CHAPTER 1

MERGING SENIORITY LISTS

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Although there has been a considerable quantity of material published on the subject of seniority, a search of the literature in the field reveals that there has been very little written on the specific subject of the merging of seniority lists. One notable exception is Professor Mark L. Kahn's excellent article entitled, "Seniority Problems in Business Mergers," which was published in 1955.[1]

Although the scope and the thrust of the present paper are somewhat different from those of Professor Kahn's study, it will be apparent to those who are familiar with his article that I am greatly indebted to him for his original work in this area. It will be evident too, as I proceed, that I am greatly indebted also to the arbitrators who have struggled with this problem in the flesh, especially to Harry Abrahams, who was chairman of the board of arbitration in the United-Capital pilots case in March, 1962,[2] and to David L. Cole, who was chairman of the board of arbitration in the Pan American-American Overseas pilots case in May 1952 [3] and arbitrator in the second United-Capital case in August 1962.[4]

The Importance of Seniority

During the past thirty years seniority rights have become progressively more important in terms of both the number of employees to whom they apply and their value to those employees.

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1 Mark L. Kahn, "Seniority Problems in Business Mergers," *Industrial and Labor Relations Review,* April, 1955.

2 United Air Lines Pilots' Merger Committee and Capital Airlines Pilots' Merger Committee, March 28, 1962.

3 *Pan American World Airways, Inc.,* 19 LA 14.

4 United Air Lines Pilots' Merger Committee and Capital Airlines Pilots' Merger Committee, August 24, 1962.

Of the 125,000 labor agreements in effect in this country today, there are few which do not contain some type of seniority provisions. In most cases these provisions establish benefits and rights which are of great material value to the employees.

Seniority rights may be divided into two distinct types. One type is concerned with employee benefits. Under most labor agreements many employee benefits such as paid vacation, retirement pay, S.U.B., and severance pay increase in value with the employee's length of service. The rights or values which an employee has in this respect may be referred to as "benefit seniority." This type of seniority usually depends solely on length of service. Its value is not determined by the employee's place on the seniority list.

The other type of seniority is concerned with such things as layoff, rehire, promotion, demotion, transfer, and other items in which the employees are in competition with each other. The labor agreement provides a system for determining the status of employees with respect to each other on these competitive matters. The rights or values which an employee has in this respect may be referred to as "competitive-status seniority." [5] The value of an employee's competitive-status seniority depends not on his length of service but on his place on the seniority list. Although length of service is almost always an important factor in determining rank on the list, it may not be the only factor.

The subject of this paper is the merging of seniority lists. As indicated above only the competitive-status type seniority is dependent for its value on the place of the individual on the seniority list. As a result we shall be interested primarily in that type of seniority and, unless otherwise indicated, when the term seniority is used throughout this paper, it shall have reference only to competitive-status seniority.

As previously stated, the value of competitive-status seniority depends on the rank or position which an employee holds on the seniority list. A high rank on such a list can be of great material value. In fact just a few points up or down the totem pole may make a tremendous difference in the employee's economic condi-

[5] Sumner H. Slichter, James J. Healy, and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington: The Brookings Institution, 1960), p. 106.

tion. Consider, for example, an employee who works in an electrical manufacturing plant where the following contract clause is in effect:

> All layoffs shall be made according to seniority provided that the employee is able to perform the available work as measured by the accepted standards for the job.
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> Recall of employees following layoff when work is available will be made in accordance with their seniority, provided that the employee is able to perform the available work as measured by the accepted standards for the job.
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> . . . promotion will be granted to the employee with the greater seniority, unless a junior employee has substantially greater ability.
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> In the event two or more employees are involved in a request for transfer first consideration will be given to the employee with the greater seniority.
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> Senior employees shall have shift preference provided there is a vacancy on the preferred shift in the job to which the employee is currently assigned.

Under this contract clause (similar clauses exist in many labor contracts) a small difference in rank may determine whether an employee works on the night or the day shift; whether he is promoted or demoted; and even whether he works or is on layoff status. Thus a change in seniority status can be of great material value to the employee. It is for this reason that when consolidations of companies, plants, or departments occur, the manner in which the seniority lists are merged becomes very important.

Technology and Consolidations

At the same time that seniority has become increasingly important to the employees, the stability of the seniority units has become more and more threatened by developing technology and other factors in our dynamic economy. The number of corporate mergers and acquisitions reported by the Federal Trade Commission has been moving up rapidly.[6] In 1961, the last year for which the figures are available, the Commission reported a new postwar high of 671 mergers and acquisitions. There are reasons to believe that this trend will continue. Major corporate mergers

[6] *Statistical Abstract of the United States, 1962* (Washington: U. S. Department of Commerce, 1962), p. 503.

are now under consideration in railroad, airline and trucking industries, as well as in manufacturing and retailing.

The data on corporate mergers, however, do not tell the whole story. Our "raging technology" and our rapidly shifting markets are causing changes of plants and departments within companies. The closing down of the major Chicago meatpacking plants in the past several years is indicative of this trend. If the records were available they would probably show a strong upward trend in the moving and consolidation of company plants and departments. When such intra-company consolidations occur the problems of integrating seniority lists can be as severe as when two companies are consolidated.

The Future of Seniority

There are those who believe that our difficulties with seniority will be short-lived. They argue that the very concept of seniority will soon be destroyed by the onrushing technological revolution. This position was expressed recently as follows:

> Within not too many years, however, the problem we have been considering is likely to be one of historic interest only. The very concept of seniority is doomed to extinction, because the economic system upon which it is based is even now in the process of fundamental and irrevocable change. The impact of our "raging technology" has become increasingly severe; already it has destroyed or substantially altered the structure of the workers' society built up over the years by collective bargaining and legislation. Wholesale replacement of men by machines in a number of industries has wiped out, or is threatening with imminent extinction, the jobs of thousands of workers who had relied upon the delusive security provided by their seniority.
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> The rapidity of technological change strongly suggests that the average employee in the immediate future will have to change jobs at least several times during his working life. Length of service in a job will thus become increasingly meaningless as a criterion for employment preference. Moreover, in the next stage of our predictable development most of what constitutes "work" today will be performed by machines. Indeed according to some observers, the "future" is already here. Full employment, says Gerard Piel, in the kind of employment that is commonly available, whether blue-collar or white-collar, has been plainly outmoded by technology. He believes that the nation's principal economic problem has become that of certifying its citizens as con-

> sumers of the abundance available to sustain them in tasks worthy of their time. Obviously seniority has no relevance in such a society.[7]

Viewed as a long-run prediction, something which will eventually take place, the above statement may very well be an accurate forecast. In the meantime, however, there are likely to be many years in which seniority will continue to be an important concept. The very elements which may eventually destroy it will cause employees and unions to resist more strongly than ever the loss of specific seniority status. During this transition period one can anticipate a great growth of consolidations both between and within companies. These mergers will frequently require the consolidation of seniority lists and, where the parties cannot agree on how it is to be done, arbitrators will be called in, as they have been in the past. If the decisions and awards in these cases are to be intelligent, fair, and practical, the possible criteria which are available for use in the merging of seniority lists need to be explored carefully.

Criteria for Merging Seniority Lists

A review of the reported arbitration and court decisions on the merging of company, plant, and department seniority lists and a survey of the general literature in this area indicate that managements, unions, arbitrators, and judges have made use of a number of criteria. The most important of these criteria are:

1. the surviving-group principle;
2. the length-of-service principle;
3. the follow-the-work principle;
4. the absolute-rank principle;
5. the ratio-rank principle.

