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Seniority Rights and Industrial Change: Zdanok v. Glidden Co.

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Most collective bargaining contracts establish a seniority system under which an employee obtains a preferred claim to present and future employment based on the length of his past service. Decisions by management to relocate an entire plant place great stress on the seniority system and raise important questions concerning an employer's obligations under the job security provision of a collective bargaining contract. In this Article, after analyzing the nature of seniority rights, Professor Blumrosen deals with the question of whether seniority rights recognized at the original plant site extend to the new location. He concludes that the courts can best answer the question by an interpretation of the collective bargaining contract that considers the nature of the system of industrial relations and not just the immediate factual situation of a particular case.

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Changes in business organization and production methods are placing severe stress on economic relationships that developed under older technological and business conditions.[1] The seniority system, which provides job security under collective bargaining, is one of the institutions that has been subjected to the pressure of demand for industrial change.

Seniority gives employees a preferred claim to present and future work based on length of past service.[2] The seniority principle assures that as the worker expends his energy, he provides not

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1. For discussions of various phases of the process of technological change, see AMERICAN ASSEMBLY AUTOMATION AND TECHNOLOGICAL CHANGE (Dunlop ed. 1962); BRADY, ORGANIZATION, AUTOMATION, AND SOCIETY (1961); MICHAEL, CYBERNATION (1961).

2. See the full discussion of the scope of the seniority principle in SLICHTER, HEALY & LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104–41 (1960).

only for his immediate needs but also for an uncertain future. Once the system is established, men work not only for current pay but for the expectation of continued employment, barring certain contingencies, until retirement. Seniority with a firmly established employer may be a valuable asset in case of a recession. In reliance on expectations of security created by seniority systems, men forego other opportunities and construct their life patterns. For these reasons, seniority rights are entitled to the fullest judicial protection possible.[3]

Yet seniority rights cannot be treated as absolute. The collective bargaining process from which they emerge involves the continuous adjustment of terms of the employment relationship. Union and employer need flexibility to alter elements of this relationship in light of experience or in anticipation of new developments. Furthermore, the union needs flexibility to work out conflicts in seniority claims within its own ranks.

The task of reconciling these complex interests has fallen to the judiciary in the absence of explicit legislative direction. The courts have given the unions broad discretion to modify and, in some instances, to destroy seniority rights in negotiation with management. This discretion is regulated by the principle that the union must fairly represent all of the employees in the bargaining unit. The concept of fair representation allows the union considerable leeway in selecting among various claims.[4] One court has become sufficiently concerned with the importance of seniority to substitute a "fair and reasonable solution" test for the "broad area of discretion" test in a recent case where the union merged seniority lists incident to a merger of two establishments.[5]

The possibilities for change in the organization of the production process have placed the seniority system under severe stress. A comparison of the cost of union demands with the cost of au-

3. See the extensive discussion in the relatively early case of Dooley v. Lehigh Valley R.R., 130 N.J. Eq. 75, 21 A.2d 334 (Ch. 1941), *aff'd per curiam*, 131 N.J. Eq. 468, 25 A.2d 893 (Ct. Err. & App. 1942).

4. See generally Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 FORDHAM L. REV. 259 (1960); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

5. O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W.2d 484 (1961). For a discussion of cases dealing with negotiated changes in seniority rights, see Blumrosen, *Union-Management Agreements Which Harm Others*, 10 J. PUB. L. 345, 366–72 (1961).

tomating or building a new establishment may give management a potent bargaining table weapon. This may lead to a contractual weakening of seniority claims. Management may modify the seniority system or even avoid collective bargaining altogether by automating or by transferring either the particular work or the entire plant to another location.

The "plant removal" cases supply a dramatic illustration of the problem. The movement of a plant places a strain on the seniority principle along the dimensions of both time and place. It creates difficulties on the level of policy, legal theory, and contract construction. Many of these difficulties were apparent in the case of *Zdanok v. Glidden Co.*,[6] which has become a *cause celebre* in labor law and deserves close examination.

I. FROM MANAGEMENT PREROGATIVE TO A CONSIDERATION OF THE WHOLE AGREEMENT

Historically, problems of movement of work or plant were approached with a "management prerogative" orientation. Unless the contract in explicit language limited the employer, he was free to reorganize his business, introduce technological change, or subcontract. By changing the nature or location of his work requirements, the employer could avoid obligations of the collective bargaining agreement.[7]

Collective bargaining has established a complex network of relations between and among union, employer, and employees that now defies such a simple analysis. Seniority clauses, job classifications, recognition clauses, and guarantees against improper discharges do in fact relate to the work that employees have been doing under the control of the employer. Thus they are relevant to the question of management's freedom to act, although this is not recognized by the management prerogative thesis. The following types of clauses relating the employee to the work are contained in most collective bargaining agreements.

The recognition clause will normally identify the union as bargaining agent for a certain type of employee—for example, pro-

6. 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1962). The *Zdanok* case has been discussed in Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 VA. L. REV. 291 (1962); Note, 37 IND. L.J. 380 (1962); Note, 16 RUTGERS L. REV. 416 (1962); Note, 1962 WIS. L. REV. 520; Comment, 72 YALE L.J. 162 (1962); 61 COLUM. L. REV. 1363 (1961); 110 U. PA. L. REV. 458 (1962).

7. See, *e.g.*, Amalgamated Ass'n of St. Elec. Ry. Employees v. Greyhound Corp., 231 F.2d 585 (5th Cir. 1956).

duction, maintenance, or clerical employees. This definition of the relationship between union and employer is based on the assumption that the employer has control over certain job opportunities.[8]

The job description and classification clause will, with more or less detail, identify the different operations performed by employees. The identification is useful for several purposes including pay differentials and different lines of seniority. This clause in turn more specifically relates certain employees to specific work.[9]

Clauses dealing with layoff and recall, the heart of the seniority system, assume that the employment opportunities under the control of the employer may fluctuate. Layoff is from, and recall is usually to, a specific job or type of job to which seniority attaches. This intimately relates the employee to the job.[10]

Clauses protecting employees against discharge except for just cause, while dealing primarily with employer action based on conduct or ability of the employee in relation to his job, are also relevant to the manner in which the employer disposes of opportunities for continued employment.[11]

These clauses establish a set of relationships between the employee and his work that cannot be ignored. The fundamental reason for the negotiation of such clauses into the collective contract—and for the contract itself—lies in the fact that the employer controls certain employment opportunities. If in exercising this control the employer can destroy job opportunities for his employees, he can reduce these clauses to a set of meaningless abstractions.

