). Dunlop, Wage Policies of Trade Unions, 32 Am. Econ. Rev. 290 (Supp. 1942) states that: [S]eniority . . . [is] not to be regarded as less essential to the total agreement than the wage structure. The contract is made in view of all the conditions of the exchange. At times, bargaining over the total agreement will include some substitution between these two groups [wage and non-pecuniary] of terms.
34. "It is scarcely an exaggeration to say that in some industries . . . employees build their lives upon seniority preferences . . ." Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 164 (1957).
for granting them. Although empirical studies indicate that guarantees of job security, along with other fringe benefits, tend to discourage worker mobility,35 there is no direct evidence on the extent to which the right to be laid-off in reverse order of seniority and recalled in order of seniority for a definite or indefinite period 36 affects employee conduct.

In the case of monetary fringe benefits, courts and arbitrators assume reliance without examining the amount of actual reliance on the particular provision involved. There is no reason to believe that job security benefits less effectively induce employees to render continuous services than do vacation or severance benefits. To the contrary, since lay off and recall provisions are the essential guarantees of job security, they are the features of the seniority system primarily responsible for inducing service continuity. In some industries, at least, older employees regard their seniority—that status which guarantees a job in a market that becomes increasingly narrower with age—as more important than higher wages or other benefits offered elsewhere. Clearly an employee would be more likely to remain, or likely to remain longer, at a job which lays off in reverse order of seniority than where order of lay off is at the employer's discretion. Moreover, continuous service would appear to be further induced by a provision assuring recall based upon length of service and the period of such preferential recall based upon seniority.37 The importance of the recall pro-

---

35. See, e.g., COUNCIL ECON. ADVISORS ANN. REP. (1961); Brissenden, Labor Mobility and Employee Benefits, 6 LAB. L.J. 762 (1955).

36. As to the prevalence of various types of recall arrangements:

Over three-fourths of agreements that specify rehiring procedures provide for rehiring in reverse order of layoff—the last laid off in the unit is the first rehired. In addition 33% specifically give laid off employees preference over new employees for vacancies that arise in other seniority units.

A maximum period of layoff, after which rehiring and seniority privileges are lost, is specified by about 63% of agreements. This maximum layoff period is the same length for all employees in about 38% of contracts, as opposed to the 25% which vary the period of rehiring rights according to the employees' length of service. Of those with the same period for all, over two-fifths set one year as the cutoff date on rehiring rights. Another quarter specify two years. The remainder of these provisions are divided about equally among limits of less than a year, a year and one-half, and three years.

Where the period of rehiring rights is linked to the seniority record, practice is divided. About two-thirds keep employees on rehiring and seniority lists for a period equal to their service with the company, but set a maximum period nevertheless—five years is the most frequent limit set, with one, two, and three years appearing slightly less frequently. The others provide periods based upon different categories of seniority; for example, employees with three months' service retain rehiring rights for one year, those with one to five years' service for two years, with over five years' service for three years.


37. If severance provisions encourage service continuity by providing a payment which cushions unemployment, as suggested in Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N.W.2d 338 (1951), and In re Brooklyn Eagle, Inc., 32 Lab. Arb. 156 (1959), then such a recall provision, designed to remedy the same problem, should provide an analogous inducement. Indeed, where the practice of the industry is to rehire frequently within a few
vision is somewhat lessened where the preferential recall period is uniform for all employees, regardless of length of service. The employees' strongest case for reliance is under a lay off or recall provision which requires continuous service during a specific earning period to qualify for job security benefits. Where there is no specific earning period and employees are entitled to such lay off and recall preference as their seniority status warrants, it is arguable that job security rights do not survive, since there was no specific reciprocal performance for the employees to render. Since order of lay off and recall are based on seniority, such provisions nevertheless may have induced employees to continue rendering services. The employees' case is weakest if there are no recall rights.

