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Owen Fairweather

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SENIORITY PROVISIONS IN LABOR CONTRACTS SOCIAL AND ECONOMIC CONSEQUENCES

OWEN FAIRWEATHER

THE law concerns itself with rights of individuals, or synthetic individuals like corporations, relative to each other or to the state. A labor agreement establishes relative rights among employees and between employees, unions and the company. It is, therefore, a legal instrument and the rights established in that instrument are becoming of greater social importance every day.

When the substantive provisions of a labor agreement are determined, not by agreement between the parties, but by recommendations of a public quasi-judicial tribunal, the process of establishing the relative rights, and the relative rights themselves, are of greater concern to the law, to lawyers and to the public generally. If erroneous principles are employed in this process, erroneous patterns and precedents may be established which are hard to change. It is wiser to employ sound principles in the first instance than to "muddle through" and then face the problem of correction later.

The Wage Stabilization Board's dispute powers represent the current form of intervention by the state into the process of establishing relative rights in labor agreements. Important questions involving the "seniority rights" aspects of a labor agreement have come before that tribunal and additional problems may be presented to it or to similar boards. It is important to reconsider the social and economic consequences of further extensions of the "seniority" principle. Seniority systems are becoming universal, and rather than being a mere provision in a labor agreement, seniority systems should be considered as social institutions and the advantages and disadvantages of changes in these systems should be analyzed from this point of view.¹

¹ The Wage Stabilization Board has recently made recommendations in a dispute between the United Steelworkers of America and various steel and iron ore companies. One of the issues before the Board concerned the Union's demands to change certain basic "seniority" concepts. This article considers the problems involved from a

MR. FAIRWEATHER is a member of the Chicago firm of Seyfarth, Shaw and Fairweather, and is active in labor relations work, principally as a representative of management.

The demands of unions to change seniority provisions and practices are often classified as non-economic demands. This classification seems inaccurate because seniority practices directly affect the ability and capacity of industry to absorb the cost increases and to grow. Industrial growth in part depends upon (1) the rate that new and better equipment is made available by technological research and capital investments, and (2) the efficiency with which workers operate this machinery and equipment. This article deals with practices which directly affect the second of these two factors.

In many major industries "seniority rights" provisions of a labor agreement establish tests and principles of application which are used to select employees for jobs, determine under what circumstances seniority is to be applied, and from what group or unit the individuals are to be selected. In this sense "seniority rights" represent a composite of the tests used and their method of application in a system of choice. Accordingly the term "seniority rights" as used herein should not be confused with the term "seniority" as it is used in the railroad industry where length of continuous service is the *primary* test in the system of choice.

The first important principle in the seniority systems in many industries, notably the steel industry, is that the primary test for selection is the relative ability and physical fitness of an employee to perform the job efficiently and after that is determined length of continuous service is used as the test.

The second important principle of most seniority systems is that the system should not be so rigid that plant operations are seriously affected. Flexibility in the application of the system is preserved by allowing management the right to make the initial determinations and providing that the tests do not apply to all job transfers.²

Unions often urge in those industries which have seniority systems based on the two principles mentioned above, that a more rigid and inflexible system be established. Typical of the rigid type of system is the

general point of view, but many of the examples cited and arbitration awards referred to concern the steel industry. This results from the fact that much of the material contained in the article was developed in connection with that proceeding.

² "Between a reasonable, flexible use of seniority—'other things being equal'—and a rigid, written exclusive reliance on length of service in layoffs and rehiring lies the difference. The issue is between the proper use of a sound principle and its application in a way ultimately oppressive and hurtful not only to management but also to labor and to the public." Feldman, *Stabilizing Jobs and Wages* 207 (1940).

seniority system in the railroad industry.³ It is necessary, therefore, to summarize the typical reasons for union objection to flexible seniority systems which employ the relative ability standard.

Unions desire to substitute length of service as the sole criterion because such a criterion is impersonal. It is impersonal because it ignores all consideration of the relative merit of individuals and depends only on length of service. This method of selection is easily "sold" to the mediocre and the unambitious worker who objects to promotion on the basis of merit "because the use of merit as the basis for a promotion will help the superior few at the expense of the mediocre many."⁴

Union objection to a system of choice which contains the relative ability test may also stem from the fact that such a system is more difficult to administer and may lead to controversy between employees which could involve the union leaders. Informed observers point out that unions are mistaken because the use of the arbitrary length of service tests produces even greater problems between employees.⁵

In addition, unions have argued that where the ability of the employee is to be determined there exists the possibility that the choice may be influenced by either friendship for, or dislike toward, an employee. By using length of service as the sole criterion these influences, which are difficult to detect and prove, would be eliminated. The mere possibility of such an influence is hardly a reason for abandoning a system which is correct in principle.

The use of an impersonal system which denies to the individual a right of advancement on his own merits may consciously or unconsciously be urged by unions because it forces individuals to attempt to raise their status by group action rather than by individual efforts, and hence the result is the strengthening of union power. Gardner and Moore, in their book, "Human Relations in Industry," noted this effect when the ambitions of an employee to progress were blocked by impersonal tests and rigid rules.

³ The adverse effect of the railroad type of seniority system was exhaustively treated in four articles published at the University of Chicago. Mater, *Seniority Rights Before the Courts*, 12 *Journal of Business* 152 (1939); Mater, *The Development and Operation of the Railroad Seniority System*, 13, 14 *Journal of Business* 387, 36 (1940 and 1941); Mater, *A Statistical Study of the Effect of Seniority Upon Employee Efficiency*, 14 *Journal of Business* 169 (1941); and Mater, *Effects of Seniority Upon the Welfare of the Employee, Employer, and Society*, 14 *Journal of Business* 384 (1941).

⁴ Slichter, *The Challenge of Industrial Relations* 38 (1947).

⁵ Sayles, *Seniority: An Internal Union Problem*, 30 *Harvard Business Review* 55 (1952).

The mobile group, with their great desire to get ahead, generally have high expectations. They visualize themselves as achieving important positions in the company—as becoming part of management. With these feelings, they tend to have a strong identification with management, rather than with the workers. . . . So long as these people feel that they are making satisfactory progress toward their goals, this attitude, this acceptance of management's point of view, is reinforced. When, however, they feel that their progress is blocked and they cannot obtain the status they are seeking, they tend to turn against management. In these cases they express great dissatisfaction with the company; they become critical of its policies and suspicious of all its motives. If they are shop workers, they often turn to the union and become active in it, or perhaps are active in organizing a union. . . .⁶

Companies which have non-rigid systems which recognize relative ability generally recognize that an employee's length of service should be the determining factor in making the choice from among a group of candidates who have *relatively equal* ability and physical fitness for the job in question. The use of the length of service factor at this point in the selection process rewards a well qualified employee for his loyalty to the job and his years of service to the company but does not injure efficiency nor thwart the opportunities of superior employees.