The modern collective bargaining agreement has created conflicting claims of employer freedom and employee security that require evaluation in light of the circumstances of each relation-

8. See discussion of the various views of arbitrators as to the significance to be attached to the recognition clause in SLICHTER, HEALY & LIVERNASH, *op. cit. supra* note 2, at 309–12. *Compare* the approach of Arbitrator Dworkin in Weatherhead Co., 30 Lab. Arb. 1067 (1958), *with* that of Arbitrator Gray in Hearst Consol. Publications, Inc., 26 Lab. Arb. 723 (1956), on the relation between recognition clauses and subcontracting disputes. A recognition clause does not destroy managerial claims, but in conjunction with other clauses, it does relate the employee to the work he has been doing and thus helps to provide a foundation for his claim.

9. See generally SLICHTER, HEALY & LIVERNASH, *op. cit. supra* note 2, at 244–79, 558–90.

10. See generally *id.* at 142–77 for a discussion of layoff and recall problems in collective bargaining.

11. See, *e.g.*, Hearst Consol. Publications, Inc., 26 Lab. Arb. 723 (1956). *But see* Local 2040, Int'l Ass'n of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), discussed in note 27 *infra.*

ship. The management prerogative analysis does not evaluate or accommodate these conflicting claims. Rather, it summarily rejects claims based on job security and seniority provisions of the contract. Therefore, the management prerogative thesis conflicts with the long-established principle of contract law that requires an examination of all aspects of the agreement in an effort to make related sense of all of its provisions.[12] The management prerogative thesis has accordingly been receiving cooler judicial reception.

As a starting-point from which to begin reasoning toward a solution to a problem of construction of a collective contract, the management prerogative thesis was rejected in the *Warrior & Gulf* case.[13] There it was argued that management prerogative precluded submission of a subcontracting claim to arbitration. The Court rejected the management prerogative approach and construed the agreement in light of labor policy favoring arbitration. The rejection of management prerogative as the premise from which to begin construction of the labor agreement has implications that go beyond arbitration. Every area of contract law is affected, including the construction of seniority clauses.

A clear indication of this development is the *Webster Electric*[14] case, holding that subcontracting is an improper dilution of seniority and related job rights although the contract did not explicitly limit the right to subcontract. The court reasoned that subcontracting would necessarily interfere with the employee claims to work. This decision is the first of its kind.

Given the prevalence of arbitration clauses, the *Warrior & Gulf* decision will channel most problems concerning plant removal and seniority claims into arbitration. The arbitrators tend to deal with these cases on an *ad hoc* basis; they have not developed abstract principles to resolve them.[15] If the parties have not agreed to

12. For the express application of this principle to a collective bargaining agreement, see Mr. Justice Brennan's opinion in Kennedy v. Westinghouse Elec. Corp., 16 N.J. 280, 287–88, 108 A.2d 409, 412–13 (1954).

13. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). See also United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The literature concerning these three steelworker cases is enormous. See, *e.g.*, Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360 (1962); Smith, *The Question of "Arbitrability"—The Role of the Arbitration, the Court, and the Parties*, 16 SW. L.J. 1 (1962); 45 MINN. L. REV. 282 (1960).

14. UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962). For another example, see note 26 *infra*.

15. See the analysis of arbitration cases concerning subcontracting in Celanese Corp., 33 Lab. Arb. 925 (1959); Note, 37 N.Y.U.L. REV. 523 (1962); Note, 13 RUTGERS L. REV. 702 (1959). Arbitrator Seward

arbitrate, or if their agreement is not broad enough to cover this type of dispute, the courts must harmonize stability of employment with managerial freedom to reorganize the productive process.

II. *ZDANOK v. GLIDDEN CO.*: "VESTED" OR "CONTRACTUAL" SENIORITY RIGHTS?

The problem of how to reconcile employment stability with managerial freedom to relocate was sharply raised in *Zdanok v. Glidden Co.*[16] The Glidden Company closed its plant at Elmhurst, Long Island, and laid off its employees. The work previously done at Elmhurst was transferred to a new plant in Bethlehem, Pennsylvania. The layoffs took place during the last months of a collective agreement, and the plant was closed after the contract expired. The Glidden Company agreed to consider the Elmhurst employees—some of whom had worked for Glidden for as long as 25 years—as applicants for new employment at Bethlehem, but refused to recognize seniority that had accrued at Elmhurst.

An attempt by the union to arbitrate the transferability of seniority rights was rebuffed by a New York court.[17] A group of employees then sued Glidden for violation of the collective contract in federal court. These employees had been laid off while the

examined a group of subcontracting cases in Bethlehem Steel Co., 30 Lab. Arb. 678, 682 n. (1958). He reported:

> It is true that a number of arbitrators have held that Management retains its full right to contract out unless that right is qualified or limited by express contract language. . . . But a number of other arbitrators have held to the contrary—have agreed, in effect, with Cardozo that "a promise may be lacking, and yet the whole writing may be instinct with an obligation imperfectly expressed" . . . and have found that an implied bar against contracting out did exist in the cases before them. . . . Within each group of decisions, moreover, there are conflicts of principle and approach. The Umpire has returned from his exploration of the cases a sadder—if not a wiser—man, echoing the plaint of Omar Khayyam:
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> "Myself when young did eagerly frequent
> Doctor and Saint and heard great argument
> About it and about: but evermore
> Came out by that same door where in I went."

16. 185 F. Supp. 441 (S.D.N.Y. 1960), *rev'd*, 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1962).

17. In the Matter of General Warehousemen's Union, 10 Misc. 2d 700, 172 N.Y.S.2d 678 (Sup. Ct. 1958). If the issue were to arise today, the court would probably have ordered arbitration in response to the trilogy of steelworker cases, cited note 13 *supra*, decided by the Supreme Court in 1960. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1554 (1962).

contract was in effect. The contract entitled employees with more than five years seniority to be recalled if a suitable opening occurred within three years of layoff. Employees with less than five years seniority were entitled to preferential re-employment within two years of layoff. After the expiration of the two and three year periods, the employees would not be entitled to re-employment, and the employment connection would be severed. The Court of Appeals for the Second Circuit held that the seniority rights did not terminate when the rest of the agreement expired, but persisted for the additional periods indicated in the contract, and that these rights attached to the work at the new plant in Bethlehem.[18] The court thus protected the seniority claims along dimensions of time and space.