The monetary fringe benefit cases also suggest that the value the employer receives by virtue of continuous service, presumably induced by the fringe benefit provisions, supports the employees' claim that rights are "earned" and survive termination. At the termination of a collective agreement providing for vacation, severance, or pension payments, it is assumed that the employer has been unjustly enriched or has failed to render the contractual consideration in return for the bargained-for performance. Where the order to lay off and recall and the length of the recall period are based on seniority and there have been no lay offs during the contract term, or laid-off employees have received less than their full recall period, it may reasonably be presumed that the employer has received benefits for which he is still indebted at the termination of the agreement providing for job security benefits. Under such circumstances the benefits received from employee services and continuity of employment are no different from the managerial benefits obtained by virtue of employee reliance on monetary fringe benefit provisions. Arguably, however, at the time of the employees' claim to post-termination layoff or recall, the benefits the employer received from the employees' reliance were offset by the costs of the job security system as a whole. During the contract term the employer may have been required to promote, layoff, and recall on the basis of seniority under circumstances in which he would have preferred to utilize other criteria. Restricting management's right to promote, retain, and recall employees on the basis of their ability may produce substantial managerial costs. On the other hand, there may be managerial cost savings produced by an automatic system for effectuating complex layoff procedures, such as the stability and good will engendered by a predictable formula for managerial decisions significantly affecting the employees' welfare. When these factors are added to the monetary payments the employer presumably avoided by agreeing to a seniority system, and the savings in turnover costs produced by continuity of employment, it may well be that the seniority system on balance enhanced the employer's profits at the expense of employees who relied on receiving job security rights.

Dissenting in Glidden, Chief Judge Lumbard argued that "Unions are...
able to protect themselves and their members at the bargaining table" and "it is hardly 'irrational' ... for a court to leave the parties as they are if they have never seen fit to provide otherwise." This view presumes that silence speaks for management; that if job security rights are to survive the termination date the union must successfully bargain for a contractual provision to that effect either at the time of the original negotiations or when the removal is imminent.

This is obviously not the view taken of the provisions providing vacation and severance benefits, which are also based upon seniority status and which are subject to the same termination clause in the collective agreement. Even aside from these cases, the assumption that the termination clause cuts off job security rights created by the agreement seems unsound. Collective bargaining agreements generally contemplate indefinite renewals of the contractual relationship; the termination date, therefore, is meant to serve the needs of the contracting parties to reconsider and renegotiate the terms and conditions of future management-union-employee relations in light of changing economic and social conditions. Contractual termination thus serves the same function as a "re-opener" clause; the parties reconsider specific elements of their relationship but rarely disturb its underlying roots. The termination clause can serve this function without construing it to operate as an automatic limitation on job security rights. Moreover, an express contractual clause making seniority benefits (both monetary and security) nugatory after the termination date could easily have been included. Its absence, and the ramifications such a clause might have during the bargaining process, suggests that the language of the agreement does not compel any conclusion in regard to the survival of job security rights. It is quite possible that at the time of negotiations neither party raised or contemplated non-renewal of the agreement or plant removal problems or that removal was foreseen by the employer but not mentioned, or that the possibility of removal was raised and dropped in favor of more pressing problems. In these circumstances it would be erroneous to conclude that the employer's superior bargaining power was responsible for the contractual silence on the subject of job security rights after termination and plant removal. Only where it is clear that the parties consciously explored and deliberately omitted provisions covering job security rights in the event of plant removal should the contention that silence speaks for management prevail.

39. The heart of the collective agreement ... is the process for continuous joint consideration and the adjustment of plant problems. And it is this feature which indicates the great difference between the collective labor agreement and commercial contracts generally. The latter are concerned primarily with "end results," the former with continuous process.
40. This standard was suggested in NLRB v. Jacobs Mfg. Co., 196 F.2d 650 (2d Cir. 1952), enforcing 94 N.L.R.B. 1214 (1951), in the context of Board determination of subjects bargainable during the term of the agreement. Although the decision does not indicate how vigorously a matter must have been discussed before it may be deemed to have been deliberately excluded from the agreement, it is clear that the Board is authorized to look...
the absence of such evidence, however, either disposition of the issue places an affirmative gloss upon the existing contract terms.