These companies believe that the major concepts in the system of choice presently used within their industries permit the industry to continue to increase its productivity, minimize industrial accidents, utilize to the fullest extent handicapped workers, and give to individuals the maximum of personal satisfaction.

The considerations which are involved in the removal of the relative ability test and the substitution therefor of length of service as the sole criterion of choice are noted below. Normally, where the demand for the removal of the relative ability test is made, a further demand is made for a required trial period for the employee with the greatest service and for a shift in the burden of proving the inability of the employee to meet the minimum requirements of the job from the employee, represented by the union, to the management. These changes are designed to enforce the change in the basic test. Since the forced trial period and change in the burden of proof are means of enforcing the change in the basic test, these three matters will be considered together.

The elimination of the relative ability and physical fitness factors from the seniority test raises certain fundamental problems which should be considered first.

The maximum utilization of skills and abilities requires that em-

⁶ Gardner and Moore, *Human Relations in Industry* (rev. ed., 1950).

ployees and their jobs should be properly matched.—People are not alike by nature, training, education or inclination. A job may be a source of great personal satisfaction to one, a monotonous and boring one to another, and entirely beyond the capacity of a third. Modern industrial personnel placement strives to place every individual on a job that matches his capacity. If the job is too difficult, low production and possible injury either to the operator, a fellow employee, or the machine may result. If the job is too easy, the result is boredom and dissatisfaction.

Just as men differ in their capabilities and skills, so do jobs in industry vary in their requirements. Some jobs require a tall man; others can be done equally well or perhaps even better by a short man. Some jobs require physical strength; others do not demand much physical effort. Some jobs require keen vision at specific distances; others are relatively independent of visual skills. Some require educational training;⁷ others require little or no educational background. The different capabilities and abilities required by different jobs are not confined only to the skilled jobs. Joseph Tiffin made this comment:

Industry has long recognized the existence and importance of individual differences . . . but often employers do not so clearly recognize the fact that differences in capacity for machine operation and other jobs that are ordinarily considered as unskilled or semiskilled, are just as great and just as important as differences in skill among tradesmen. . . . The concept of individual differences is concerned in basic differences in capacity which are of importance in every phase of industrial personnel placement.⁸

Unions advocate that the test to be used to match an employee to his job shall be his length of service. If all jobs required the same abilities and capacities and all employees had the same abilities and capacities, this test would have some merit on the basis of the principle of "first come, first served." But since this is not true, it cannot be used without causing misfits and inefficiency. All students of this subject agree that the length of service test produces gross inaccuracies and that ability evaluations of both men and jobs must be made for proper placement.⁹

⁷ Educational requirements of job and the educational background of the employees otherwise eligible for promotion is a valid test when determining relative ability. National Tube Company & USWA—Local 1104, No. 382; Carnegie-Illinois Steel Co. and USWA—Local 1288, No. A-46-Z.

⁸ Tiffin, *Industrial Psychology* 3 (2d ed., 1947).

⁹ Taylor, *Management's Stake in Collective Bargaining*, 81 *American Management Association Personnel Series* 18 (1944); Mater, *Effects of Seniority Upon the Welfare of the Employee, the Employer and Society*, 14 *Journal of Business* 384 to 418 (Univ. of Chicago, 1941); Tiffin, *Industrial Psychology* (2d ed., 1947); Yoder, *Personnel Management and Industrial Relations* 462 to 464 (1942); Harbison, *Seniority Sys-*

For example, Dan H. Mater said:

Improvement in nearly every field of endeavor has occurred; is it not, indeed, time to institute a more scientific way of determining who can work and at what job? . . . any improvement in the seniority system can come only as a movement away from it.¹⁰

When Mater refers to a "seniority system," he is referring to the railroad system, which he studied exhaustively, where length of service is the primary test.

If there were correlation between length of service and increased capacity for different jobs, the inaccuracies which would result from a use of the length of service test might be somewhat minimized.¹¹ However, there has been found to be little or no correlation.¹² The performance of employees on a particular job has no relationship to the length of service on even that job.¹³ The training on one job has been found not to be transferable to another except where elements of the work of the new job are the same.¹⁴

tems—Some Danger Points, 4th Annual Stanford Industrial Relations Conference 102 (1941) "There is then little justification for the conclusion that, because rigid seniority rules have persisted on the railroads, they must necessarily become a permanent institution in the mass production industries. Greater flexibility of seniority rules in manufacturing industries is both desirable and, I earnestly hope possible of achievement." Hancock, *Why Workers Feel Insecure*, 28 *Personnel Journal* 177 (1949); Reynolds, *Labor Economics and Labor Relations* 222 (1949); Gardner and Moore, *Human Relations in Industry* 217 to 284 (rev. ed., 1950); Benjamin M. and Sylvia K. Selekman, *Productivity and Labor Relations*, 27 *Harvard Business Review* 373 to 391 (1949).

¹⁰ Mater, *Effects of Seniority Upon the Welfare of the Employee, the Employer and Society*, 14 *Journal of Business* 384 to 418 (Univ. of Chicago, 1941).

¹¹ Length of experience in a job or doing a particular kind of work is not by itself proof or even an indication of greater ability. Geneva Steel Company and USWA—Local 2701; Case No. G-12, July 21, 1949.

¹² Tiffin, *Industrial Psychology* 8 to 17 (2d ed., 1947) summarizes many such studies.

¹³ One such study by Slocombe revealed a correlation of +.023 between experience on the job and general knowledge of the job. Personnel Research Federation, New York; 19 *Personnel Journal* 120, 149. Difference in productivity as measured by difference in incentive earnings held to be a proper measure of relative ability between men. Worth Steel Company and USWA—Local 3182, June 9, 1949.

¹⁴ Perrin, *An Experimental Study of Motor Ability*, 4 *Journal of Experimental Psychology* 24 to 56 (1921); Muscio, *Motor Capacity with Special Reference to Vocational Guidance*, 8 *British Journal of Psychology* 157 to 184 (1922); Seashore, *Stanford Motor Skills Unit*, 39 *Psychological Monographs* 51 to 66 (1928); and *Individual Differences in Motor Skills*, 3 *Journal of General Psychology* 38 to 66 (1930). In filling job as roller on temper mill, company was justified in promoting the most qualified roller on the reduction mill rather than being required to promote an employee with extensive experience as a feeder on the temper mill because the roller training on the reduction mill was transferable but the experience as a feeder on the temper mill was not, Granite City Steel Co. and USWA—Dec. 20, 1948.

Tests of employees working on repetitive routine jobs sometimes reveal negative correlations between the employee's mental ability and his manual dexterities which produce productivity on that job.¹⁵ Generally, as jobs ascend in their value, the mental requirements increase, and the manual dexterity requirements normally decrease.