To conclude that the court based its decision on the abstract principle that seniority rights had "vested" is neither accurate nor illuminating. "Vesting" is simply legal shorthand indicating that relations once established may not be terminated except under defined conditions. The term "vested" does not itself define these conditions and therefore *cannot* determine in any given case whether seniority rights continue or terminate. While the court used the term "vested" in its opinion,[19] and while some commentators have concluded that this concept provided the basis of the decision,[20] it seems clear that *Zdanok* rested on two specific assumptions.

First, it is obviously important that the employees could "trace" the work that they had been doing at Elmhurst to the new Bethlehem plant. Glidden had combined elements of several jobs, but the court did not think that the combination provided any serious obstacle to the usefulness of Elmhurst employees at Bethlehem. If the employer had radically reorganized his production by automation or otherwise, it might have been impossible for the employees to trace their jobs. Even if they could have traced them, a serious question of employee ability to perform these newly designed jobs might have arisen. This ability to trace the work provides a major limitation on the scope of the decision. The case dealt with a movement of production facilities, but this movement did not involve drastic rearrangement of the production process itself.

18. 288 F.2d at 103–04.

19. *Id.* at 103. The discussion of vested rights in the opinion was in response to a contention that the seniority provisions of the agreement expired with the rest of the contract despite the three year right to recall clause.

20. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1535, 1548, 1552–53 (1962).

Second, the court relied heavily on the clause in the collective agreement that provided for re-employment within a stated time after layoff.[21] Any discussion of the concept of "vested" seniority rights must turn on contract provisions that deal with duration of the right to be recalled to work, for this is the heart of the seniority system. This point requires amplification.

A. Duration of Right of Recall Where the Contract Is Silent

If the collective agreement is silent on the matter, an employee laid off under a contract that recognizes the right of recall is entitled to be recalled *during* the term of the contract if a suitable vacancy develops.[22] But what happens if, as in *Zdanok,* the vacancy develops *after* the expiration of the contract? If the contract itself is silent on this matter and there is no later controlling agreement, there are two possible analyses. (1) The right to recall continues after the expiration of the particular contract because the parties intended to provide meaningful job security for employees laid off at any time during the contract period, not just for those laid off at its beginning. (2) The promise does not survive the termination of the contract since the expectations of the parties concerning a continued employment relationship are not clear. Unless the opportunity for recall arises during the contract period, the employee gains no benefit from the promise.

The courts have adopted the latter approach. The leading case is *System Fed'n No. 59, Ry. Employees v. Louisiana & Ark. Ry.*[23] In that case, a contract providing for seniority rights was entered into in 1929. It ran for two years, during which time plaintiffs were laid off. It was replaced in 1931 by a set of company rules that did not entitle them to be recalled if their layoffs extended beyond a year. In 1937, a new collective bargaining agreement confirmed the arrangements under the 1931 rules. Nearly ten years after the layoff and after Railway Adjustment Board proceedings, plaintiff sued, contending that the promise to recall extended beyond the life of the agreement and had never been properly terminated. In 1941, the Fifth Circuit rejected his claim, concluding that the promise to recall terminated with the terminal date of the rest of the contract.

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21. 288 F.2d at 102–03.

22. A. D. Juilliard & Co., 15 Lab. Arb. 934 (1951) (Maggs, Arbitrator). *But see* California Cotton Mills Co., 14 Lab. Arb. 377 (1950) (Marshall, Arbitrator), implying a one-year limitation on the right to be recalled on the basis of past practices of the parties.

23. 119 F.2d 509 (5th Cir.), *cert. denied,* 314 U.S. 656 (1941).

The law to be applied to this case was the law of 1929, the date the contract was made. At that time, collective bargaining, even in the railroad industry, was not firmly established. The great labor reforms that made collective bargaining the normal way of administering the employment relation still lay in the future, beyond the Great Depression. Employer responsibility to employees in connection with employment opportunities was not established, and expectations concerning the stability of seniority claims had not firmly developed.[24] Thus, as a matter of contract construction under these conditions, the *Louisiana & Ark. Ry.* case was probably correct. Furthermore, a decade had intervened between the time of the alleged contract violation and the decision. During this time, other rights had ripened, and new collective bargaining relations had been established. Under all of these circumstances, it would have been difficult, if not improper, for the court to render a decision that might upset these relationships.

Because of the changes in labor-management relations and legal policies toward collective bargaining, this decision, based on the law of 1929, should not be relied on in 1963 for a point of contract construction. If the question arose today, a court examining the problem independently of the *Louisiana & Ark. Ry.* case might reach a different conclusion. As the underlying economic and legal realities change—and in this field they have changed drastically—there is no reason to expect that new parties under changed circumstances hold the same attitudes toward the issue under consideration. In light of the currently recognized importance attached to seniority, a construction that protects seniority claims is more appropriate than one that minimizes them. Until a court is willing to re-examine the *Louisiana & Ark. Ry.* case, however, we will assume that unless the contract specifically provides that seniority rights shall continue after the collective contract has expired, they will not do so. This forces us to focus sharply on the clause extending the right of recall for a definite period of time after layoff.

B. Duration of Right of Recall if Established in the Contract

Contract clauses providing for re-employment within a stated time after layoff are quite common today.[25] They establish a terminal date after which seniority claims cannot be asserted by

24. See generally BERNSTEIN, THE LEAN YEARS 144–89 (1960).
25. See generally SLICHTER, HEALY & LIVERNASH, *op. cit. supra* note 2, at 104–41.

the employee. This terminal date may be long after the expiration date of other terms of the contract. If a man is laid off shortly before the expiration of the contract, his re-employment rights under such a clause must persist after the expiration of the rest of the contract. Any other construction would give maximum protection to those laid off on the first day of the contract and none to those laid off on the last, a result not contemplated by any bargainers in labor relations. In *Zdanok,* the three-year right of recall extended beyond the two-year contract from the very first day of the agreement.