In the absence of any substantial evidence of either party's intent, arguably a rule of law placing the burden of including an express provision determining survival on either party is superior to a complex inquiry into the extent of sacrifice, reliance, and enrichment. But the difficulty with such a rule in the plant removal situation lies in the potentially disruptive effect it would have upon the collective bargaining process. For imposing an affirmative duty upon either party to include an explicit provision disposing of seniority rights in case of plant removal would require the union and management to settle a thorny issue at a time when removal is merely hypothetical. Since in most cases the problems presented by removal would never arise, requiring that the parties bargain over this contingency would thus add an unnecessary issue to an already complex agenda upon which management and the union must reach an agreement.

Judge Lumbard's statement that unions are "fully of age" and no longer need judicial protection also seems to be an allusion to a policy of judicial non-interference with the balance of power in collective bargaining. Where a dispute arises that is not settled by the collective agreement, courts, rather than decide the issue according to their own dictates of fairness, will "remand" the issue to the parties for a determination. The NLRA supports this process by requiring that the parties bargain in good faith over all disputes that are not settled by the collective agreement. But this solution would, in effect, decide the issue for the employer, since the distribution of bargaining power has radically shifted on the eve of removal. Thus, any protection afforded to employees seeking to enforce their seniority rights by the requirement that the employer bargain in good faith before relocating is illusory. Shortly before removal, in the absence of an express or implied no-strike clause, a union may attempt to enforce its demands by striking. The employer need bear the economic consequences of a strike, however, only until he has bargained with the union to a "good-faith impasse." After reaching such an impasse, he is statutorily free to parol evidence explaining the course of the negotiations. The suggestion that past "discussion" might support the employer's contention that the union had bargained away seniority rights is not without drawbacks. The difficulty of ascertaining what actually transpired during past negotiations suggests perhaps that a more rigorous standard should be applied. A "bright line" test would create less problems of administration, for if the employer has truly won the concession, requiring him to obtain the insertion of a contractual provision spelling out this fact should create no hardship, so long as this rule is administered prospectively.

41. LMRA, §§ 8(a) (5), 8(b) (3), 61 Stat. 141, 29 U.S.C. §§ 158(a) (5), 158(b) (3) (1958). See also National Licorice Co. v. NLRB, 309 U.S. 350 (1940); J. I. Case Co. v. NLRB, 134 F.2d 70 (7th Cir. 1943).


43. After impasse, the employer may take unilateral action without committing an unfair labor practice, Pacific Gamble Robinson Co. v. NLRB, 186 F.2d 106 (6th Cir. 1950), provided that such action does not amount to bad faith "disparagement" of the collective bargaining process, NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).
to remove his operations without granting any of the union's requests. Further-
more, the presence of a no-strike clause effectively prevents the union from
striking unless the strike is in response to an unfair labor practice.

Comparison of removal with contingencies which do not nullify monetary
fringe benefits based on seniority supports the conclusion that job security
rights survive the removal of a plant to a new location. Since removal seems
far less foreseeable than a failure to negotiate a new collective agreement or a
willful discharge after termination, contingencies which have been held not to
defeat the right to vacation or severance pay, the case for survival of job secur-
ity benefits after removal in fact seems stronger. At any rate, earned sever-
ance and vacation pay can be destroyed only by an event initiated by an
employee, such as his discharge for cause, resignation, or death. Since plant
removal is at the employer's initiative, it would seem that job security rights
as well as monetary fringe benefits remain intact. The holdings that the jobs
of employees with seniority may not be destroyed by arbitrary discharge or by
subcontracting or transferring jobs to non-bargaining unit employees also mili-
tate in favor of the employees' contention that their jobs survive removal.