In the pages which follow, each of these criteria will be examined in order; examples of the use of each will be presented; the rationale behind it will be analyzed; some of the problems involved in its application will be explored, and finally, its effect on the value of the seniority rights of the various members of the merged groups will be evaluated.

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[7] Benjamin Aaron, "Reflections on the Legal Nature of Enforceability of Seniority Rights," *Harvard Law Review*, June, 1962.

1. *The Surviving-Group Principle*

In some industries it is the accepted practice that, when one company purchases or acquires another company, the employees of the purchasing or acquiring company receive seniority preference over the employees of the purchased or acquired company. In the printing industries, for example, this principle has had the support of the International Typographical Union for many years. As a result, when one newspaper buys out another newspaper, the seniority lists are merged by adding the names of the employees from the acquired paper to the bottom of the list of the surviving paper.

Likewise, in the trucking industry, although there has been a move away from this position which will be explained later, many contracts still contain provisions such as the following from the 1961-1967 New England Freight Agreement:

> (e) Acquisition or Purchase.
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> When one company acquires or purchases control of the business of another company, including control by an I.C.C. order, then the employees of the company so acquired or purchased shall be placed at the bottom of the acquiring or purchasing company's seniority roster in the order of their payroll or company seniority with the former company. If the Employer requires additional men he shall give preference to the employees of the former company for a period of 150 working days after the date of purchase.

In other cases the subordination of the seniority of the employees of a purchased company occurs, not because the policy is spelled out specifically in the labor agreement of both the purchasing and the purchased company as illustrated in the above trucking contract, but because of a literal interpretation of a contract clause in the labor agreement of the purchasing company only, which limits seniority to the date of employment with that company. Thus in a case involving the consolidation of two companies in the steel industry, an arbitrator ruled that a contract clause which stated "continuous service shall be determined by the employee's first employment in any work of the Corporation" limited the accrual of the seniority rights of the employees of the purchased company to the date of purchase. The union in this case argued that the clause should be interpreted to allow the employees of the purchased company to retain their seniority, but the arbitrator disagreed and reasoned as follows:

> We find absolutely no basis for such an interpretation of the Agreement. When it is considered that seniority has no existence apart from contract, and that in the ordinary course of events seniority extends only for the duration of employment with a particular employer, it is clear that any interpretation which constitutes a departure from this norm should be based only upon the clearest evidence that such departure was actually intended by the parties. We find no such evidence in the record before us.[8]

In the consolidation of Pan American World Airways and American Overseas Airways, the Pan American labor agreement with its pilots contained a similar clause. It stated that "seniority shall begin to accrue from the date of employment as a pilot with the company. . . ." The Pan American pilots argued that this clause had to be interpreted to place the American Overseas Airways pilots at the bottom of the list. In this case, however, the arbitrator refused to adopt a literal interpretation of the clause and, based on other contract clauses, ruled that the lists should be integrated.[9]

In cases where a union fears that the company may be purchased and as a result its members may lose seniority status, it may demand a contract clause which will provide protection of seniority rights under such a contingency. In 1951 the Flight Engineers International Association demanded the inclusion of such a clause in its contract with National Airlines. The matter was finally heard by an arbitration board chaired by William Howard Payne which ordered the inclusion of the following clause in the contract:

> I. It is understood and agreed that all provisions of this agreement shall be binding upon successors or assignors of the Company. In case of a consolidation or merger, representatives of the Company and the Association will meet without delay and negotiate the proper provisions for the protection of the seniority and any other rights of the employees covered hereunder.[10]

In a similar situation, the employees of L. A. Smith Company were able to maintain their seniority rights as a result of a successor and assigns clause in their contract when the company was bought by the Refiners Transport and Terminal Corporation.

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[8] *Jones and Laughlin Steel Corporation*, 20 LA 797. See also *Transcon Lines and Local 850 International Association of Machinists and Local 886 International Brotherhood of Teamsters* (1959).

[9] *Pan American World Airways, Inc.*, 19 LA 14.

[10] *National Airlines, Inc.*, 16 LA 532.

Following the consolidation the Refiners Transport and Terminal Corporation contract with the Oil, Chemical and Atomic Workers International Union was revised to include the following clause:

> (a) In accordance with the Successor and Assigns Clause from the former L. A. Smith Company contract, it is mutually agreed and understood that the former employees of the L. A. Smith Company (purchased by RT&TC in March 1959) at its River Rouge and Napoleon, Michigan Terminals who are presently employed under the terms and conditions of this Agreement, shall retain all past seniority and benefits accrued while being employed by L. A. Smith Company.[11]

One problem which sometimes arises in the application of this criterion is the difficulty of determining whether the consolidation has resulted from a true purchase or from some kind of a merger in which neither of the original enterprises can be considered as the acquiring company. In the consolidation of two trucking companies in Western Pennsylvania, management maintained that one of the companies had been purchased by the other. Since it was the accepted practice, in that part of the industry at that time, that the seniority of the employees of a purchased company should be subordinated to the seniority of the employees of the purchasing company, management constructed the merged seniority list accordingly. The union objected, claiming that the consolidation had resulted from a merger rather than from a purchase. The arbitrator, after investigating the facts of the consolidation, ruled that it had resulted from a merger, not a sale and, therefore, ordered the lists to be dovetailed.[12] In order to avoid difficulties of this nature, the 1961-1967 New England Freight Agreement contains the following clause:

> The decision of the Interstate Commerce Commission or State Regulatory Body shall be considered as presumptive proof as to the nature of the transaction relative to mergers, purchases, acquisitions, and/or other combinations of two or more contract or common carriers.

Once it is determined that the consolidation has resulted from a purchase of the one company by the other company the applica-

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[11] *Refiners Transport and Terminal Corporation*, 38 LA 100.
[12] *Western Pennsylvania Motor Carriers Association*, 31 LA 976.

tion of the surviving-group principle is very simple. It is much easier to apply, however, than it is to justify. The rationale behind it seems to be the same as that expressed in the old cliche, "possession is nine tenths of the law."

Placing the employees of the purchased company at the bottom of the list can sometimes be justified because the purchased company was in such a financial condition that it would not have been able to continue to supply jobs for its employees if the consolidation had not been consummated. To integrate the two seniority lists in such a way that some of the employees of the purchased company rank higher than some of the employees of the purchasing company under such conditions would provide the former with a windfall at the expense of the latter. The trouble with this argument is that in many instances the purchased company is not in financial difficulty and brings to the consolidation many valuable jobs. Even if the purchased company brings only a few jobs to the consolidation, the result of using the surviving-group principle is that the employees of the purchasing company gain a windfall in the value of their seniority rights at the expense of the employees of the purchased company.

Recognizing that the placement of the employees of a purchased company at the bottom of the seniority list can be highly inequitable if the company was financially sound before the consolidation, the teamster's union and the trucking industry in many parts of the country are now moving away from the type of clause quoted above from the 1961-1967 New England Freight Agreement and are providing instead that the surviving-group principle shall be effective only when the purchased company was insolvent at the time of the purchase.