Normally, the question of duration of the right of recall under such a clause will not arise because a subsequent collective contract will be negotiated. If the new contract simply continues the existing system, the question of whether an employee's right arose under the old or the new agreement is not important. If the new contract extends the right of recall, the only objectors would be the lower seniority men whose opportunities for advancement are diluted by the expanded claims of the higher seniority men. They can attempt to pressure their union not to extend the clause, but that is the limit of their power.

If the seniority period is reduced, the high seniority men suffer a diminution in their job security. They may assert that such a diminution violates the duty of fair representation on the part of the union.[26] All of the complex employee-union issues would then arise and ultimately the union would be required to justify its action.

If no subsequent agreement is negotiated, the issue of survival of recall rights under the expired contract is clearly projected. The argument that the right of recall "expired" with the termination of the contract has already been dismissed. The parties have created a situation where the seniority claim may be enforced after the expiration of other provisions of the contract.[27] All

26. The dilution of seniority rights was the principal basis for the holding in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), that the union had violated the duty of fair representation. See Blumrosen, *Union-Management Agreements Which Harm Others,* 10 J. PUB. L. 345, 358–82 (1961).

27. Local 2040, Int'l Ass'n of Machinists v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), involved the total discontinuance of manufacturing operations by the employer and the discharge of all employees. The employees contended that provisions of the contract extending the right to recall from 12 to 24 months after layoff entitled them to certain benefits that would accrue in the period after discontinuance of the manufacturing operations. To invoke these provisions, the employees argued that they had not been discharged for just cause under the contract. The court never reached the question of the significance of the duration of right to recall

provisions of the agreement need not terminate at the same time. In *Zdanok*, the contract ran for two years, but the right of recall ran for three; obviously, the parties knew that the right of recall extended beyond the expiration of the rest of the contract.

It has been argued that the parties contemplated that a new contract would be made during this latter period, and that since this was not done (because of the movement of the plant), the contract should be ignored.[28] The argument contains an element of the fanciful. It is a fundamental axiom of labor relations that the parties contract with reference to an ongoing relationship of indefinite duration and the contract captures and stabilizes certain elements of that relationship. It is doubtful, however, whether the parties had any understanding of the consequences that would result if the union ceased to represent the employees at the end of the contract period. Their only intention related to an ongoing employment relationship, and the employment relationship did continue, albeit without the union. Therefore, it would seem that this promise should be enforced by its terms against the employer unless a new collective agreement superseded it[29] or unless the employee agreed to waive it. Thus construed, the collective agreement in *Zdanok* contained two terminal dates, one for the seniority clause and the other for the rest of the contract. This analysis is simple and straightforward as long as one avoids the semantic trap posed by the word "terminated." For if one asks, "How can seniority rights persist after the contract is terminated?," the answer is likely to be that they cannot. But to say that seniority rights "terminated" assumes the point in issue. In the *Zdanok* case, the seniority rights did not terminate, but continued for up

provisions because it held that the discontinuance of business justified the discharge of the employees independently of the just cause provision of the contract, relying on the management prerogative thesis developed in Chicago & N.W. Ry. v. Order of R.R. Telegraphers, 264 F.2d 254 (7th Cir. 1959). The latter decision was reversed in Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960). The Supreme Court held that the management prerogative argument did not justify enjoining the union from striking over demands concerning the curtailment of jobs. Reliance on the *Chicago & North Western* case makes clear that the court in *Servel* was concerned only with the discontinuance of a manufacturing operation. Whether or not it was correct in its decision, the case is clearly not significant in connection with cases of plant removal where the manufacturing operations continue. The history of the *Chicago & North Western* case, on which the *Servel* decision was based, provides another example of the judicial rejection of the management prerogative thesis as the basis for construction of collective agreements. See text accompanying notes 7–12 *supra*.

28. 61 COLUM. L. REV. 1363, 1365 (1961).

29. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

to three years after layoff. This is what the court of appeals meant by the "vesting" of these rights.[30]

C. Duration of Right of Recall if Layoff Takes Place After the Contract Expires

Suppose the employee had been laid off after the "expiration" of the contract? Could he invoke the three-year-recall provision? The answer would seem to be no—at least, not directly. Seniority claims must be related to a contract made by the employer.[31] Once the collective contract has expired, it cannot provide the foundation for claims to seniority benefits on behalf of employees thereafter laid off. Those employees who continue to work after expiration of the contract are presumably employed under individual employment contracts that became effective when the collective contract expired.[32]

In the absence of an express employment contract, it is a judicial function to define the elements of this "implied in fact" contract. In determining the reasonable value of the employee's services, the past employment contract—here a collective agreement —establishes the standard.[33] Since compensation under a collective contract takes various forms, it may be difficult to approximate the value of that compensation.

1. Converting Fringe Benefits Into a Wage

The court could establish the value of all the fringe benefits, seniority, and the like, and convert it into a weekly or hourly wage. This would result in a substantial increase in the hourly cost of labor in many instances. Fringe benefits, which cannot easily be measured, represent up to 14 percent of an employee's wages.[34]

30. This analysis of *Zdanok* is confirmed in Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 186 (2d Cir. 1962), and is consistent with Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962).

31. Elder v. New York Cent. R.R., 152 F.2d 361 (6th Cir. 1945).

32.

> Men may continue work after a collective agreement expires and, despite negotiations in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern. The conditions for collective bargaining may not exist . . . . As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.

J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

33. See 1 WILLISTON, CONTRACTS § 90 (Jaeger ed. 1957). For discussions of judicial treatment of the survival of other types of employee benefits after expiration of the collective contract, see Note, 54 NW. U.L. REV. 646 (1959); Note, 16 RUTGERS L. REV. 416 (1962).

34. 182 Daily Labor Rept., Sept. 18, 1962, § B, p. 7.

The employees would thus earn more take-home pay without a collective contract than with it. This approach would add to the union's bargaining power since working without a contract might become expensive for the employer. Furthermore, the valuation of seniority, pension, arbitration, and other rights would be very difficult. The time and energy involved would not be worth the result.

2. Ignoring Fringe Benefits

The court could ignore the value of all such nonwage benefits and award on the principle of quantum meruit only the same cash wage as that earned under the expired collective contract. While simpler, this alternative would be unfair to the employee because it would reduce his wages to a level below that established by the collective agreement. Such a reduction—14 percent of an employee's wages in the typical case—is unjustifiable. Presumably, the services are worth as much the day after the collective contract expired as they were the day before.