Thus, an analysis of the rationale behind the holdings that the right to mo-
tary fringe benefits is not destroyed by termination of the collective contract
and an examination of the contingencies which defeat claims to monetary fringe
benefits suggest that job security rights should survive both the termination of
an agreement and the removal of a plant. These guidelines for deciding whether
seniority rights survive termination of the collective agreement, nevertheless,
should be regarded as highly tentative. Until studies are undertaken to deter-
mine the role played by various seniority provisions at the bargaining table and
in the economic calculations and welfare of the employer and employees, de-
cisions must be based on reasonable, albeit somewhat speculative, inferences.
To the extent that the approach of courts and arbitrators in dealing with rights
to vacation, severance, and pension pay is sound, however, the conclusion that
job security rights are unaffected by the termination of the collective agree-
ment seems warranted.

The Counter-Arguments

In light of the paucity of critical analysis of the issues presented by the
Glidden case, it seems fruitful to evaluate the soundness of this conclusion by
considering the arguments supporting a contrary one; the arguments opposing
the reasoning of the court in Glidden and, in general, rejecting the treatment
of job security rights as earned, have recently been elaborated in one of the

44. Along with the wide scope of legitimate "good faith" unilateral action which is
available to the employer who has bargained to an impasse, note the language of § 8(d),
defining "good faith":

[B]ut such obligation does not compel either party to agree to a proposal or require
the making of a concession.

few articles dealing with the issue. Professor Aaron contends that "seniority rights are readily distinguishable from vacation pay benefits, with which they are sometimes compared, because the latter are easily convertible into cash and increasingly have come to be regarded as deferred compensation for services already performed." This reasoning appears fallacious, for it is difficult to understand why a managerial obligation of value to employees may not be specifically enforced merely because it has no easily ascertainable monetary equivalent. Recall rights clearly have some value. Where an employer is contractually required to transfer employees to a new plant after removal, the union, in negotiating with the employer before removal, frequently trades some or all transfer rights for severance pay and thus converts job security rights into rights having a definite pecuniary value. The argument that vacation pay is different from seniority benefits because the former have come to be regarded as deferred compensation begs the question as to the nature of the latter. To determine whether seniority rights are deferred compensation—i.e., earned or accrued—one must examine the factors—sacrifice, reliance, and enrichment—which warrant treating other fringe benefits as earned. Upon finding that such elements are present, it seems appropriate to treat seniority rights as earned and due after termination of the agreement.

In distinguishing severance pay from job security rights, Professor Aaron relies upon a case holding that, although severance benefits could not be earned after termination of the agreement, benefits which had been earned during the contract period were due after termination. In other words, the measuring rod for determining the amount of the disputed right did not extend beyond the termination of the agreement; the right already earned, however, was not destroyed by such termination. The conclusion that job security may be an earned right is consistent with the above holding—it is here suggested only that seniority rights earned and unpaid during the contract term are due after termination, not that employees may earn new seniority rights under the expired agreement.

Professor Aaron's other attempts to distinguish seniority rights from other fringe benefits similarly seem conclusory or erroneous. For example, it is argued that "seniority is a system of beneficial employment preferences; it is absolutely dependent upon the existence of an employment relationship . . . . If the employer goes out of business, the employee with the most seniority is no better off than the one with the least, and neither is entitled by his seniority to a money indemnity for the loss of his job." This view ignores the fact that job security is a relative right, which, by definition, assumes the availability of

46. Id. at 1536-37.
49. Id. at 1540.
at least some jobs. In fact, the only function of job security is to assure a worker of the order in which he will be laid off or recalled when the number of available jobs decreases or increases. Thus, because a right to job preference becomes valueless when an employer goes out of business tells us nothing as to the value or nature of that right where an employer has jobs available. While seniority rights are obviously dependent upon the existence of the employment relationship, they also place limitations upon the employer's power to sever that relationship. It has often been held that seniority rights protect employees from arbitrary discharge. Seniority rights also prevent an employer from transferring or subcontracting work to employees outside the bargaining unit and successfully asserting that employees who lost their jobs were on a "permanent layoff." Thus, though seniority rights may depend on the employment relationship, they also preserve that relationship by prohibiting an employer from removing available jobs from bargaining unit employees who give no cause to be discharged.