Although generally a better solution to the problem than the policy of placing the employees of the purchased company at the bottom of the list regardless of its financial condition, the teamster solution is far from perfect in so far as avoiding windfalls and inequities. For even an insolvent company is likely to bring some jobs and some work with it into a consolidation. Only where it can be shown that the opposite is true, that is, where the purchased company contributes no work, would equity be served and a

windfall prevented by placing its employees at the bottom of the combined seniority list.[13]

The surviving-group principle is not limited in its application to inter-company consolidations. It is also quite generally employed in intra-company consolidations. When one plant or department is closed and the workers are given the right to move to another plant or department, it is usual for them to be placed at the bottom of the seniority list in the new plant or department. Clark Kerr noted that this was the general policy in an arbitration decision which he wrote on the issue in 1949.[14] The situation has not changed much since then.

The 1961-1967 New England Freight Agreement in the trucking industry contains the following clause:

> 2. When a branch, terminal, division or operation is closed or partially closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, an employee at the closed or partially closed down branch, terminal, division or operation shall have the right to transfer to the branch, terminal, division or operation into which the work was transferred if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with his seniority at such terminal.

In 1961 when Armco Steel closed its Etna plant and moved the work which had been done in it to its Ambridge plant, the workers at Ambridge argued strongly that employees transferred from Etna should be placed at the bottom of the seniority list. Only as a result of intervention by the International Union followed by an arbitration award were the former Etna employees able to secure more favorable consideration and even so their seniority list was integrated only with the employees at Ambridge who were on layoff status.[15]

In general the surviving-group principle has not been supported by arbitrators as an equitable and fair means of merging seniority lists. In one case, where the arbitrator found himself forced by

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[13] This was evidently the case when PAA Africa and PAA Air Ferries were merged into Pan American World Airways. See *Pan American World Airways, Inc.*, 19 LA 14.

[14] *C. K. Williams Company*, 12 LA 987.

[15] *Armco Steel Corporation*, 36 LA 981.

the contract to apply the principle, he included the following apologia in his decision:

> It is not unusual that a change, a merger, a consolidation or a new method of operation, works a hardship upon some individuals, and no one has found a successful way to avoid this unfortunate consequence. The arbitrator is not permitted to render an award based solely on his concept of fairness and equity, but on the contrary, must render an award which is equitable under the contractual provisions existing between the company and the affected employees. It has often been said that justice can be as cruel as truth itself.[16]

In the Pan American World Airway case, arbitrator David Cole stated his opposition to the use of this criterion as follows:

> When the operations of two airlines are combined it is because economies and flexibility are attained and because the CAB or the President thinks it is in the national interest that they should be. Whether one company or the other should continue, or whether a totally new company should be formed are decisions definitely not made with reference to the seniority rights of either group of employees. Financial or tax advantages, or perhaps legal considerations may be weighed, but so far as the employees are concerned it is sheer happenstance whether Company A or Company B survives in its original legal form. In view thereof, it seems highly undesirable that the future welfare of the employee population of two companies should hinge on the legal form the transaction may take. The substance of the combination of the two enterprises and the contributions made by each in the nature of jobs are of much more consequence and significance.[17]

In summary, the surviving-group principle is a criterion which is widely used for the merging of seniority lists not only in inter-company but also in intra-company consolidations. One problem which is sometimes encountered in the application of this criterion is the difficulty of determining whether the consolidation was the result of an acquisition or a merger. In general, however, it is very easy to administer. On the other hand its effects are usually inequitable, resulting in windfalls in seniority rights for the employees of the surviving company, plant or department at the expense of the seniority rights of the employees of the discontinued company, plant or department.

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[16] *Transcon Lines and Local 850 International Association of Machinists and Local 886 International Brotherhood of Teamsters* (1959).
[17] *Pan American World Airways, Inc.*, 19 LA 14.

2. *The Length-of-Service Principle*

Seniority lists are usually based primarily on length of service. As a matter of fact, in most labor agreements seniority is defined as length of service. One current labor contract states it as follows:

> Seniority shall be designated as Plant-wide or Departmental: Plant-wide Seniority is determined by *length of continuous service* computed in years, months, and days from the last date the employee entered the service of the Company. Departmental Seniority is determined by *length of continuous service* computed in years, months and days from the last date the employee permanently entered the Department.

As a result length of service is almost always an important factor in the merging of seniority lists. Even in cases such as those cited in the previous section where the surviving-group principle is the dominant criterion and as a result the employees from the purchased or closed company, plant or department are placed at the bottom of the seniority list, the employees in each group usually are listed according to their length of service. Likewise, when the follow-the-work principle, the absolute-rank principle, or the ratio-rank principle is dominant, length of service in most instances still plays an important role.

In many cases length of service is the only criterion which is employed when seniority lists are merged. In the airlines there are numerous examples of this. When United Air Lines was formed by consolidating a number of smaller companies, each employee was placed on the seniority lists of the new company on the basis of length of service within category. In the Inland-Western merger the same pattern was followed. In the PanAm-AOA consolidation, although the merged pilot seniority list was not integrated solely by length of service, the lists of a number of the other crafts were so integrated; the Pan Am and AOA clerks represented by the Brotherhood of Railway Clerks agreed to length-of-service integration as did the stockroom clerks who were represented by the International Association of Machinists; and the Pan Am and AOA dispatchers were integrated solely by length of service as a result of an arbitration award.[18]

In many mergers in other industries the length-of-service principle has been used as the sole basis for integrating the seniority

[18] *Pan American World Airways, Inc.*, 19 LA 14.

lists. Thus, when a major automobile company decided to consolidate its two California plants, the Bay Area employees were given the opportunity to move to the enlarged Los Angeles plant where not only the plant-wide seniority lists but also the departmental seniority lists were integrated entirely on the basis of length of service.[19]

The rationale of using the length-of-service principle as the basis for the integration of seniority lists is fairly simple. If it was reasonable to construct the original lists by this method, why is it not also reasonable to combine them by the same method? If seniority is defined as length of service in the labor contract, as it frequently is, how can a merged seniority list be constructed on any other basis, unless the definition of seniority is changed?

Although some difficulties are encountered at times in the construction of a merged seniority list by the length-of-service principle, on the whole it is an easy method to apply. The service date of each employee is usually available on the original seniority lists and it is simply a matter of combining the two by placing the employees in order of those dates. Moreover, where two plants of the same company are being consolidated and where welfare benefits depend on length of service, this method has the advantage of causing one list to serve both purposes. Where the seniority lists are merged by other criteria, some peculiar results can flow from having one list for welfare benefits and another for competitive-status seniority rights. For example, an employee who is eligible for two weeks of vacation may find that an employee who is eligible for only one week of vacation has preference over him with respect to choosing the time of vacation.

Use of the length-of-service principle, however, is not without its problems. Although the seniority lists to be merged usually have been constructed solely on the length-of-service principle, this is not always the case. When one of the original lists has not followed the principle, should this be corrected in the merged list

[19] Margaret S. Gordon and Ann H. McCorry, "Plant Relocation and Job Security: A Case Study," *Industrial and Labor Relations Review*, October, 1957. See also *Carnegie-Illinois Steel Corporation*, 1 ALAA par. 67,130. In this case the company transferred employees from two closed plants to another plant and integrated the departmental seniority lists as well as the plant seniority lists on the basis of length of service with the company.

or should the merged list simply reflect the order of the original lists?