Where employees work on group incentives the employees in the group themselves are quick to block the transfer of an employee into the group that they recognize as slow and inefficient. These situations, where fellow employees would suffer if the relative ability test was removed do not come to arbitration because in such cases the majority desire operates against the inefficient employee.

Joseph Tiffin has cited many examples to support his contention that proper matching of employees to their jobs is important to obtain the maximum utilization of employees' abilities and capacities, and he said:

On many jobs a good employee is at least twice as valuable to the company for which he works as a poor employee. We may answer the question about the magnitude of individual differences, then, by saying that the differences are not only real, but are large enough to be of vital practical importance to industry.¹⁶

The exclusive use of the length of service test in the layoff situation could even cause greater inefficiency because it would require the displacement of men who have received training on their jobs for months and years. The serious loss of efficiency is true even on those jobs which are often considered unskilled.¹⁷ For example, several stockmen in a warehouse may have learned locations of material over a period of months or years which permit them to perform their work efficiently. To force their replacement by employees who have not been trained in this work even though they had potential ability to learn the work, would require a long period of inefficient operations before the warehouse would again be operating properly.

The length of service test would produce improper utilization and an increased risk of damage to equipment.—The technological improvement in industry generally and in the steel industry in particular in recent years has been rapid. More complicated and expensive machinery and equipment such as high-speed precision rolling mills, and continuous electroplating processes controlled by complicated devices

¹⁵ Tiffin, *Industrial Psychology* 96, 97 (2d ed., 1947).

¹⁶ Tiffin, *Industrial Psychology* 17 (2d ed., 1947). See also Halsey, *Handbook of Personnel Management* (1947), and 20 *Personnel Journal* 166 (1942).

¹⁷ Halsey, *Handbook of Personnel Management* (1947); 20 *Personnel Journal* 166 (1942).

are being installed. The men who must operate this equipment are often technical specialists who do not fit the layman's conception that steel men are merely men of brawn. As one of the presidents of a steel company said recently:

You know, when a man is handling a machine that may cost \$10,000,000 or more . . . when he is rolling steel coils at speeds ranging up to 80 miles an hour, and is controlling the thickness accurately to a tolerance of 1/1000th of an inch . . . and when he knows that his own safety and the safety of his fellow workers depends on what he does . . . it gives him a sense of pride and proper responsibility.¹⁸

Such a man is a trained specialist, and to force his replacement on the basis of mere length of service alone would be sheer folly.

If employees were transferred to jobs where they control the operation of such equipment or any part thereof merely on the basis of length of service alone, there exists a risk of poor utilization, damage to product or even damage to this equipment.

As we will show later, the forced trial period will accentuate underutilization, potential damage, and the resulting waste.

The use of length of service as the test reduces employee effort; the relative ability test stimulates performance.—Under the typical plan proposed by unions, the employee *by merely waiting* will move to the higher paid job. This tends to establish the minimum level of performance as the norm.¹⁹ Williamson and Harris,²⁰ in a study conducted for the 20th Century Fund, stated with respect to the use of length of service as the test: "It discourages ability and efficiency and encourages the chair-warmer."

On the other hand, where employees have an opportunity to move up on the basis of their improvement and demonstration of ability, the most powerful incentive for improved performance results. Harold A. Wren of Loyola University, Chicago, expresses this fundamental human motivation in these words:

It would seem from the investigation that an individual is motivated toward a vocational goal not only by his previous achievement (vocational status level), and the pressures of his immediate social environment (familial occupations), but also to exercise those capabilities that he believes he possesses, and to secure

¹⁸ Fairless, *The Boy Next Door* 11 (1951).

¹⁹ "Ability to perform the work" without regard to any comparison as to whether this ability is relatively equal between two employees would become the standard of work performance if length of service governed promotions. Jones and Laughlin Steel Corp. and USWA, Docket 93-C-47—J&L No. 6-158, Union No. 55 7-23-49; Mitchem, *Seniority Clauses in Collective Bargaining Agreements*, 21 *Rocky Mt. L. Rev.* 293, 298, 299 (1949).

²⁰ Williamson and Harris, *Trends in Collective Bargaining* 102 (1945).

the rewards that will accrue to him when the new goal has been achieved. These rewards, whether power, prestige, income or any other value important to the worker, are an ever shining goal that sustains ambition throughout life.²¹

In the final analysis, the workers themselves would be the real losers if promotions and job security were to be determined primarily on length of service.

It is sometimes argued that the ability factor should receive greater weight for the purpose of determining promotions than it is given for the purpose of determining layoffs.²²

In view of the necessity to maximize the incentives for individual performance, particularly in the steel industry, the tests in both situations should be the same. Sumner Slichter points this out when he says:

The application of seniority to lay-offs inevitably weakens the incentives to efficiency, because superior efficiency is no longer necessarily a protection against lay-off.²³

Where the tests for promotions and layoffs are not the same, it has been found that employees desirous only of holding a job will reduce their performance to a minimum level.²⁴

Any compromise in the way in which the relative ability test operates so as to make the selection test the mere ability to perform a job would be destructive to this needed incentive. Unless the test is *relative* so that the superior individuals can move ahead, the competition between individuals to improve themselves in their performance will not exist. Sumner Slichter made the following comment on examining this problem from the point of view of the consumer:

Each member of the community in his capacity of consumer has a strong interest that promotions be by merit. Furthermore, every consumer has an interest that industry be kept dynamic and creative by keeping the door of opportunity open to superior ability wherever it may be found.²⁵

Blocking advancement with a length of service test causes employee discontent, turn-over and a reduction in the quality work force.—The desire of individuals to improve their economic status for themselves and their families is a normal goal. All individual incentive

²¹ 20 Personnel Journal 317 (1942).

²² Employee with four years' experience as Operator—Hot Form and Upset Job, would have been displaced by a longer-service employee who had never performed the job had the union prevailed on length of service. American Steel & Wire Co. and USWA, Local 1885, Grievance No. WS-868.

²³ Slichter, Union Policies and Industrial Management 150 (1941).

²⁴ Feldman, Stabilizing Jobs and Wages (1940).

²⁵ Slichter, The Challenge of Industrial Relations 35 (1947).

is based upon this fact. When the right of individuals to progress on the basis of their own individual ability and talents is denied them, a frustration occurs which is manifested in employee discontent, negative attitude, instability and even labor strife.²⁶ The famous Hawthorne studies²⁷ and the studies of Bakke²⁸ and Mayo²⁹ have completely demonstrated this fact.