Another argument advanced to support the contention that seniority rights expire with the collective bargaining agreement is that while the rights to other fringe benefits may be deemed "property" rights,

An employee has no power of disposition over his bundle of beneficial employment preferences except the power to relinquish them; he may not sell or assign them, give them to any person he chooses, or negotiate individually with his employer for changes advantageous to himself. His rights are created and nourished by the collective agreement; when it lapses or is changed, they expire or are changed accordingly.

Seniority rights may not be sold, assigned, or bequeathed because they are rights to enter into a personal relationship; the employer has promised to accept continued service, if appropriate jobs are available, from particular employees who have accumulated seniority, not from their donees, assignees, or vendees. Since the non-alienability of seniority rights does not inhibit a court from enforcing such rights during the term of the agreement, there is no reason why the termination of the agreement should allow non-transferability to pre-

50. The argument has frequently been made that the very existence of a seniority roster implies a restriction upon employer power to discharge arbitrarily. See Higgins Industries, Inc., 25 Lab. Arb. 439 (1955); Atwater Mfg. Co., 13 Lab. Arb. 747 (1949). But see Okenite Co., 22 Lab. Arb. 756 (1954). Although the contention was rejected in Held v. American Linen Supply Co., 39 L.R.R.M. 2555 (Utah 1957), it should be noted that there the seniority roster was alterable within the discretion of the employer, and the layoff order was similarly qualified by "reasonableness." It is submitted that Held is wrong in principle to the extent that it assumes that arbitrary managerial action can coexist with a thoroughgoing seniority system. Seniority has been held to restrict the employer's freedom to reduce the work week; Wesley v. Electric Auto-Lite Co., 44 L.R.R.M. 2019 (Ohio 1959). Moreover, seniority is a restriction upon the employer's freedom to subcontract, Local 391, U.A.W. v. Webster Electric Co., 48 L.R.R.M. 2111 (E.D. Wis. 1961); DeAtley Paving & Crushing Inc., 37 Lab. Arb. 496 (1961); Mead Paper Corp., 37 Lab. Arb. 342 (1961); U.S. Potash Co., 37 Lab. Arb. 442 (1961).

51. Aaron, supra note 45, at 1540.
clude their enforcement. In short, the enforceability of a recall right does not depend on its meeting the definition of a "property right"; designating it a "contract right" will warrant granting relief. It is further argued that since an employee or the union cannot trade or bargain job security rights after termination of the agreement, such rights necessarily expire when the agreement lapses.52 Where a union is the designated representative of employees, an employee may not negotiate individually with his employer for changes advantageous to himself. But this limitation, arising out of the nature of collective representation, is no more relevant to the question of post-termination survival of seniority than the nonalienability factors discussed above. Furthermore, whether an individual, or union, at the termination of the agreement can trade job security rights for monetary rights depends on whether the former are entitled to judicial protection; to assert that the union and employee cannot bargain about seniority rights is merely to conclude that such rights are not earned, not to establish the validity of such proposition.

A similar objection is applicable to the statement that seniority rights are created by the collective agreement and expire with the agreement.53 "[T]he rule has always been . . . that . . . 'collective bargaining agreements do not . . . extend [seniority] rights . . . beyond [the] life [of a contract], when it has been terminated in accordance with its provisions.'"54 If this statement is to be more than a mere assertion, it must imply that seniority rights do not survive the agreement because they are created by the agreement. That such proposition is erroneous becomes immediately apparent upon observing that other fringe benefits survive the termination of the collective agreement which created them. The principal case cited for this proposition is the only reported decision holding that a contractual recall period is cut off by termination of the agreement and is distinguishable from Glidden because the union ultimately ratified the abrogation of job security rights; the other cases cited for this proposition uphold the right of a union to modify seniority rights. The fact that a union may bargain away seniority rights does not support the contention that such rights are not earned or vested. The union is the representative of the employees, the employer is their opponent at the bargaining table. Thus the policies behind judicial refusal to interfere with a union's ability to modify or eliminate employee rights are not relevant to the employer's assertion that he may abrogate such rights. Union representatives have a statutory duty to further the interests of all the members of the bargaining unit;55 in the process of advancing the welfare of the majority, the interests of particular employees must occasionally be compromised.56 Unless minority employees have been blatantly denied fair representation, or have been discriminated
against for invidious reasons, for courts are extremely reluctant to scrutinize a union's bargaining policies, for it is believed that excessive judicial activism in this area would inhibit the flexible union leadership needed to deal with changing employee needs.