Another problem which sometimes arises is that length of service may be defined differently in one seniority list than in another. In a case involving the consolidation of photoengraving departments, four different starting dates were proposed as the basis for determining length of service: (1) starting date with the company, (2) starting date in one of the photoengraving departments, (3) starting date as a journeyman in one of the photoengraving departments, and (4) starting date as a journeyman in one of the kindred departments.[20]

Closely related to the above problem is the difficulty which may arise in integrating seniority lists by means of the length-of-service principle when two or more employees have the same starting date. In large companies or plants a sizeable number of employees may be hired on the same day. Under some labor agreements two employees hired on the same day are considered to have identical seniority and when a choice must be made between them with respect to such matters as promotion and layoff, factors other than seniority are controlling. Under many labor agreements, however, the parties have worked out a method for ranking such employees on the seniority list. Unfortunately the companies and plants have adopted different methods. Among the various devices used to rank same-day hires are: the hour or the minute when the hiring was finalized, the employee's number given to him by the employment office, the time at which the employee reported for work, alphabetical order, or the toss of a coin.[21] When two lists which have employed different methods for ranking same-day hires are merged, which method should be employed in developing the merged list?

Although the above problems in the application of the length-of-service principle are troublesome, there is, under certain conditions, a more fundamental objection to its use as the sole criterion for the merging of seniority lists. Most arbitrators accept the position that when two lists are merged the seniority rights which employees had in the original lists should be preserved to

[20] *Moore Business Forms, Inc.*, 24 LA 793.
[21] See *National Biscuit Company*, 4 ALAA par. 68,530.2 and *Lone Star Steel*, 9 ALAA par. 70,870.

the greatest extent possible, and if there are losses or gains these should be shared equally by the two groups. In other words, the merger should not provide the members of one of the groups with major windfalls at the expense of the members of the other group.

Unfortunately, under certain circumstances when the length-of-service principle is employed exclusively, major windfalls do occur. These inequities which occur arise from the fact that the value of an employee's seniority rights derives not just from his length of service but also from (1) the length of service of other employees on the list, and (2) the amount of work which is available.

In plant A a full ten years of service may leave an employee at the very bottom of the list, the first person to be laid off in case of curtailment and the last to be hired or to be considered for recall, promotion, etc. In plant B only two years of service may place an employee at the very top of the seniority list, the last person to be laid off in case of curtailment and the first to be considered for recall, promotion, etc. When plant A and plant B are consolidated, if the seniority lists are merged solely on the basis of length of service, the employees from A gain a windfall at the expense of the employees from B who suffer a loss in the value of their seniority rights.

In plant C there may be ample work available for all of the employees on the list, whereas in plant D work may be available for only one-half of the employees. Even assuming that the average length of service and the spread of length of service in each plant seniority list is identical, an employee in plant C with two years of service is assured of steady work, whereas an employee with ten years of service in plant D may be unemployed. If these two groups are combined solely on the basis of length of service, it is clear that the employees from plant D will gain a windfall at the expense of the employees from plant C.

Arbitrators and judges have recognized the inequities which would result in some cases if length of service were to be used as the sole criterion and have ruled accordingly. In an early case which ended in a court decision two printing companies, one of which had plenty of work for all of its employees, merged with

another company which had a considerable number of its employees on layoff status because of lack of work. Under the rules of the Local of the International Typographical Union, the two seniority lists were integrated on the basis of length of service alone. As a result many of the workers in the thriving company were displaced by employees who had been on layoff status in the other company. Some of these displaced workers appealed to the court for protection of their rights and the judge ruled that the integration of the lists by length of service only under such circumstances resulted in inequity. He ordered that the displaced employees be restored to their jobs.[22]

In a more recent case involving the consolidation of two photoengraving plants, one of which contained a seniority list with an average length of service much higher than the other, arbitrator Harold M. Somers refused to integrate the lists on the basis of the length-of-service criterion exclusively. He found that to do so would have resulted in unwarranted and extensive gains in seniority rights for the members of the older group at the expense of comparable losses for the members of the younger group.[23]

In summary, length of service is an important criterion for merging seniority lists and plays a part in every such integration. In many cases it is the sole criterion employed. When so used it has the advantage of resulting in a merged list which is in harmony with the definition of seniority in most labor agreements. In general it is easy to apply, although difficulties may arise if the original lists have not been developed solely on the basis of length of service or if they have different definitions of length of service. However, the use of length of service as the sole criterion in cases where there is considerable difference in either the average length of service or the degree of employment in the two merging groups, can cause one group to gain a windfall in the form of increased value of seniority rights at the expense of the other group. In order to avoid the inequities in such cases, arbitrators and others have deviated from the length-of-service principle and given some weight to the follow-the-work principle and/or the ratio-rank principle.

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[22] *Hamilton* v. *Rous*, 165 N.Y. Supp. 173 (1917).

[23] *Moore Business Forms, Inc.*, 24 LA 793.

3. *The Follow-the-Work Principle*

When a company is merged with another company or when plants or departments within a company are consolidated, the workers may be given the opportunity to follow the work with the seniority rights to such work protected. This may occur because of certain provisions in the union constitution or in the labor agreement or because the follow-the-work principle is used as a criterion by the management and the union or by the arbitrator for determining seniority rights, even though the union constitution and the labor agreement are silent on the matter.

In the railroad industry the right to follow the work is spelled out in many of the union constitutions and accepted by the management. The constitution of the Order of Railway Conductors and Brakemen contains the following provision:

> Whenever one railroad is absorbed or leased by another railroad the conductors and brakemen on the road absorbed or leased shall retain their right and seniority as heretofore on the road absorbed or leased. When it becomes necessary to readjust the service of the merged roads, the trains and runs shall be manned by conductors and brakemen of the respective roads in proportion, as nearly as practicable, to the mileage run on the territory of each.
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> Traffic increases over and above the traffic diverted from one road to the other upon acquisition of trackage rights, shall also be given consideration in the apportionment of said increased traffic as between the Conductors and Brakemen employed by the Carrier over whose lines the trackage rights are acquired and Conductors and Brakemen employed by the Carrier or Carriers acquiring such trackage rights, in apportionments found to be fair and equitable to all Conductors and Brakemen involved.[24]

The employees' right to follow the work when companies, plants or departments are consolidated may also follow from interpretation of certain contract clauses. Reference has been made earlier to a successor and assigns clause which offered protection to seniority rights in the case of a merger.[25] In other cases contract clauses providing that transfer of work should not change the bargaining unit have been interpreted by arbitrators to give

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[24] Constitution and Statutes, Rules of Order, Order of Railway Conductors and Brakemen (1958), p. 126.

[25] *Refiners Transport and Terminal Corporation*, 38 LA 100.

the employees the right to follow the work.[26] A very interesting development in this area occurred during 1961 and 1962 when several federal courts ruled that rather ordinary seniority clauses in collective bargaining agreements gave employees the right to follow the work when plants were moved.[27] However, in July 1962 the Sixth Circuit Court reversed such a ruling and in December 1962 the Supreme Court refused to grant certiorari for a review of the Sixth Circuit Court's decision.[28] Thus, it now appears to be established federal law that ordinary seniority clauses do not give employees the right to follow the work when plants are moved.