Furthermore, the inability of the ambitious and able employee to advance on the basis of his own merit will cause him to seek employment elsewhere.³⁰ Turn-over resulting from employees' unwillingness to wait for the mere passage of time is commented upon by Dale Yoder:

Close adherence to seniority (continuous service) as a basis for advancement may cause ambitious young workers to seek employment elsewhere, rather than to make progress by the slow stages which seniority makes necessary.³¹

If the typical union proposal was adopted, employment would first occur in the lowest skilled jobs and the pool of employees with abilities and capacities for upgrading to higher skilled jobs would therefore be-

²⁶ Reynolds, *Labor Economics and Labor Relations* 222, 223 (1949): "If capable young men find their promotion blocked by the number of older men above them, and if they find that the effort they exert has no relation to their occupational progress, there may be serious effects on efficiency and initiative. It is important, therefore, that some leeway be left for rapid advancement of unusually capable workers."

George W. Hancock of The University of Illinois, made an exhaustive study of the causes of insecurity and resentments among workers. He explains that this study was made because: "The forces of insecurity and resentment on the job are the bases for much of the turmoil within a shop. If these feelings can be removed or reduced, many of the surface causes of departmental strife, work stoppage, quits, and strikes will lose their potency."

To determine the main causes for such insecurity and resentment, he arranged a series of 22 statements, each statement presumably being a cause of such feeling. Item No. 17, which was: "Not being permitted advancement, when you have ability, just because others have been on the job longer than you have"—was found to be the second most important cause of insecurity and resentment among workers. 28 *Personnel Journal* (Oct., 1949).

Dr. Herbert Moore of Toronto, in his article entitled, *Basic Needs of Industrial Workers*, states that: "Among the more basic needs of man is one that can be expressed as an urge to handle the type of a job that will challenge one's own special abilities." He continues: "A considerable number of dissatisfactions have their roots in the fact that the men who are holding down jobs are superior to the job, which shows itself in a number of ways, especially in: 1) a careless attitude . . . ; 2) complaints about supervision . . . ; 3) the habit of getting into sidelines and diversions . . . ; 4) instability." 27 *Personnel Journal* 344 (1949).

²⁷ Roethlisberger and Dickson, *Management and the Worker* 255 to 269 (1939).

²⁸ Bakke & Kerr, *Unions, Management and the Public* (1948).

²⁹ Mayo, *The Social Problems of the Industrial Civilization* (1943).

³⁰ Miller, *Why Employees Leave; Company Records and Analysis of Causes of Exits* 298 to 305 (1926).

³¹ Yoder, *Personnel Management and Industrial Relations* 463 (1942).

come smaller, and over a period of time, this would expose industry to a serious disadvantage. This disadvantage, with its resulting decrease in the quality of the work force, has already occurred in the railroads.³²

In addition to the scarcity of men of capacity and ability which occurs when length of service alone is the basis of advancement, it has been found that employees will leave jobs when they have been assigned to work which is above their capacities. Pond and Bills found that labor turnover can be markedly reduced by the proper placement of employees in the jobs commensurate with their ability.³³

Problems in employee dissatisfaction will likewise arise if length of service is the only test used in the lay-off situation. Even labor organizations have been forced to recognize this fact. During the war, production machinists were moved into the tool rooms in Detroit. The regular tool room machinists trained these production machinists in tool room techniques. When the work force was reduced after the war, the seniority provisions of the agreement operated to retain the "students" in the tool room and to demote the "teachers." This result was considered unfair by the demoted machinists who believed themselves entitled to the status they had achieved on the basis of their individual skill irrespective of their length of service, and this discontent caused the UAW to propose revisions in the seniority programs to protect the "skilled employee" from "bumping" by longer service employees.³⁴

The use of length of service tests blocks the entrance of trained personnel, makes impossible a proper integration between industry and education, and increases the number of supervisors.—Some individuals, in their desire for personal advancement, continue their education through high school and then on to trade schools or college. It is their intention that by so doing, they will be able to reach a status higher than those who did not pursue this route of progress and entered industry at an earlier date without the same training. Where all progress within an industrial organization is controlled exclusively by the length of service, this individual must enter in a low skilled job or not at all.³⁵

³² 18 Personnel Journal 177.

³³ Pond and Bills, Two Studies of Relation Test Score to Job Held, 12 Personnel Journal 41 to 56 (1933).

³⁴ International Union United Automobile Aircraft and Agricultural Workers of America. Skilled Trades Department Booklet.

³⁵ Harbison, The Seniority Principle in Union-Management Relations 34 (1939): "Although employers and unionists seemed to be primarily preoccupied with seniority problems as they directly affect union-management relations, both groups were aware of the consequences of widespread acceptance of seniority on industry and the working

It was pointed out earlier that the employee of ambition and ability will often leave a company if his rate of progress is arbitrarily slowed down by length of service tests. How can industry integrate the individuals who continue their education at a level commensurate with their previous training?³⁶

Where seniority is controlled by length of service, some labor agreements have established a special class of industrial trainees to provide opportunities for men to work in preparation for supervisory jobs. Such special categories are not the answer. American industry should not be forced to create "loopholes" to integrate itself with the educational process.

As high as 75 per cent of the supervisors in some steel plants today have come from "the ranks." This upgrading to supervision is wise for various reasons—the supervisor knows the work and the working man and it is psychologically sound to create this additional opportunity for advancement. If the number of potential supervisors in the ranks drops because of the effects of the length of service tests, this ratio will go down and more supervisors will have to be trained and introduced over the heads of the workers. This causes difficulties among the employees as Gardner and Moore noted:

As more and more of the higher level positions are filled with college-trained persons and the workers on the lower levels see themselves further and further cut off from opportunity, they feel with an increasing intensity the frustration of living in a 'land of opportunity' where there is no opportunity to be had.³⁷

Under the length of service system, the inability to integrate men to jobs where some education is important means that the responsibilities for even the simplest calculations and judgments will more rapidly be transferred to supervisors. This will cause the number of supervisors to increase, and added cost will result.

These considerations have implications to the entire educational system; as young people learn that additional education means nothing,

population as a whole. "First is the problem of the younger employees and those potential workers who are just coming out of school. Employers pointed out that, with greater emphasis on seniority, these younger workers will find it increasingly difficult to find employment because older workers will have prior claim to existing jobs. Furthermore, incentive of younger workers may be dampened if they must wait their turn for advancement regardless of merit and bear the brunt of repeated lay-offs . . ."

³⁶ Company upheld in filling job of Junior Cost Analyst with an employee not a member of the bargaining unit nor of the seniority unit which included this job, as there was no one in the unit qualified for the vacancy. American Steel & Wire Co. and USWA—Local 2353 Grievance No. WK-C-31.

³⁷ Gardner & Moore, *Human Relations in Industry* 234 (rev. ed., 1950).

and their date of entrance into employment means everything, they are under a positive incentive to leave school and go to work too soon.

The use of length of service would increase industrial accidents and deny employment to handicapped workers.—There have been tremendous improvements in plant safety records; for example, the steel industry, through constant vigilance and modern techniques, is now one of the safest of industries.³⁸ One of the most important is the proper placement of employees on jobs. This is well summarized in a report of the President's Conference on Industrial Safety.