3. Incorporating Certain Terms of the Collective Contract

The court could adopt an analogy from the law of individual employment contracts[35] and of tenants holding over after the expiration of a lease,[36] and continue in the individual contract the terms of the collective bargaining contract until they are changed by an express contract between the employer and the employee.[37] This alternative provides the most convenient measure for valuing the employee's services. Furthermore, it encourages the employer to make new bargains with the individual employees.

The problem of incorporation of the terms of an expired collective agreement into the succeeding individual employment contract has been recently examined in *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*[38] In that case, the union sought arbitration of grievances that arose after a collective contract had expired and before a later collective agreement was negotiated. Neither collective agreement expressly covered the period in which the grievances arose, but during this interval

35. See note 32 *supra*. See also Martin v. Campanaro, 156 F.2d 127 (2d Cir. 1956); Art Wire & Stamping Co. v. Johnson, 141 N.J. Eq. 101, 56 A.2d 11 (Ch. 1947), *aff'd*, 142 N.J. Eq. 723, 61 A.2d 240 (Ct. Err. & App. 1948).

36. 1 CORBIN, CONTRACTS § 96 (1959).

37. On the continued relevance of selected common-law rules in labor relations, see Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 14–15 (1958).

38. 202 F. Supp. 518 (E.D.N.Y.), *rev'd*, 312 F.2d 181 (2d Cir. 1962).

the employees continued to work and the employer made no significant changes in the conditions of employment.

The district court ordered arbitration on the grounds that the right to arbitrate was one of the conditions of the continuing relationship of employer and employee even after the collective agreement expired. The court of appeals reversed, construing the arbitration clause of the expired contract to permit only the union or the employer, but not the employee, to secure arbitration.[39] The court reasoned that since the employee had no right to arbitrate *under* the collective agreement, its expiration could not provide the basis for the recognition of such a right. The collective contract did not create an expectation of an individual right to arbitrate that the court could be called upon to recognize in the succeeding individual contract.

By examining the relevant terms of the expired collective agreement to determine if it should be incorporated into the individual contract, the court utilized the analysis suggested here. Once it was determined from an examination and interpretation of the collective agreement that the claimed arbitration provision did not run to the individual but only to the union, the court properly denied the petition for arbitration. Since only arbitration was sought, the court was not required to interpret or construe the terms of individual employment contracts that were effective on the dates of the grievances.

Given the interpretation of the collective agreement and the type of relief requested in *Procter & Gamble,* the decision was sound. Unfortunately, the court used some general language not necessary to the decision that may cast doubt on the validity of the process of incorporating relevant terms of an expired collective contract into succeeding individual employment contracts. It stated that once the collective contract expired, "there is no ground whatever for considering that the old agreement still gov-

39. The arbitration clause is ambiguous on the question of whether an employee may secure arbitration. See 312 F.2d at 185 n.4. The definition of grievances includes disputes between employer and employee, and such grievances relating to the interpretation and application of the agreement are arbitrable. However, union and employer are to select the arbitrators. This would not necessarily deny the employee's right to submit disputes to the arbitrator. Section 5 of the arbitration clause confines the arbitrator to issues submitted by the employer and the union and makes no mention of the individual. This is the strongest language in support of the court's conclusion. A contrary construction of the arbitration clause would have been permissible. See Gilden v. Singer Mfg. Co., 145 Conn. 117, 139 A.2d 611 (1958). But the Second Circuit has decided against such a construction. See Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962).

erns the relationship of the parties . . . ."[40] The reference here is ambiguous. If by "parties" the court meant the relation between union and employer, it was clearly correct because the agreement had expired.[41] If by "parties" the court meant the relation between employer and individual employee, the statement would be technically true because individual, not collective, contracts would govern the relationship. But if these individual contracts incorporate some terms of the expired collective contract, then the expired collective contract would, in a loose sense at least, "govern" the relationship between the parties. The court discussed this possibility only in connection with the arbitration clause.

Having held that the arbitration clause of the expired collective contract did not inure to the benefit of the individual employee, the court went on to state:

> [E]ven if it could be argued that employees had any right to compel arbitration under the [expired] collective agreement . . . there would be no more reason to hold that that right survived the expiration of the agreement to arbitrate than there would be to hold that the union's right so survived.[42]

This language would seem to oppose the incorporation theory, at least where arbitration clauses are concerned. The court suggests that the reason for denying the union the right to arbitrate would also justify denying the individual the right to arbitrate. But this reasoning is unsatisfactory. The reason for denying the union's right to arbitrate is that the collective agreement that created the right had expired by its own terms. This cannot be said of the claimed individual contract right to arbitrate. The individual contract right did not come into existence until the collective agreement had expired. Therefore, the reason for denying the union's right to arbitrate—the expiration of the collective contract —cannot possibly provide the basis for denial of the individual employee's right to arbitrate under the terms of an individual employment contract that the court must construct upon termination of the collective agreement.

In the case put by the court, where the collective agreement provided for an individual right to arbitrate and the men continued to work after its expiration with no changes in the condi-

40. 312 F.2d at 184.

41. This is the most probable meaning of the sentence. The cases cited for the proposition are all cases in which the issue was whether the collective bargaining agreement had expired or was still in effect by reason of various informal extensions when the matter in litigation took place.

42. 312 F.2d at 186.

tions of employment mentioned,[43] there is no reason why the individual employment contracts could not be interpreted to include this right. The enforceability of the right would depend on state, not federal, law. Under the common law or state statutes that enforce only written arbitration agreements, the promise might not be enforceable.[44] But these problems should await disposition in appropriate cases. In any event, *Procter & Gamble* deals only with an arbitration clause and not with the problem of incorporating other substantive terms of an expired collective contract into the succeeding individual contract. Thus, *Procter & Gamble* need not be read as rejecting the principle that the expired collective contract provides the standard for determining the terms of the succeeding individual employment contract.