Remedies

The principal difficulty in fashioning an appropriate remedy lies in establishing guidelines that will enable the employee to receive the benefit of recall rights at the new plant without unduly hampering the operations of the employer or the flexibility of union representatives. Where employees are found to have earned the right to be recalled and are not represented by a union at the new plant, a court should assure that the employer does not take action which would render the recall right illusory. In order for recall rights to be meaningful, there must be some limitations on the employer's power to affect the welfare of transferred employees. Such employees should be entitled to comparable job positions at the new plant to the extent that they are available.


59. The problem of integration of employees whose employment was interrupted by military service is handled by the Selective Service Act of 1948, § 9, 62 Stat. 614 (1948), 50 U.S.C. App. § 459 (1958), and especially § 459(c)(1) which gives protection against discharge without cause for one year after reinstatement. This is designed to aid those returning to non-unionized jobs. Those returning to unionized work are guaranteed retention of seniority which would have accrued had they remained in the unit for the same period. The basic right to the job was demonstrated in Dame v. C. A. Batson Co., 157 F. Supp. 862 (D. Mass. 1958), where a common laborer was given damages for the employer's failure to make work available to him. The court conceded that the employer may normally select his employees daily where there is no seniority system, but held that the veteran was entitled to some "preference." The employer cannot escape the statutory obligation by sale of the business; Rix v. Turnbull-Novak, Inc., 245 F.2d 809 (8th Cir. 1957). Although concededly there is statutory authority in these cases for protection of the job rights of transferred employees against employer action directed at rendering the job right illusory, the suggestion is that these cases provide some experience for solving the problems raised by recall rights at a new plant. The statute recognizes the equity of those who served during the war; the proposed rule of construction recognizes the equity of those who have "earned" rights by steady continuation in service.

60. By hypothesis, the new plant replaces the old, so that there is substantial similarity of operations rendering the determination of what is "comparable" less difficult. The returning veteran steps upon an "escalator" upon induction, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). When he returns, he receives a job comparable to that which he would have had if he had remained in the unit, McKinney v. Missouri-K-T R.R., 357 U.S. 265 (1958); McNichols v. Southern Ry. Co., 194 F. Supp. 148 (E.D. Ky. 1961).
Since the right to a job does not necessarily embody the right to any specific wage rate, their wages need not be equal to those they were receiving at the old plant. The employer, however, should not be permitted to nullify the recall right by paying transferred employees lower wages than those received by other employees doing comparable work or by employees whose job positions commanded relatively lower wages at the original plant. Furthermore, an employer should not be free to discharge arbitrarily his transferred employees, nor to revise the seniority roster in such manner as to impair the preferential status for layoff and recall of transferred employees. But there is no reason to require the employer to permit transferred employees to continue earning severance and vacation pay or layoff and recall benefits within the terms of the expired agreement, although rights which have been earned under that agreement must be recognized. This managerial duty should protect the employee only to the extent that he would have been protected under the old contract at the former plant; the employer should still be free to discharge for valid cause, to lay off where economic necessity so dictates, and to modify, alter, or abolish specific job operations and thereby sever employment where good faith business considerations so require.