Another method of reducing the number of accidents in industry relates to the effective integration of the worker and his job by means of (a) determining what is required of the employee on the job, *i.e.*, job analysis, (b) the testing of general ability, special aptitudes, and the degree of proficiency or training, and (c) a study of the worker's physical characteristics, especially in relation to physical defects or limitations.³⁹

An examination of the critical features of a job usually reveals that some of the components are closely related to safety. For example, a plant tractor operator is required to move his tractor through narrow passageways and around sharp corners. This requirement demands that the operator must be able to estimate distances accurately and must have good eye-hand-foot coordination. In this case, a fair degree of coordination must be present so that the operator can transport materials quickly. Mere speed, however, is not sufficient. Damage to stored materials along the way, damage to goods being transported, damage to vehicle and operator, to the building, and to other personnel are all to be avoided. Tests for coordination and such other abilities as may be revealed by an analysis of the job will place men on jobs who have the necessary behavioral equipment to operate safely as well as quickly.⁴⁰ To illustrate how rapidly knowledge on the subject of accident prevention through employment placement is developing, we need only cite the recent article by Dr. Hedwig S. Kuhn in the *Journal of Industrial Medicine and Surgery*,⁴¹ who reported that nearsighted employees are particularly susceptible to the injury of "detached retina" when placed on jobs that require heavy lifting.

³⁸ The Safety record of the Steel Industry was ahead of "Automobiles" and "all industry." The industry ranking in 1950 was: Steel Industry 4.63 man hours lost due to accident per million man hours worked. Automobiles 4.78 man hours per million man hours worked. All industry 9.30 man hours per million man hours worked. 1950—National Safety Council Accident Facts.

³⁹ Bulletin No. 112, U. S. Department of Labor.

⁴⁰ Safety Subjects Bulletin No. 67, United States Department of Labor 115.

⁴¹ Kuhn, *Journal of Industrial Medicine and Surgery* (Oct., 1951).

Approximately 10% of all workers have physical difficulties which can be classed as partial disabilities.⁴² This physically limited group must be used in the steel industry, as well as in industry generally, if our maximum output is to be attained. The maximum utilization of this group must be accomplished, however, with the minimum of risk to the individual and to others. If a seniority system forced the company to transfer employees on length of service alone, disregarding an employee's physical abilities, the extent of injury to this group of employees would undoubtedly increase. In addition, since management is responsible for plant safety, unless it may fit properly these employees to jobs in industry to the greatest degree possible, they will be denied employment. Under some union proposals a disabled employee would have a right to exercise seniority and down-grade himself to vacant jobs. This means that the judgment concerning an employee's physical ability to perform a job should be transferred from the management to the individual worker. This is no answer. The management is legally and morally responsible for plant safety. It is axiomatic that the right of determination must rest with the party who has the responsibility.⁴³

A forced trial period would magnify all the adverse effects of the length of service test.—Under many union proposals the senior employee must be given a trial period on any job the transfer to which involves an application of "seniority rights." This trial period requirement supplements and enforces union proposals that length of service should be the sole test for the initial choice. Even if the senior employee is obviously unqualified, either in terms of his capabilities or physical abilities, he must be given a trial and training period.

Therefore, the trial period becomes a period during which an unqualified employee must be permitted to remain on a job.⁴⁴ In many instances another employee would have to be assigned to the job during

⁴² President's Conference on Industrial Safety, Bulletin 112, United States Department of Labor 287 (1940).

⁴³ Company held to have right and duty under its prerogative clause to consider the health and welfare of its employees in the assignment of duties and was upheld in moving an employee from job of wire drawer to sweeper-laborer when medical evidence indicated that requirements of job were too great for employee's physical condition. John A. Roebling's Sons Co. and USWA—Local 2110, Case No. L-4304—PHI-L279-48.

⁴⁴ "Of greater consequence is the annoyance, inconvenience, and inefficiency involved in transferring employees from job to job and department to department until they can be placed on work for which they have sufficient qualification. Carried to extremes, this 'trial and error' method used in effecting layoffs may disorganize the whole plant." Harbison, *Seniority Policies and Procedures as Developed Through Collective Bargaining*. Princeton: Industrial Relations Section, Princeton University 24 (1941).

this so-called training period. There is usually no way of determining from a union's proposal the length of this trial period and training. It could be of substantial duration.⁴⁵ Any forced trial period on all jobs of any duration, however, would be dangerous, expensive and otherwise disruptive to sound industrial relations techniques.

This demand for a trial period has been urged before by various unions and has been considered by experts. One such expert, Allen P. Mitchem, has this to say about this demand:

It has frequently been urged by unions, in behalf of the claims of senior employees who have been by-passed in promotions, that the senior employee is entitled to a trial period on the vacant job. It is undoubtedly true that an employee who *has been* promoted would, under most contracts, be held entitled to a reasonable trial period in which to make good at the new job before he may be demoted. A different situation is presented, however, where the employee who is *seeking* promotion asserts that he is entitled to a trial period on the higher job in order to prove his eligibility for promotion to that job. Since it would be absurd in most instances to permit all applicants for the promotion to have a trial period, the issue here will be narrowed to whether the senior applicant is entitled to a trial period to prove his ability. Supposedly, the only functions of such a trial period would be to furnish a basis either for determining whether the senior applicant was 'capable' of handling the job, or for making a comparison of the relative abilities of that applicant and of a junior employee who was aspiring for the position. If there is available other competent evidence from which the employee's qualifications can be determined (and such evidence probably will be available in most instances), there would seem to be no justification for permitting the senior employee a trial period in the higher position. . . .⁴⁶

The introduction of more complicated equipment makes the trial period that much more serious.

If the management cannot make the initial selection of the most qualified employee, even though the seniority test contained a gesture

⁴⁵ Union demand that senior employee be given ample time to learn power house engineer's job and that an employee be assigned to teach him that job was denied. Youngstown Sheet & Tube Co., USWA—Local 1462.

Senior employee's claim for job of mill provider denied. A trial period on job in question would have entailed experience on another job before being able to perform job of mill provider. American Steel & Wire Co. and USWA—Local 3391, Grievance No. Dul-CL-8.

Arbitrator gave weight to opinion of company's supervision when denying claim of senior employee for job as roll polisher. Evidence indicated that it would take a man with a good machinist's background five or six weeks to become a roll grinder and after that three or four months to become a roll polisher or a total of four to five months. American Steel & Wire Co. and USWA—Local 1885, Grievance No. WS-833.

The joint job evaluation manual establishes training periods for as long as six years and the Union may contend that these training periods are a reasonable trial period.

⁴⁶ Mitchem, *Seniority Clauses in Collective Bargaining Agreements*, 21 Rocky Mt. L. Rev. 311 (1949).

toward the ability factor, and any form of trial period was required, the system would operate essentially as a straight length of service system with all of the adverse consequences which have been discussed heretofore.