In a recent steel company case involving the closing of a plant and the moving of its production to another plant, the International Union supported the follow-the-work principle as one of several criteria which became the basis for settling the dispute between the two locals. One of the locals in this case argued that follow-the-work should be the sole criterion but the International and the arbitrator considered other factors as well.[29]

Follow-the-work has also been one of the important criteria, although not the only criterion, used in determining the seniority rights in some of the airline merger cases. In its opinion in the PanAm-AOA pilot seniority controversy, the Civil Aeronautics Board stated that weight should be given "to the additional job opportunities which the transfer of American Overseas operations to Pan American will create in the latter Company."

In the more recent United-Capital consolidation the three neutral members of the seven-man Arbitration Board under the chairmanship of Harry Abrahams stated:

> The difference in equipment of each Company created one of the difficulties involved in the merger of these two pilot groups

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[26] *American Machine and Foundry Company,* 16 LA 95 (1950); *Merrick Machine and Foundry Company* (1950).

[27] *Zdanok* v. *Glidden,* 47 LRRM 2865, and 50 LRRM 2693; *Oddie* v. *Ross Gear and Tool Co., Inc.,* 48 LRRM 2586; *Selb Manufacturing Co.* v. *Machinists, District 9,* 50 LRRM 2671.

[28] *Oddie* v. *Ross Gear and Tool Co., Inc.,* 48 LRRM 2586, 50 LRRM 2763, 51 LRRM 2717. See also Benjamin Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," *Harvard Law Review,* June 1962, p. 1562.

[29] *Armco Steel Corporation,* 36 LA 981.

> Prior to the merger, United had 129 jet aircraft on hand or on firm order, and Capital did not have any.
>
> If there had been no merger, the United pilots would have flown all of their jet equipment. Since, ordinarily, equipment flown by a pilot is determined by his seniority status, the Capital pilots if integrated into a merged seniority list solely on the basis of length of service could possibly enjoy a windfall at the expense of the United pilots. The Capital pilots could have conceivably received most of the future jet flying for the next few years.
>
> Prior to the merger announcement, the maximum monthly income of the United Captains flying pure jets was from $395.00 to $668.00 (plus overseas pay of $255.00 on their Honolulu run) more per month than the Capital Captains received while flying the Viscounts. Co-Pilot earnings had a similar relationship with a smaller differential.
>
> Prior to the merger, Capital had 102 pilots on furlough; United did not have any pilots on furlough. Due to the merger, the Capital pilots on furlough were recalled to work. Since the merger, there have not been any furloughs, and on August 7, 1961, United published a job opportunity announcement for the hiring of 260 additional pilots.[30]

Because of the above condition the neutral members of the Board deviated from the length-of-service criterion which was favored by the Capital pilots and gave considerable weight to the follow-the-work principle. This was accomplished by giving most of the jet flying to United pilots until June, 1966.

The rationale behind the use of the follow-the-work principle is that it prevents the consolidation from resulting in windfalls to some employees at the expense of other employees. Reference was made in the previous section to a thriving printing company which bought out another company which was in financial difficulty. In that case the seniority lists were merged solely on the basis of length of service and as a result the unemployed workers from the company which had been in difficulty were able to claim jobs in the consolidated company at the expense of the workers who had had steady work in the thriving young company. It is true of course that in our dynamic economic system workers frequently suffer gains or losses in their seniority rights through no fault of their own. However, arbitrators who have been called

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[30] United Air Lines Pilots' Merger Committee and Capital Airlines Pilots' Merger Committee, March 28, 1962.

upon to determine the resultant seniority rights following a merger have frequently decided that they did not want to add further to such inequities. As a result they have given weight to the follow-the-work principle.

The application of the follow-the-work principle involves certain difficulties. There is the question of whether it is better to merge the lists or to continue them as separate lists. If the work which each group brings to the consolidation is to remain clearly distinct and separate in the future, separate seniority lists may be the simplest and easiest solution. However, in many consolidations the work also becomes merged, if not immediately, at least over a period of time. When this occurs it becomes difficult or impossible to operate with two seniority lists and to give to each group of employees the work which they brought with them to the consolidation. Either the lists must be merged or a new method developed for assigning work from the two lists.[31]

It is possible of course to integrate the seniority lists on a ratio basis representing the amount of work brought to the consolidation of each group. This is the kind of integration which is required if full weight is to be given to the follow-the-work principle.

One of the problems involved in the application of this criterion is that it is frequently difficult to determine the amount of work which each group has brought to the consolidation. In a case where a steel company closed one plant and enlarged the facilities of another plant, the local union representing the employees of the closed plant contended that all of its work was being transferred to the other plant and that such work would be separate and distinct from the other work at that plant. The arbitrator disagreed and stated:

> The evidence does not support the allegations . . . only a small amount of the Etna equipment is actually being moved. True the new mill will produce the same end-product as the old mill, viz, continuous weld pipe. But it will do more. It will be capable of producing a continuous weld pipe and electrical weld steel pipe at speeds almost four times as great as before and be capable of

[31] Prior to the arbitration award in the PanAm-AOA consolidation, the CAB for some time continued the two separate pilot seniority lists and provided that employees be taken from the two lists on a ratio basis. Later the CAB ordered that the lists should be combined on a length-of-service basis. The arbitration award modified the CAB award by giving some weight to rank. *Pan American World Airways, Inc.*, 19 LA 14.

> stretch-reducing welded pipe to final size and seamless pipe to smaller sizes. The new mill, equipped with complete finishing operations, will produce a wide range of pipe sizes and will perform processes never before performed at either Etna or Ambridge. And while continuous weld pipe similar to that manufactured at Etna will be produced, the Company estimates that the facilities will be employed in such production at an average of only 28 percent of the time over the next five years. Also in terms of supervision, management, and service functions, the evidence is that there will be no segregation of the new Ambridge facilities from the existing plant. In actual fact the new facilities are to be integrated into the existing Ambridge operation. The Etna functions will henceforth be indistinguishable Ambridge functions.[32]

In the PanAm-AOA consolidation the arbitrator recognized that "an important issue in the case is whether the AOA pilots brought their jobs with them." However, after reviewing all the available data on the issue, the arbitrator concluded that "it fails to tell us precisely what effect on pilot jobs the merger actually had . . ." [33] In the United-Capital consolidation the arbitrators were faced with the difficulty of deciding how much weight to attach to routes as compared to equipment. Capital pilots brought with them some routes but for those routes the equipment was to come largely from United. The arbitrators decided that because they brought these routes into the consolidation the Capital pilots "are entitled to share in some of the jet flying."

The percentage of the total work brought to the merger by each of the groups is further complicated by whether one should consider the past work, the present work or the future work. The representatives of the employees of a successful firm which merges with a failing firm may argue that if the consolidation had not taken place, eventually there would have been no work at the failing firm and, therefore, its employees have no right to anything but the bottom of the seniority list. On the other hand the representatives of the employees of the failing firm may argue that as a result of the merger the future prospects of the consolidated company are much brighter than was the case for either of the companies if they had gone it alone.

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[32] *Armco Steel Corporation*, 36 LA 981.

[33] *Pan American World Airways, Inc.*, 19 LA 14.