A transferred employee’s job security rights should endure for the full duration of the recall period to guarantee the employee the kind of job security envisaged by the old agreement. Where there is a fixed recall period, it should begin tolling at the contract termination date or the layoff date, whichever is earlier. Thus, a transferred employee laid off in good faith at the new site should retain the right to successive recall and concomitant job security until the period specified in the old agreement expires. Where there is no fixed recall period, the ordinary understanding of the parties is that employees have received something more than a fixed recall period, for a fixed recall period is ordinarily inserted at management’s behest as a limitation of the employee’s recall rights. Yet the intention could not have been to grant recall rights in perpetuity. Thus, courts must devise some appropriate means of limiting the duration of the indefinite recall right, while preserving vitality commensurate with the original purpose. Since most fixed recall periods are shorter than state statutes of limitations for contract actions, the period provided by such statutes, again tolling from the earlier of the layoff or contract termination date, seems appropriate. To protect the employer from unconscionably long-delayed assertions of the recall right, during which period the employer would be likely to fill the

61. In order to maintain a more efficient working force, management frequently urges the inclusion in the collective agreement of a “cut-off” provision which will serve to terminate the seniority rights of employees who have been laid off for continuous periods of one year or more. Mitchem, Seniority Clauses in Collective Bargaining Agreements, 21 Rocky Mt. L. Rev. 156, 183 (1949).

62. On length of recall periods, see note 61 supra. The following statutes of limitation selected at random suggest that the average statutory period is longer than the average bargained recall period: Del. Code Ann. tit. 10, §§ 8106, 8120 (1953) (three years); Md. Ann. Code art. 57, § 1 (1939) (three years); Cal. Code Civil Proc. §§ 337-38 (four years); Ala. Code tit. 7, § 21 (1960) (six years).
jobs of potential transferees, a dilatory former employee should lose his right of recall. However, he should be entitled to a job if an opening appears within the suggested period.\textsuperscript{63}

The same considerations that required a distinction between the employer's and the union's power to divest employees of earned seniority rights suggest that the above limitations upon management should not apply to a union certified as bargaining representative at the new plant. Courts have been extremely reluctant to substitute their judgment for that of the union negotiators when choice of seniority rosters and placement of competing employee groups within them are at issue.

DAVID R. LEVETI\textsuperscript{†}

\textsuperscript{63.} The period is used as an outer limit in actions brought under the Selective Service Act; Walsh v. Chicago Bridge & Iron Co., 90 F. Supp. 322 (N.D. Ill. 1949). Cf. Cummings v. Hubbell, 7 F.R.D. 360 (W.D. Pa. 1947). The only precedent for this problem is a case holding that indefinite recall rights are limited to the term of the agreement. System Federation v. Louisiana & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941). If previous analysis demonstrating the intended effectiveness of such indefinite periods is sound, the use of the limitations period seems preferable to the disposition in System Federation.

Should the use of the contractual recall period and statutes of limitation prove to be a cumbersome method of limiting duration of the substantive right to recall and job protection, a court might, on analogy to statutorily protected seniority, apply a flat one-year period from the date of removal. Since removal has ramifications akin to decertification, and protection must only be afforded to employees who are unrepresented by a new union, the Taft-Hartley one-year period insulating certification elections provides a further example for the establishment of a one-year period.

\textsuperscript{64.} This suggestion is analogous to a device which was used where the veteran was tardy in asserting his rights: recovery against the employer was limited to prospective benefits only; Anglin v. Chesapeake & O. Ry. Co., 77 F. Supp. 359 (S.D. W. Va. 1948) (action brought 18 months after discharge from service); Thompson v. Chesapeake & O. Ry. Co., 76 F. Supp. 304 (S.D. W. Va. 1948) (16 months). If the delay is too long, the equitable doctrine of laches is available even when the relevant period has not expired. Cases under the Selective Service Act have applied this principle: Lacek v. Peoples Laundry Co., 94 F. Supp. 399 (M.D. Pa. 1950) (four years); Marque v. Stern, 88 F. Supp. 306 (M.D. Pa. 1950) (two years); Polansky v. Elastic Stop Nut Corp., 78 F. Supp. 74 (D. N.J. 1948) (13 months).

\textsuperscript{†}LL.B. 1962, Yale Law School.