Trial periods are urged by unions, even where some recognition of the ability factor is incorporated into the seniority test, because they claim that the determination of management would otherwise be tinged with prejudice, friendship for one employee or dislike for another.⁴⁷ This claim is exaggerated. Supervisors who are working with the employees soon come to know the capabilities and the physical difficulties of the employees.⁴⁸ Supervisors today are under compelling pressures to handle the question of employee selection as fairly as they possibly can.

In certain management-union relationships today, the principle of selection of employees through tests and aptitude evaluations has been accepted and is operating successfully.⁴⁹ Tests are used in the steel in-

⁴⁷ "On the other hand, it can be argued that although favoritism is undesirable since it often penalizes the more efficient man, seniority is no solution to the problem. It too penalizes the good worker—probably on a larger scale. The man with the longest service record is not necessarily the most productive worker, and giving the 'breaks' to him may result in an uneconomical utilization of labor. This argument undoubtedly points to one of the greatest weaknesses of the seniority principle." Dankert, *Contemporary Unionism in the United States* 374 (1948).

⁴⁸ "Once the man has been hired and reports for work, his performance including practices affecting his own safety and that of other workers becomes the responsibility of his supervisor. Seeing the man in actual performance and in contact with his fellow workers, the supervisor is in a good position to properly evaluate abilities and traits of character." Safety Subjects, United States Department of Labor Bulletin 115.

⁴⁹ The Northwest Airlines have developed a complete program with the Airline Mechanics Assn. Inc., for grading employees in their maintenance shops.

Frederick Rand Rogers of Boston University has advocated the use of tests of muscle power in the selection and assignment of employees. He explains that these strength tests include the measurement of lung capacity, grip strength, back and leg muscle strength, and strength of upper arm and shoulder girdle muscles. The scores of each individual are totalled, giving his strength index. Averages or norms have been scientifically determined for all combinations of sex, weight and age of workers, and by using these norms and dividing the strength index by the norm for the sex, age and weight of the individual, a quotient called the "Physical Fitness Index" is calculated.

The P. F. I.'s of individuals range from as low as 30 to 40 for those in poor physical condition, and P. F. I.'s approaching 200 for those in extremely fine condition. The author reports that these tests have been scientifically validated, and have been tested over a 12-year period. He states: "In fact, the number of tests given must now exceed a million. The reliability co-efficient of the battery is between .97 and .99. The use of mechanical measuring instruments and standard testing technique, render the tests highly objective. A large number of schools and universities now use them, particularly in New York State." *15 Personnel Journal* 26 (1936).

Harbison reports successful qualifying examinations used for promotion in a coke plant: This plan was fully accepted by the Union. *Seniority Policies and Procedures* 42 (1941).

dustry for noncraft jobs.⁵⁰ They are designed to test physical fitness as well as capability and cover such qualities as mechanical aptitude, dexterity, manual and visual skills.⁵¹

In addition, many companies have developed employee aptitude rating procedures to assist their supervisors.⁵² The State and Federal Governments have found such techniques and tools advisable.⁵³ These systems have been designed to produce a high degree of accuracy and objectivity. Intensive studies on so-called "halo" tendencies and on the weighting of the factors evaluated have been made. One of the recent techniques was developed by the Army, and is known as the "Forced Choice Method." The studies upon which this new method was based were initiated when it was recognized that the length of service basis for promotions was injuring that organization.⁵⁴ It is through the use of these techniques based upon a wealth of technical study that the proper solution to the question of employee selection for job transfers must come.

Men in academic life have devoted their energies to the development of techniques for the measurement of employee aptitudes and abilities.⁵⁵

⁵⁰ Tests were given to 150 tinplate inspectors in a steel mill. These tests showed no significant relationship between the ability of this group to identify defective sheets and experience on the job. It did show a relationship between ability to identify defective sheets and scores made on a battery of tests. Tiffin, *Industrial Psychology* 305 (2d ed., 1947).

⁵¹ *Ibid.*

⁵² The General Motors Corporation is working to validate some new techniques of employee testing and ability at its Delco-Remy plant in Anderson, Indiana, under the direction of Mr. Bryon Stewart, working in conjunction with Professor Flanagan of the American Institute of Research in Pittsburgh.

One such system in a steel company was carefully validated by Tiffin and was described in *American Management Association Personnel Series No. 127* (1949).

⁵³ The men who are responsible for the personnel policies of Government agencies advocate and use merit rating to determine the performance and progress of the employees. For example, Irving Weinstock of the New York State Employment Service specialized in formulating merit rating programs for the War Manpower Commission during World War II, as well as for his employer, the State of New York. 27 *Personnel Journal* 223 (1948).

"Almost all rating systems include some measure of subjectivity, but since we are dealing with human beings, not machines, this is necessarily and properly so." Weinstock, 27 *Personnel Journal* 224 (1948).

⁵⁴ Sisson, *Forced Choice—The New Army Rating*, 1 *Personnel Psychology* 365 to 381 (1948).

For the use of merit rating by the Army and Navy, see Leatherman, *Army Personnel Research*, *Public Personnel Review* 113 to 122 (July, 1948).

⁵⁵ John C. Flanagan of the American Institute for Research in *A Report of Three Years of Experience* (Sept., 1950), shows that the total studies by himself and his staff will not be completed for 20 years.

If the elimination of the relative ability and physical fitness factors in the seniority systems became the prevalent practice due to Government recommendation, or otherwise, and forced trial periods were introduced to implement this test, the efforts of these men could be almost futile because such compromises would spread throughout industry.

Shifting the burden of proving inefficiency would be inconsistent with the established concepts of management's function.—The individuals who comprise the management carry the responsibility for planning the work and directing the working forces. These individuals are under incentives to perform this function in a way that will result in efficient operations. It is a basic rule that the persons who have the responsibilities must have the necessary rights to properly discharge their responsibilities. The right to evaluate the qualifications of employees for certain jobs and to select the most qualified employee available for a job are among the most fundamental responsibilities of any individual who is charged with directing the activities of any group of people. This principle applies to all organizations including an industrial plant or any subdivision thereof. If this right is denied to the individuals charged with the responsibility, successful operations would be seriously impeded.

Since the selection of the most qualified employee for a job is one of the functions of management, management must be free to initially perform this function—of course in conformance with the standards or tests established in the labor agreement. Sumner Slichter observed:

The determination of merit is a responsibility of management. Merit will obviously differ in various situations. An important aspect of merit is a man's adaptability to the people with whom he must work. Will he be a good member of a team? Will he add the proper qualities to the team? Will he improve the balance of the team? Managers are in the best position to answer these questions. *Indeed, that is what they are hired for.* The requirement that promotions be based on seniority deprives managers of the opportunity to exercise some of their most important skills. (Emphasis added.)⁵⁶

This principle of supplying to management the rights necessary to perform its function properly is deeply ingrained into the principles which have thus far been controlling in union-management relations. The opinions of the War Labor Board and arbitration boards recognize this "functional approach."⁵⁷

⁵⁶ Slichter, *The Challenge of Industrial Relations* 37 (1947).