Incorporating the terms of the collective bargaining agreement into the individual employment contract is the least difficult to apply of the three alternatives. It is relatively simple for the courts to administer if the distinction suggested in *Procter & Gamble* —that terms of a collective contract running exclusively to the union cannot be so incorporated—is kept in mind. The incorporation theory combines practicality and fairness—practicality by enabling the employer to restructure his employment relationship when the contractual collective contract has expired by posting a notice of changed conditions; fairness by requiring the employer to disabuse the employees of expectations of continued treatment in conformity with the collective agreement. This bur-

43. *Ibid.*

44. At common law, agreements to arbitrate were not enforceable. See STURGES, COMMERCIAL ARBITRATION AND AWARDS 82–84 (1930). Under statutes in many states, agreements in writing to arbitrate have been made enforceable. See N.Y. CIV. PRAC. ACT § 1449, which presumably would govern the dispute in the *Procter & Gamble* case since it arose on Staten Island, New York.

Once it is assumed that state rather than federal law governs the interpretation of such individual contracts, the problem of federal court jurisdiction emerges once again. Except on some theory of protective jurisdiction, these cases would not seem to fall within the federal question jurisdiction of the district courts. They do not arise under § 301 of the Taft-Hartley Act. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). It might be argued, however, that the interpretation of the individual employment contracts must follow the federal substantive law in related areas under both § 301 and §§ 7, 8, and 9 of the Taft-Hartley Act. 61 Stat. 140–46 (1947), 29 U.S.C. §§ 157–59 (1958). These statutory provisions may establish a sufficient federal question basis for such actions. Since the federal question issue turns on the pleadings initially, the matter cannot be disposed of in the abstract, but only on examination of the particular case. This discussion should indicate that the matter is sufficiently intricate, both as a matter of federal jurisdiction and as a matter of applicable substantive law, to require more extended treatment in appropriate cases than was given in the *Procter & Gamble* decision.

den should rest on the employer, who preserves the initiative to make changes in the individual employment contract.

The principle of incorporation would include the seniority clause in the expired collective contract. An employee laid off after a collective agreement had expired might be able to establish that the right to be recalled had become a part of the individual employment contract that superseded it unless the employer had negotiated a new individual employment contract that denied such expectations.[45]

In summary, if the collective contract contains a promise to re-employ in order of seniority after the contract's "terminal date," the promise is enforceable according to its terms on behalf of an employee laid off during the contract period. It cannot be enforced by an employee laid off after the collective contract expired, but he may be able to establish that the terms of the collective contract carried over into his individual contract and thus indirectly enforce it.

III. TERRITORIAL SCOPE OF RIGHT TO RECALL

If the employer moves his plant, do seniority rights that are recognized at the original site extend to the new location?[46] If

45. The case of Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956) is often cited for the proposition that terms of the collective contract (in that case, severance pay) are not to be incorporated into the individual contracts that come into existence after the collective agreement expires. In that case, employees worked for some time after a collective agreement expired, were discharged, and sought severance pay. The court held that they were entitled to severance pay measured by their length of service under the collective agreement, but not by service under the subsequent individual contracts. The court stated that it would not give the collective contract such *in futuro* effect. An examination of the case discloses that within a week after the collective agreement expired, individual contracts that did not provide for severance pay were entered into between employer and employee. Thus the court properly held that severance pay rights did not accumulate under the individual contracts, but the principle of nonincorporation of collective contract terms into individual contracts was clearly irrelevant since the parties had entered into individual contracts that did not provide for severance pay. See Blumrosen, *Labor Law 1954–1956*, 11 RUTGERS L. REV. 171, 178–82 (1956).

46. Whether the Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 136, 29 U.S.C. § 141 (1958), as amended, 73 Stat. 519 (1959), 29 U.S.C. § 401 (Supp. III, 1962), has been violated by the move is not germane to the question of whether the employer breached its contract. Smith v. Evening News Ass'n, 371 U.S. 195 (1962). A breach of contract, however, might provide one basis for a finding by the NLRB that the employer has violated the statute. See the discussion in Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1557 (1962). Recent NLRB decisions suggest that the decision of whether to relocate a plant may now fall within the

the parties have dealt explicitly with the contingency of plant movement in the contract, the only judicial or arbitral function is to implement and enforce their agreement.[47] The problem is more complex in connection with clauses that were drafted to meet some other problem but bear indirectly on the problem of plant removal. When dealing with these clauses, the courts must be wary of following the parties' intention into a legal wilderness. This temptation is often presented by the introductory clause in the contract that identifies the subject matter of the agreement. In *Zdanok,* for example, the contract provided that it was made by the company "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."[48] It was argued that this clause limited the territorial scope of the contract, making seniority rights inapplicable to a new plant in another location. The majority of the court of appeals in *Zdanok* quite sensibly concluded that the "statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it."[49] Unless the clause identifying the location of the employer's operation had been a focal point of dispute over the territorial scope of the agreement, the majority in *Zdanok* is correct. The identification of the location of the employer normally does not carry with it *any* disposition of the question of whether the employees are entitled to follow the work to a new plant. Pursuing the intent of the parties through such clauses is difficult and unreliable.

The difficulties in attempting to rely on either the language of the recognition clause or the history of collective bargaining negotiations, neither of which were directed to the issue of plant movement, are vividly demonstrated by the opinions of the courts in *Oddie v. Ross Gear & Tool Co.*[50] One stands unconvinced by the

range of mandatory bargaining. See Town & Country Mfg. Co., 136 N.L. R.B. No. 111 (1962).

47. See Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962).

48. 288 F.2d at 103.

49. *Id.* at 104.

50. 195 F. Supp. 826 (E.D. Mich. 1961), *rev'd,* 305 F.2d 143 (6th Cir. 1962), *cert. denied,* 371 U.S. 941 (1963). The recognition clause provided:

> The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining . . . .

305 F.2d at 147. The district court and the court of appeals differed on the significance of this clause. The district court said that although this clause appears to limit the territorial scope of the contract, it was negotiated when the union gave up a claim to represent employees in another

court of appeals' adherence to the "plain meaning" of the contract and unpersuaded by the reasons given by the district court as to why the contract should be read as covering the work when moved. The basic problem of reconciling the interest in managerial freedom with the reasonable expectations of employees cannot be resolved solely by reference to the language of an agreement that was not drafted with the problem in mind. The fact that the parties did not agree to resolve the conflicting claims cannot be treated as a resolution in favor of one side or the other or as a denial that any conflict exists. Additional factors must be considered before the problem can be appropriately resolved.