Faced with the above arguments one arbitrator reasoned as follows:

> Whether the enlarged enterprise prospers or is unsuccessful will have an unavoidable influence on the employment of pilots and on their opportunities for future advancement, but this is true in almost any business venture with which employees are connected. One hesitates to complicate this difficult situation by undertaking to foresee the future course of business. There are far too many variables involved which may have no direct connection with the merger as such. If the combined air line is started on a workable and fair basis so far as the seniority rights of the two groups are concerned, it would be better to let the future take care of itself through the normal functioning of the seniority provisions of the collective bargaining agreement.[34]

In summary, the follow-the-work principle is recognized as a means of preventing windfalls in the value of seniority rights to the employees of one group at the expense of the employees of the other group, resulting solely from consolidation of companies, plants or departments. For this reason it has been written into some union constitutions and some labor agreements. Even where it is not a part of the union constitution or the labor agreement, managements, unions, arbitrators and judges have given weight to it in order to avoid gross inequities. In some cases, however, it is quite difficult to determine the percentage of the work in the consolidation which each group brings to it. This is especially true if one is concerned with future as well as present work.

4. *The Absolute-Rank Principle*

Rank is a very important factor when a seniority list is under consideration. Although the rights to payment under certain benefit plans such as pensions, vacations, S.U.B. and termination pay may depend on length of service, the things for which a seniority list is developed—preference with respect to layoffs, rehire, promotion, shift, etc.—depend on rank on the list. An employee may have twenty years of service, but, if he is the last man on the seniority list, he is the first to be considered for layoff, and the last to be considered for rehire, promotion, shift preference, etc.

None of the three criteria previously discussed give weight to this important factor of rank. The use of the surviving-group prin-

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34 *Ibid.*

ciple, of course, guarantees the rank of the employees of the surviving group but it gives no weight to the rank of the employees of the acquired group. The use of the length-of-service principle or the follow-the-work principle may cause employees to gain or lose rank on the merged list. These two criteria are concerned with the protection of other factors, not with preservation of rank.

It is possible, of course, to integrate seniority lists solely on the basis of absolute rank: the two employees who were first on the two original lists can be given the first two places on the merged list; the two employees who were second on the two original lists can be given the third and fourth places; and so on. The rationale behind the use of this method is that it places the emphasis on the most important aspect of a seniority list and that as a result, under certain conditions, it prevents windfalls to some employees and losses to other employees which flow from a merger of lists when the length-of-service criteria is used as the sole basis for integration.

Consider, for example, a consolidation involving plant A and plant B, each of which has twenty employees. In plant A a ten-year employee has the shortest length of service and, therefore, is the lowest man on the seniority list. In plant B a nine-year employee has the longest length of service and, therefore, is the highest man on the seniority list. In each of these groups there has been enough work available recently for only one-half of the employees, and the work of the consolidated plant consists of only the work which the two original plants have contributed. Prior to the consolidation ten employees were on layoff status from the plant A seniority list and ten were on layoff status from the plant B seniority list. If as a result of the consolidation the seniority lists are merged solely on the basis of length-of-service, the last ten men on the original plant A list would be called back to work at the expense of the ten men on the top of the plant B list who would now be on layoff status.

If the goal of the integration of the seniority lists is that employees should neither gain nor lose as a result of the consolidation, it is clear that the length-of-service principle is not effective under the circumstance of the above hypothetical case. On the other hand the use of the absolute-rank principle in this case would

result in the achievement of this goal. Under it the first ten employees on each of the original seniority lists would become the first twenty employees on the new merged list and would continue to work. The last ten employees on each of the original lists would become the last twenty employees on the new merged list and would remain on layoff. Thus, as a result of the use of the absolute-rank principle, the employees of neither group would have gained a windfall at the expense of the employees of the other group. The results can be shown as follows:

	Prior to Merger		*After Merger Under Length-of-Service Principle*		*After Merger Under Absolute-Rank Principle*	
	Working	*On Layoff*	*Working*	*On Layoff*	*Working*	*On Layoff*
A Employees	10	10	20	0	10	10
B Employees	10	10	0	20	10	10
TOTAL	20	20	20	20	20	20

One interesting problem which arises with the use of the absolute-rank principle is the determination of which of the two employees who occupied the first places on the two original lists should be given first place on the combined list; which of the two employees who occupied the second places on the two original lists should be given third place; and so on. However, this problem lends itself to easy solution by giving the highest rank to the employee with most length of service. Another problem which arises here, as in the case of the use of the follow-the-work principle, is that the resulting seniority list does not coincide with the length-of-service list. Since benefit plans are usually related to length of service, this can cause some strange results as was indicated when the length-of-service principle was discussed.[35]

The basic difficulty with the use of the absolute-rank principle is that it results in the preservation of prior rights, as in the above example, only when the two groups to be merged are equal in size. Consider what would have happened if plant A had had 40 instead of 20 employees, assuming that all the other conditions had been identical with the earlier example, including the assumption that each plant had work for only one half of its employees. Now, if the two lists were to be merged on the basis of absolute rank,

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[35] See *The Length-of-Service Principle*, above.

fifteen of the employees from the A plant and fifteen of the employees from the B plant would occupy the first thirty positions on the new seniority list and, therefore, would be eligible to work. However, five of the thirty employees who would be working following the merger would be plant B employees who had been on layoff status prior to the merger and they would be replacing five plant A employees who had been working prior to the merger. The results may be shown as follows:

	Total	*Working Before Merger*	*On Layoff Before Merger*	*Working After Merger*	*On Layoff After Merger*
A Employees	40	20	20	15	25
B Employees	20	10	10	15	5
TOTAL	60	30	30	30	30

Thus, if the goal is to achieve preservation of value of seniority rights and to avoid windfalls as a result of the merger, the absolute-rank principle must be limited to those few cases where the number of employees in each of the groups to be merged are about equal.

The absolute-rank principle has not been popular with managements, unions, or arbitrators. No case has been turned up where it was used or proposed, either as the sole criterion, or as one of the criteria. This lack of use has not been due to a failure to recognize the importance of rank in the integration of seniority lists but because there is another criterion, the ratio-rank principle which permits weight to be given to the rank factor without producing the distortions which occur with the absolute-rank principle when the groups to be merged are different in size, as they usually are.

In summary, rank is more important than length of service in a seniority list and as a result, if lists are merged solely on the basis of length of service, windfalls may occur for some employees at the expense of others. In consolidations where the seniority lists to be merged are equal in size, the use of the absolute-rank principle may eliminate such windfalls and preserve the original seniority values of the employees.[36] However, where the groups

[36] This is true only where the amounts of work contributed to the consolidation by each of the two groups are not significantly different.

to be merged are different in size, as they usually are, the use of this principle may result in inequities as serious as the inequities caused by the use of the length-of-service principle. For this reason, when managements, unions, and arbitrators have wanted to give weight to the rank factor they have made use of the ratio-rank principle instead of the absolute-rank principle.

5. *The Ratio-Rank Principle*

Integration of two seniority lists may be accomplished also by establishing a ratio from the number of employees in each of the two groups to be merged and assigning the places on the new seniority list according to this ratio. Thus, if seniority list A has 200 employees and seniority list B has only 100 employees, the ratio is two to one. Therefore, of the first three places on the new seniority list, two are allocated to the first two employees on the A list and one is allocated to the first employee on the B list; then places 3, 4, and 5 on the new list are allocated to the third and fourth men on the A list and to the second man on the B list; and so on, until all the A and B employees are placed on the new list. This criterion, which will be referred to as the ratio-rank principle, differs from the absolute-rank principle in that it results in the preservation of relative rank rather than absolute rank. In arbitration cases this criterion frequently has been called simply the ratio principle or the ratio method of merging seniority lists. It is believed that inclusion of the term "rank" in its title is desirable, however, because it emphasizes the real purpose of the principle and also because it clearly distinguishes it from the follow-the-work principle in which ratios based on the amount of work contributed to the consolidation by each group are employed.