⁵⁷ For these cases see: Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations, Law and Contemporary Problems* (Spring 1947).

Pointing out these principles does not mean that a union has no function to perform in the employee selection process. It performs the same function at this point that it does at many others. The union's main concern is to see that management, in initiating the every-day decisions which it must make, applies the principles established in the agreement fairly. The entire union steward system operates through a series of observers (the stewards) who have the function of detecting and challenging any action by management which is contrary to the principles of the labor agreement. The union stewards should remain in the challenging position. It is management that is responsible for initiating the actions and must remain the "acting party." Since an employee could not be removed from a job unless the management could prove to the union that the employee was not performing the job in a manner at least equal to the *minimum* standards on that job, the union's proposal reverses the normal position of the parties—it puts management in the challenging position.

If such a change in the burden of proof were made and a dispute went to arbitration, it would require arbitrators either to leave inefficient or physically unqualified employees on jobs or make refined evaluations of employee performance. An arbitrator is not in a position to determine refined questions of ability or competence. Arbitrators can only determine whether the initial selection has been exercised in an arbitrary and unfair manner. This is the view of arbitrators generally, and informed observers. Slichter states:

Incidentally, disputes over whether A or B is the better man for a job do not present the kind of question which should be referred to arbitration. That would merely be asking a neutral, who is not necessarily skilled as a manager and who cannot begin to master the facts in the case, to substitute his judgment for that of management—in other words, to replace the judgment of a professional with the judgment of an amateur. An appropriate question for arbitration, however, would be the charge that management did not exercise its discretion in good faith, that it was actuated by ulterior motives.⁵⁸

The War Labor Board, whose functions were basically similar to those currently performed by the Wage Stabilization Board in the handling of disputes, had before it a number of cases which involved attempts by labor organizations to eliminate the relative ability and physical fitness of employees as the primary basis for employee selection in connection with seniority questions. Such demands by labor

⁵⁸ Slichter, *The Challenge of Industrial Relations* 38 (1947).

organizations were uniformly rejected by the Board.⁵⁹ The position of the Board was well summarized in *Douglas Aircraft, Inc.*, as follows:

It seems to the Industry and Public Members that the Union proposal would have a tendency to stifle that great American characteristic, the competitive spirit. The possibilities which are open to young Americans because of merit, ability, and capacity, developed for the most part by hard work, differentiate them from the young men of many other nations where merit, ability, and capacity mean little toward advancement. In such countries, young men must get in line and wait; hence ambition and initiative, traditionally American traits, are stifled.⁶⁰

The War Labor Board also received and reviewed demands by labor organizations for trial periods and, in this issue likewise, the Board uniformly denied the union's request. In *International Derrick and Equipment Company*,⁶¹ the National War Labor Board reversed a decision of the Fifth Regional Board, which had recommended that there be a thirty-day trial period to determine an employee's ability to perform a job.

Similarly, in the case of *Fada Radio & Electric Company, Inc.*,⁶² Public Members Dexter M. Keezer and Edwin M. Witte of the National Board rejected a thirty-day trial period recommendation made by the Second Regional War Labor Board. The company pointed out that it would have to go through a trial process in the order of employee service before finding a person suitable for the higher rated job and that this was a "staggering proposition."

In *Colorado Fuel and Iron Corp.*,⁶³ the union requested that the seniority clause contain the sentence: "Ability to perform the work shall be determined by a trial period on the job." The Panel recommended denial of the Union's request, and the Ninth Regional Board (Denver) sustained this denial.

On the question of whether or not the function of management to make the initial decisions should be limited, and the burden of proof transferred from the union to the company, the position of the Board

⁵⁹ *Montgomery Ward & Co.*, 4 WLR 277 (1942); *Texas Co.*, 7 WLR 411 (1943); *Reuben H. Donnelly Corp.*, 15 WLR 551 (1944); *Lincoln Mills of Alabama*, 15 WLR 495 (1944); *Allis-Chalmers Mfg. Co.*, 19 WLR 423 (1944); *American Telephone & Telegraph Co.*, 20 WLR 201; "Sufficiency Ability" clauses were requested but not recommended in *Douglas Aircraft, Inc.*, cited above; *General Motors Corp.*, 22 WLR 233 (1945); *General Motors Corp.*, 22 WLR 484 (1945); *U. S. Gypsum Co.*, 18 WLR 682; *Lewis Allis Co.*, 18 WLR 519 (1944); *Detroit Steel Products Co.*, 6 WLR 495 (1943).

⁶⁰ 25 WLR 229 (1944).

⁶¹ 28 WLR 649 (1945).

⁶² 24 WLR 647 (1945).

⁶³ 24 WLR 452 (1945).

was likewise uniform.⁶⁴ See the case of *American Can Company*.⁶⁵

In *Gerber Products Co.*,⁶⁶ the National War Labor Board adopted the following statement by the Eleventh Regional Board:

The Union demands the abolition of the present merit-rating system. It does so on the ground that the employees do not know who makes the merit ratings and never sees these ratings.

The panel deemed this demand of the Union to be unwarranted and the majority of the Regional Board concurs in the recommendation of the panel. In merit-rating systems generally the employees do not know who makes the ratings. While it may be desirable that the employees should know how they are being rated, this can by no means be considered a right of the employee. Merit ratings are made primarily for the benefit of the employer. *It would be a serious encroachment upon management rights if its rights to rate employees in accordance with its own standards were forbidden.* We deem such a restriction to be unwarranted. (Emphasis added.)

In *Murray Co.*,⁶⁷ the Eighth Regional Board said, concerning management's right to make the determination concerning ability:

The decisions concerning ability shall be made by management. The decision of management, when based on ability rather than seniority, shall be subject to grievance procedure as set out in this contract, but management's decision as to ability cannot be set aside by arbitration, except for reasons of favoritism, discrimination or serious mistake.

In *Lincoln Mills of Alabama*,⁶⁸ the Fourth Regional Board stated on this subject the following:

... It is a recognized principle of employer-employee relations that the selection of men for promotion to positions of higher skill logically belongs in the realm of management and is a right and responsibility which must devolve upon those charged with the conduct of business.

The position of tripartite panels established by the Government now should be no different than they were during the period that the War Labor Board was functioning. A mere hiatus in time should not be significant.

SENIORITY SYSTEMS AS SOCIAL INSTITUTIONS

Seniority provisions are the part of a labor agreement more than any other which involve human relations in industry. To the extent that they involve placing the right individual on the right job and his as-

⁶⁴ For other War Labor Board cases giving management the right to make the primary determination of ability, see *Texas Co.*, 7 WLR 411 (1943); *Reuben H. Donnelly Corp.*, 15 WLR 551 (1944); *Lincoln Mills*, 15 WLR 495 (1944); *Allis Chalmers Mfg. Co.*, 19 WLR 423 (1944); *American Telephone & Telegraph Co.*, 20 WLR 201 (1944).