A. Construction of Seniority Clauses in Light of National Labor Policy

The *Zdanok* decision combines pragmatic and policy considerations. If the employees can follow the work without difficulty, there seems to be no reason why they should not do so. They have established many years of association with the work, and no other employees have claims to it. Management could continue to have them as useful workers.[51] Why not construe the contract so as to recognize their claims? What is the hazard in this construction?

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plant located in the Detroit area, but outside the city limits. Thus it did not deal with the question of territorial scope when the employer moved his plant to a new location. 195 F. Supp. at 828–30. But the court of appeals held that the language unambiguously determined territorial scope. The reference to more than one plant meant that this language is not merely descriptive as in *Zdanok*. 305 F.2d at 149. Thus, the court of appeals would have the narrower clause in *Zdanok* give greater territorial scope to the contract than the broader one in this case.

Also, the union had attempted to secure a clause providing that if the employer moved his plant, the union was to be recognized as bargaining agent at the new location and the matters of transferring employees, severance pay, and the like would become bargainable. This clause was not included in the contract. The significance attached to this history was also assessed differently by the district and circuit courts. The district court said that this proposal was inspired by rumors that operations in Detroit would be transferred to an existing plant of the employer in Indiana. Once the union learned that another local of the same union was the bargaining agent at the Indiana plant, it dropped the demand, believing that transfer problems could be worked out between the locals. The demand and its dropping had nothing whatever to do with the establishment of a totally new plant of the employer, and the rejection of the clause was irrelevant to the present problem. 195 F. Supp. at 830. But the court of appeals held that the proposal of this clause showed that the union did not believe that the contract would apply if the plant were moved. In conjunction with other statements of the union, this showed the union's understanding of the meaning of the contract. The practical construction given by the parties to the agreement, by their actions, was controlling. Only after *Zdanok* was decided did the union claim legal rights under the contract. Their behavior prior to *Zdanok* was indicative of their understanding. 305 F.2d at 150–51.

51. We can see no expense or embarrassment to the defendant which

To answer these questions, the courts must consider the possible consequences of their decision and choose among the alternatives. It is this choice that makes the policy element relevant in the process of construing contracts. Policy-making through the judicial process is difficult at best. These difficulties are compounded when this task is performed in the contractual context because reference to parties' intention makes it difficult to identify nonconsensual considerations. Furthermore, formulation of a national labor policy concerning movement of work and seniority claims is a function of the legislative and executive branches of government. Only if no such policy can be identified should the courts apply their own conceptions of labor policy to these cases.

At least four relevant expressions of national labor policy can be found that give guidance in the *Zdanok*-type case. (1) Depressed area legislation is designed to promote the growth of new industries, not the transplantation of existing ones. Thus, the national legislative policy recognizes the interest of existing employees in continuing their jobs, and plant movement that creates unemployment is disfavored.[52] (2) The national labor policy on mergers, which is relevant by analogy, recognizes the claims of existing employees. In the railroad industry, the claims are recognized for four years.[53] (3) The President's Committee on Automation set the following framework for its consideration:

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would have resulted from its adopting the more rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. . . . It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

288 F.2d at 104.

52. The Area Redevelopment Act § 2, 75 Stat. 47 (1961), 42 U.S.C. § 2501 (Supp. 1962), provides in its declaration of congressional purpose that:

[U]nder the provisions of this chapter new employment opportunities should be created by developing and expanding new and existing facilities and resources rather than by merely transferring jobs from one area of the United States to another.

This policy is made more explicit in § 2505(a) of the act, which authorizes the Secretary of Commerce to make loans to assist the relocation of businesses:

unless the Secretary has reason to believe that such branch, affiliate, or subsidiary is being established with the intention of closing down the operations of the existing business entity in the area of its original location or in any other area where it conducts such operations.

53. See the discussion of the emergence of this policy in the railroad industry in Brotherhood of Maintenance of Way Employes v. United States, 366 U.S. 169 (1961). See also Telegraph Merger Act § 222(f), 57

> First, automation and technological progess are essential to the general welfare, the economic strength, and the defense of the nation.
> Second, this progress can and must be achieved without the sacrifice of human values and without inequitable cost in terms of individual interests.
> Third, the achievement of maximum technological development without adequate safeguards against economic injury to individuals depends upon a combination of private and governmental action, consonant with the principles of the free society.[54]

(4) Many collective bargaining agreements provide for the transfer of employees with the work, an indication that the participants in collective bargaining believe that such a transfer system is a feasible part of the collective bargaining process and not just a dream unrelated to the realities of collective bargaining.[55] All of these considerations support the decision made in *Zdanok* to treat the contract as covering the work when moved.

There are two countervailing considerations. One is the desire to promote flexibility in the organization of productive processes to achieve optimum utilization of all resources. The other is the principle that initial decisions rest with management except as modified by collective bargaining. These considerations are not persuasive, however. The movement of a given plant may not represent an improvement in the utilization of resources, particularly when trained employees are displaced. Even if freedom of plant movement is desirable, it does not follow that this freedom should be promoted by allowing the employer to ignore claims based on seniority. The national policy as thus far developed implies that the employer has some obligation toward his employees. There are other ways of encouraging economic changes, such as affording tax advantages and other economic incentives, that do not impose the burden of change on the workers involved. The difficulty with the second consideration is that management has already, through collective bargaining, qualified its right to exercise independent judgment in this area. At issue is the extent of qualification, not its existence.

Stat. 5 (1943), 47 U.S.C. § 222(f) (1958), which also protects employees for four years after the merger. In connection with protection of employees incident to airline mergers, see Kent v. CAB, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953); Outland v. CAB, 284 F.2d 224 (D.C. Cir. 1960); Brown, *Employee Protection and the Regulation of Public Utilities: Mergers, Consolidations and Abandonment of Facilities in the Transportation Industry*, 63 YALE L.J. 445 (1954).

54. President's Advisory Committee on Labor-Management Policy, *The Benefits and Problems Incident to Automation and Other Technological Advances*, 49 L.R.R.M. 35 (1962).