The ratio-rank principle has been employed either as the sole criterion or in conjunction with other criteria in a number of important cases, especially in the airline consolidations. When the Pennsylvania-Central Airline was formed, the pilot lists of the original lines were integrated on the basis of the ratio-rank principle. Likewise, when the Challenger Airline and the Mohawk Airline were consolidated, the same procedure was followed.

The ratio-rank principle was used also in the PanAm-AOA pilot seniority arbitration award, although not as the sole or major criterion. The length-of-service principle was also used in

that case and was given two-thirds weight whereas the ratio-rank principle was given only one-third weight.[37] In the United-Capital pilot seniority arbitration case, although the final seniority list was "based primarily on length of service . . .", the ratio-rank principle was used to integrate certain groups into it.[38] In an arbitration case in the printing industry which involved the consolidation of two plants within the same company, the arbitrator made use of this criterion but gave equal weight also to the length-of-service principle. As he said in his decision, he found the arguments for each of these criteria "persuasive," evidently equally persuasive.[39]

The rationale behind the use of the ratio-rank principle is much the same as that discussed above under the absolute-rank principle. It eliminates the windfalls and losses in seniority rights which occur if the length-of-service principle is employed to consolidate two seniority lists which have considerable difference in their length-of-service structure.[40] When the ratio-rank principle is used, the employees retain their relative positions on the merged seniority list. It is argued that "this substantially maintains the same seniority privileges as the persons enjoyed under the two separate lists." [41] The ratio-rank principle is preferable to the absolute-rank principle in most cases because, whereas the absolute-rank principle is effective in preserving equities only when the two groups to be merged are equal in size, the ratio-rank principle is effective regardless of the size of the two groups.

In the PanAm-AOA arbitration case the majority of the board reasoned that equity required that some weight be given to the ratio-rank principle because of the disparity in the ages of the two companies. Length of service was not acceptable as the sole criterion because,

> ". . . it works out that the status of the AOA pilots is given practically no consideration . . . the most senior AOA captains would now barely be eligible for the most junior captaincies at best. This fails to give sufficient weight either to the status

[37] *Pan American World Airways, Inc.*, 19 LA 14.

[38] United Air Lines Pilots' Merger Committee and Capital Airlines Pilots' Merger Committee, March 28, 1962.

[39] *Moore Business Forms, Inc.*, 24 LA 793.

[40] Assuming that each group brings an equal amount of work to the consolidation.

[41] *Moore Business Forms, Inc.*, 24 LA 793.

> attained by the pilots or the losses which AOA pilots would suffer because of the amalgamation of operations or to the gains which the PAA pilots might enjoy at their expense." [42]

On the other hand the majority of the arbitration board in the PanAm-AOA case was not willing to use the ratio-rank principle as the sole criterion because

> it recognizes no value for length of service . . . Captain Robertson, employed by American Export on March 1, 1942 would be No. 18 on the seniority list whereas Captain Jack hired the same day by PAA would be No. 368 . . . it would appear to be too great an advantage to an ex-AOA pilot by virtue of being employed by that company rather than by PAA.[43]

As was indicated earlier the award in the PanAm-AOA case established a new pilot seniority list by giving only one-third weight to the ratio-rank principle and two-thirds weight to the length-of-service principle. Even the one-third weight to the ratio-rank principle was strongly opposed by the minority member of the board who pointed out in his dissenting opinion that several of the former Pan Am pilots who left Pan Am to work with AOA, "are coming back to PAA in senior positions generally higher than those which they would hold had they remained with PAA." [44]

One of the difficulties in the application of the ratio-rank principle, as in the application of the absolute-rank principle, is the problem of determining which one of the two, three, four or more employees, who have equal rights under this criterion to a certain position on the seniority list, shall be given preference for it. To return to the example of the merger of seniority list A and seniority list B used earlier in this section, the ratio was two to one so the first three places on the merged list were allocated to the top two employees on the A list and the top employee on the B list. The ratio-rank principle does not determine, however, which of these three shall be number one, number two, and number three on the new seniority list. It determines only that the three of them somehow shall occupy the first three places.

This same problem arises also when the ratio-rank principle is

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[42] *Pan American World Airways, Inc.*, 19 LA 14.
[43] *Ibid.*
[44] *Ibid.*

not the sole criterion but is used in a formula in which some weight is given also to the length-of-service principle. Under such a formula two or more employees may come up with identical points and, therefore, under the formula have equal rights to a certain position on the list. One way to settle this difficulty is to give preference at that point to length of service. This would appear to be the most equitable solution in cases where the ratio-rank principle is used as the sole criterion and even in cases where it is only one of the criteria, provided the formula has not been too heavily weighted already in favor of length of service.

In the PanAm-AOA award, even though two-thirds weight was given to length of service, it was ruled that:

> In all cases of identical index numbers, or ties, the preference has been given to PAA pilots, because of their greater length of service.

Another difficulty in the application of the ratio-rank principle, which is also common to the absolute-rank principle and the follow-the-work principle arises because the seniority list resulting from its use does not coincide with a length-of-service list. Since most benefit plans are related to length of service rather than rank on the seniority list, it is necessary to have two lists—one for benefit rights and the other for competitive-status seniority rights. As pointed out earlier, this can result in some strange discrepancies between these two types of rights.[45] Moreover, in view of the usual definition and understanding of the term seniority, many people find it difficult to accept the idea that over the long run a seniority list should be other than a length-of-service list. In one arbitration case where the use of the ratio-rank principle appeared to provide immediate equity, the long-run effect of a seniority list not based on length of service troubled the arbitrator to the extent that he considered setting up the new list on the basis of the ratio-rank principle but then having it revert gradually to length of service over a period of years. He decided, finally, to set up a permanent list, giving weight to both the ratio-rank principle and to the length-of-service principle, but his struggle with the problem and his reasons for rejecting the idea of a gradual

[45] See *The Length-of-Service Principle*, above.

transition from the ratio-rank principle to the length-of-service principle are interesting.

> One solution would be to begin with a dovetailed list and gradually shift over into a straight length-of-service list as time elapses and the historic origin of the separate plant lists becomes more and more remote. This would require a different list each year for a five- or ten-year period into the future, beginning with a dovetailed list and ending with a length-of-service list. This would involve a great deal of effort and possible confusion in the meantime. It is preferable to settle the problem once and for all.[46]

In summary, the use of the ratio-rank principle results in the preservation of the relative rank of the employees in the merged seniority list. Since rank is very important in determining seniority value, it is an important criterion in cases where the average length of service or length-of-service structures of the original seniority lists are quite different. In such cases the ratio-rank principle may be used to eliminate or to decrease the windfalls to some employees and losses to other employees which would result from use of the length-of-service principle as the sole criterion. Its advantage as compared with the absolute-rank principle is that whereas the latter is effective in eliminating windfalls and losses only when the sizes of the two groups to be merged are equal, the ratio-rank principle can bring about these results regardless of the difference in the size of the two groups. Two difficulties arise in the application of this principle: (1) the merged seniority list which results is not according to length of service which contradicts the usual definition of seniority and (2) several employees may have equal rights to the same place on the merged list. Arbitrators have tended to use this criterion as a means of modifying the length-of-service principle rather than as the sole basis for integrating seniority lists.