⁶⁵ 13 WLR 644 (1944).

⁶⁷ 25 WLR 217 (1945).

⁶⁶ 12 WLR 74 (1943).

⁶⁸ 15 WLR 495 (1944).

pirations and incentives for future progress, they are of concern to the employees and to the management alike. The system must be flexible. Men are not cut from the same mould and Clarence Manion said concerning this:

There has never been nor will there ever be a time when all men are equal in their capacities and conditions here on earth. The nature of the individual as well as the nature and continuity of human society, demands these unflinching differences. Without the wide diversification of talents, taste, abilities and ambitions that now and always exist among men, Society could neither feed nor clothe itself. It is consequently a wise provision of Providence that causes the perpetuation of endless variety in the desires and capabilities of human beings. Sparked with personal liberty and the natural personal incentive to own property and advance economically this conglomeration of inequality synchronizes into a great engine for the sustenance and progress of mankind.⁶⁹

The problems under discussion here involve intimately the rights of individuals to progress and thus raise their economic status through the process of competing with other individuals. The concept of competition in our society is not limited to competition between companies. Competition was defined by a study group led by Paul G. Hoffmann as the "indispensable pillar of the American Society"—"an expression of the individual's expectancy of realizing his potential. . . ."

It is true that modern industry is a complicated process. This does not mean that these fundamental beliefs should be forgotten—it means that greater efforts must be made to protect them. David Lilienthal has said that "there are few who fail to see that modern applied science and the machine are threats to the developments of the individual personality, the very purpose of democratic institutions."⁷⁰

Controlling the progress, the incentives and aspirations of men in industry by a factor as irrelevant to these basic beliefs, as the date of their employment, is an arbitrary, unreasonable and destructive restriction.

Unions have often charged that managements are cool and impersonal toward workers. They have said that management treats an employee as a mere number—as a member of a crew identified merely with a clock number. It is submitted that the proposals of unions to control the movement of employees through their economic life by a mere number—that is, the date of their employment, actually shows that unions rather than managements have the desire to treat individuals

⁶⁹ Manion, *The Key to Peace* 27 (1951).

⁷⁰ Lilienthal, *TVA: Democracy on the March*, p. 22 (1944).

impersonally. In fact, any test which blocks individual opportunities other than the "skills and energies" of the individual, is subject to the same criticism. Controlling the progress of men in industry by a factor as irrelevant as the date he enters employment in a plant is an impersonal standard as it ignores his qualities as an individual.

The entire structure of American economic and social life rests on two fundamental principles. The first is that all men shall have an equal legal opportunity to progress. The second fundamental principle is that, given this equal legal opportunity, a man may progress on the basis of his own talents, skill, work and ambition. The first of these principles is equalitarian and the second individualistic. They are complementary—not antagonistic—and through their inter-operation they have given working men in the United States the greatest incentive for economic self-betterment that working men have ever had.

The vital importance of these two principles in the American economy was well stated by Lloyd Warner, anthropologist and sociologist at the University of Chicago, when he said:

Our system must provide for the rise of men and their families from lower to higher levels, or to say in the jargon of the social scientists, 'vertical social mobility' must continually function in the lives of men if our system is to be democratic and successful. . . . The opportunity for social mobility for everyone is the very fabric of the American Dream. The American Dream is not a mere phantasy that can be dismissed as unimportant to those who think realistically, for it does provide the motivating power for much of what we do in our daily lives.⁷¹

The introduction of the railroad type of seniority has substantially blocked the occupational route of progress in that industry and as Warner explains, this "constitutes a grave and fundamental problem that must be faced by all business and industrial leaders; moreover, if we are to survive as a social system, it is a problem that our nation must solve." He said further:

If individuals cannot progress on the basis of their own abilities and talents, they blame the system and they 'tend not to act as individuals with separate decisions and separate consciences, but feel themselves to be a group who have a common grievance against those who run things.' . . . The consequences of this change may be disastrous to the proper functioning of a free system.⁷²

It is no answer to say a part of freedom is to contract away fundamental rights; nor that such action is the will of the majority. As Paul

⁷¹ American Management Association Personnel Series, No. 127 (1949).

⁷² *Ibid.*

A. Freund said in a series of lectures entitled "On Understanding the Supreme Court," the Fifth and Fourteenth Amendments have been used more and more to protect freedom of individual expression, which includes the right of individuals to develop themselves.⁷³ This is consistent with the fundamental political, legal and religious background of our society. Manion said:

While the Europeans were sowing the materialistic winds of their political and economic storms, our Founding Fathers were building Americanism upon the firm foundations of religious faith. When the French Revolutionaries were hammering men into mere matter, the American Revolutionaries were exalting and safeguarding man's spirit. The European system was moulding men into 'masses' and 'classes' at the same time that the American system was dedicating itself to the task of preserving the integrity of the 'individual Personality.'⁷⁴

Union proposals that length of service alone should be controlling, and contractual rights should control all transfers, limit and restrict the freedom of an individual employee to hold his job and progress to a better job on the basis of his individual effort and ability, and develop a rigid system with none of the necessary tolerances that exist when the contractual application is limited to the promotional and layoff situations, and management's initial judgment is allowed to operate. Gardner and Moore said that it must be "realized that people cannot be moved around according to some master plan the way a planning engineer moves machines. People are affected by the way the move takes place, by the meaning it has for them, and by their attitudes toward both the old job and the new job. . . ."⁷⁵

Seniority systems should consist of a series of principles which are highly flexible in their application. Leonard R. Sayles explained that "the idea that seniority provides a rigid system for allocating jobs, and that disputes on the subject only arise on the 'seniority v. ability' principle is not realistic. Seniority is not an exact measuring rod but rather a highly flexible instrument subject to use by all groups in the pursuance of their own interests. Those who wish to understand seniority, therefore, will not be totally informed after a mere reading of the contract. They must go out and observe the men in the plant, changing and adjusting their relations with each other through the manipulation of seniority."⁷⁶

⁷³ Freund, *On Understanding the Supreme Court* 28 to 38 (1949).

⁷⁴ Manion, *The Key to Peace* 29 (1951).

⁷⁵ Gardner and Moore, *Human Relations in Industry* 273 (rev. ed., 1950).

⁷⁶ Sayles, *Seniority: An Internal Union Problem*, 30 *Harvard Business Review* 55 (1952).

The principles in effect generally in many industries including the steel industry should be retained by preserving the ability and physical fitness factors as the primary test and permitting the flexibility necessary in the operation of such a system by preserving as tolerance factors certain limitations on contractual applications and allowing management to exercise its judgment initially when employee selections are made.