55. See Judge Palmieri's discussion in *Zdanok*, 185 F. Supp. at 447.

At the root of the problem is the choice of protecting the individual claims of employees caught up in the wave of industrial change or of allowing these claims to be submerged. To fail to protect the employee condemns him to a set of patchwork policies for dealing with technologically displaced employees. He faces additional problems if he is an older worker. Since in the past we have adhered to the seniority system, it seems harsh at this juncture to throw it overboard.

B. Consequences of Zdanok in Collective Bargaining

If individual claims are to be honored as the tide of business and technological change sweeps over us, the judiciary is the only institution equipped by training and tradition to provide the protection. Other forces at work in our society to minimize these claims are powerful; they do not need the support of the courts to make themselves felt.

The *Zdanok* decision forces management to spell out in the contract those rights of which it wishes to be assured. By forcing articulation of management claims, disputes will be resolved in a way that reflects the position of the parties rather than the theories of courts, text writers, or arbitrators.[56]

It has been argued that the right to follow the work recognized in *Zdanok* will not be extensively exercised, but will be waived in exchange for a little more severance pay.[57] Such a result will simply reflect the needs of the parties as expressed in collective bargaining. Moving to a new location entails many difficult decisions for workers. Some may prefer to remain in familiar surroundings and seek new work. Collective bargaining decisions may reflect this attitude by exchanging the right to move for severance pay. But the possibility that these rights may be translated into dollars should not weigh against their recognition. Law in labor relations does not dictate the choices that union, management, and employee must make. It creates a framework within which the various decisions are worked out. The parties are free to shape their own actions within this framework. One method that provides flexibility is the ability to convert rights into money.

Professor Aaron has suggested that automation, which has drastically changed our concepts of work, may cause the sen-

56. See Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360, 379–80 (1962).

57. See, *e.g.*, Giordano v. Mack Trucks, Inc., 203 F. Supp. 905 (D.N. J. 1962); Johnson v. Archer-Daniels-Midland Co., 203 F. Supp. 636 (E.D. Mich. 1962); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1562–63 (1962).

iority principle itself to become obsolete.[58] Men may have to adjust to several job changes, and the furor over *Zdanok* will then have proved to be a transient tempest. This, of course, is no criticism of *Zdanok*. It is a variation of the "long run" argument that is refuted by recognizing that the task of the courts, in cases such as *Zdanok*, is to fashion wise decisions for the present as our economy enters an era whose end we cannot anticipate. In the performance of that task, the *Zdanok* case stands as a reminder that expectations rooted in the seniority system are not to be disregarded.

The argument that industrial change should be promoted by restricting seniority claims and expanding management freedom misses the mark. Assuming that industrial change is desirable, it does not follow that the courts should make matters worse for dislocated employees by a restrictive construction of seniority clauses in labor contracts. National policy does not allow the employer to escape significant responsibility for the plight of his employees who are caught up in the process of industrial change. In fact, by giving employees the protection of the *Zdanok* decision, the courts may clarify the conditions under which industrial innovations will take place, thus paving the way for wiser and more humane solutions to some of the problems implicit in industrial change. For example, if the *Zdanok* decision adds considerably to the cost of relocating a plant, employers may be moved to support more extensive governmental programs that will help relieve them from the brunt of the costs of relocation.

C. Judicial Decision as a Factor Shaping National Labor Policy

The basic problems created by the technological revolution of our time do not create such clear-cut legal issues as the problem of plant removal. The reorganization of the productive process to eliminate various types of jobs, establish new skill requirements, and make obsolete the old falls within the area of collective bargaining. While the duty to bargain over such changes appears clear, the content of the bargain remains unregulated. Bargaining practices in the form of retraining programs, enhanced severance pay, and the like have emerged.

The issues in the case of a simultaneous reduction and alteration in jobs that accompany automation also center around seniority.[59] The older rule that seniority may be negotiated away

58. *Id.* at 1563.

59. See, *e.g.*, Panza v. Armco Steel Corp., 208 F. Supp. 50 (W.D. Pa. 1962).

easily may no longer adequately protect employee claims to jobs that remain. Broadening of protection for seniority is one way of cushioning the shock of automation. Accompanying this should be enhanced judicial concern for seniority claims within the limits of technological developments that force greater emphasis on employees' abilities.

The most intensive study privately conducted to date has indicated that the problems transcend the capacity of the parties and require solutions by government.[60] The network of worker retraining programs, extended unemployment compensation, and other governmental programs all bear heavily on the problem of industrial change and job security. The conventional concept of job security with a particular employer through collective bargaining may protect an employee against a territorial movement of the productive facility, but it cannot protect him against technological displacement. Nevertheless, judicial recognition of seniority claims may be the essential foundation of a more extensive social response to the vast problems created by the emergence of an automated society. Once it is clear that the costs of this development cannot be allocated to the affected workers, the likelihood of a more balanced national solution is enhanced.

CONCLUSION

In grappling with problems of such a deep and basic nature as the changes created by our technological revolution, we must utilize some premise rooted in the past for the resolution of today's issues. The basic question before the judiciary when industrial change conflicts with seniority claims is whether to view these problems contractually or contextually, whether to focus on the ramifications of the problem or only on the immediate and narrowest considerations in each specific case.

This question of breadth of judicial focus is another way of describing the difference between an approach based on contract and one based on status. The contract approach emphasizes the immediate concrete relations of the parties; the status approach demands that these relations be viewed within a wider setting. Perhaps, as Professor Aaron has suggested, it is no longer useful to discuss employee rights within the framework of the distinction between contract and status.[61] The fact is that employees today

60. Armour & Co. Automation Comm., *Progress Report*, 48 L.R.R.M. 239 (1961) (unbound).

61. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1564 (1962).

are caught up in a system of industrial relations that transcends the immediate contracting situation. As long as courts will consider the employee's rights and obligations within this system, it matters not whether the discussion is cast in terms of contract or status.

The contract approach has historically fragmented the relation and focused on its narrowest aspects. This Article demonstrates that the contract analysis is not necessarily so limited. Plant removal can be adequately analyzed and resolved within a contractual framework that considers the broader implications of these problems.

The wisdom of the *Zdanok* decision lies in its synthesis of the contract and status considerations. The decision protects employee rights to transfer with the work, subject to such contractual limitations as may be agreed to by the immediate parties. By placing the burden of limitation on those who would negate seniority rights, the court has provided some small measure of protection for the worker caught up in the process of industrial change.