Applying the Criteria

In some of the future arbitration cases involving the merger of seniority lists, a single criterion may be provided as a guide to the arbitrator by the union constitution or governing body, the collective bargaining agreement, or the stipulation to arbitrate.

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[46] *Moore Business Forms Inc.*, 24 LA 793.

The union constitution or the union governing body may provide that integration shall be strictly according to length of service; or the collective bargaining agreement may call for integration on the basis of the surviving-group principle; or the parties may stipulate that integration shall be accomplished on the basis of the ratio-rank principle. In such cases the arbitrator may believe that the resulting merged list is equitable and fair or he may believe just the opposite, but the basic decision will have been made by the parties. The arbitrator's job will be simply one of implementation. Actually, arbitrators will probably receive very few cases of this type. If the parties can agree on a single criterion, they will probably be able to agree on the manner in which it should be applied.

The cases which are more likely to go to arbitration are those in which the union constitution or governing body, the collective bargaining agreement, or the stipulation to arbitrate either (1) provide two or more criteria which may be contradictory or (2) provide no criteria except that "justice shall be done." An example of the former is the following statement of the Fourth Executive Board of the Air Line Pilots Association:

> The Board in reaching its decision shall recognize the employment dates of pilots as a factor, recognize employment status of pilots prior to merger as a factor, recognize that monetary gains or losses by pilots of either air line should be completed to a minimum and resist loss of employment by any pilots involved, minimize gain or loss of future advancement of position. However, if such losses do result, that payment be set for such loss.

An example of the second is the following stipulation which was entered into by the parties in a current case when a construction company closed down one of its two divisions:

> In view of the facts as set forth above and other equitable considerations, and such facts as may be presented by the union which are relevant, what is the seniority status of [the names of the employees of the closed division are listed] in the unit represented by Local ..... at the ..... Construction Company.

Given the right to choose the criteria to be applied in a specific case, it would appear that most arbitrators would not use the surviving-group principle or the absolute-rank principle, either singly

or as part of a formula. The reasons for the rejection of these two criteria should be clear from the earlier analysis of them.

Which of the other three criteria—length-of-service, follow-the-work, or ratio-rank—to employ either singly or jointly, and how much weight to give to each if they are employed jointly, presents the arbitrator with a difficult dilemma. The dilemma arises because there are two fundamental goals which the arbitrator would like to achieve in the merging of seniority lists and these two goals are mutually exclusive under the conditions which exist in most arbitration cases involving this problem.

The first goal is that the merged seniority list should be a length-of-service list. This is important because over the years seniority has been defined as length of service and is still so defined in our labor agreements, as well as in our dictionaries.[47] More important, however, is the fact that the philosophy of seniority has been based on the concept that seniority and length of service are synonymous. To establish a so-called seniority list in which the employees are not ranked according to length of service, not only violates the accepted definition of seniority, but flies in the face of the basic argument which has been used to justify the existence of seniority rights.

The other goal which is very dear to the heart of arbitrators is that some employees should not gain a windfall at the expense of other employees as a result of the arbitrator's decision. The arbitrator is supposed to see that justice is done and it does not appear to be justice if some employees through no effort of their own receive a great increase in the value of seniority rights at the same time that other employees suffer severe losses in the value of their seniority rights through no fault of their own.

There are some conditions under which both of these two goals can be achieved in the merging of seniority lists. If each of the two groups to be merged bring the same relative quantity and quality of work to the merger and if the average length of service and the length-of-service structures of the two groups are equal, there is no problem. Under such conditions, if the length-of-

[47] Webster's *Third New Collegiate Dictionary* (1961) defines seniority as "the status attained by *length of continuous service* to which are attached by custom or prior collective bargaining agreement various rights or privileges" (emphasis added).

service criterion is used to integrate the seniority lists, the merged list will be a length-of-service list and at the same time the value of each employee's seniority rights will have been preserved. When such is the case, however, the parties can usually reach agreement on the merging of the lists without the help of an arbitrator.

Whenever these two conditions are not present, that is, whenever (1) the work contributed to the consolidation by each group is not relatively equal in quantity or quality or (2) the average length of service or the length-of-service structure of the two groups are not the same, then both of the goals cannot be achieved. One can be attained only at the expense of the other.

Under such conditions the arbitrator must make a choice. He can decide to use the length-of-service criterion exclusively and in this way he can achieve the goal of a merged seniority list in which status and length of service are synonymous. In so doing, however, he must abandon the principle that employees should not gain or lose seniority values through no effort or fault of their own as a result of the arbitrator's award. On the other hand, under these same conditions the arbitrator, by deciding to use the follow-the-work criterion and/or the ratio-rank criterion, can guarantee that the value of each employee's seniority rights is preserved and that no employee gains a windfall or suffers a loss solely as a result of the arbitrator's award. Again, however, this can be achieved only at the expense of violating the other principle, that is, that the merged list should be based on length of service.

There is, of course, a third way open to the arbitrator. He can decide to render an award which will partially achieve each of these goals but fully achieve neither. This has been the path followed by most of the arbitrators who have made awards in this area to date. Under such conditions the arbitrator develops a formula which gives weight to both (1) the length-of-service criterion and (2) the follow-the-work criterion and/or the ratio-rank criterion. How much weight is given to each factor in the formula depends upon: (1) the degree of differences which exists between the original seniority groups in terms of relative quality and quantity of work and in terms of average length of service and (2) the relationship between the goal of length of service and

the goal of preservation of seniority rights which the arbitrator believes is most equitable under the circumstance.

Unfortunately there is no pat formula which provides the most desirable results in all instances. As in so many other types of cases, the arbitrator must use his best judgment.

Discussion—

VERNON H. JENSEN *

Professor Kennedy's paper, as I am sure you will agree, is an excellent review and analysis of the various approaches to the problems of handling seniority claims when seniority lists are merged or consolidated. I find little to criticize in the paper. It is highly informative. Of course, it may prove to be of more value to the parties than to arbitrators.

Perhaps one thing to be noted is Tom's recognition that problems arise from "consolidation of companies, plants, or departments," yet his paper deals primarily with mergers of companies and of plants which, I think, present the same type of problems. But nothing is said about seniority problems growing from merging or consolidating departments. The problem would be similar to company and plant mergers in consolidating departments if there are two or more unions in separate bargaining units. In other situations, I think the problems are not quite the same; primarily, perhaps, because the collective agreement and the ongoing practices are apt to be a better guide to the parties and to the arbitrator, if the matter gets to him. Nevertheless, one may find the problems troublesome for the reason that the seniority agreement was negotiated with other considerations in mind and it may not deal explicitly with merging of departmental seniority lists. Transference of departmental seniority rights or termination of departmental rights may be clearly taken care of in some agreements, but a company and a union faced with substantial internal reorganization arising from technological change will have difficulties with seniority rights. The problems will be greater when the agreement is not explicit.

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Tom quotes Ben Aaron to the effect that seniority will soon be destroyed by the onrushing technological revolution. He includes Ben's statement that "The very concept of seniority is doomed to extinction, because the economic system upon which it is based is even now in the process of fundamental and irrevocable change," and that wholesale replacement of men by machines makes of seniority a "delusive security." The latter may sometimes be true but not always and seniority is used in collective agreements for purposes other than job security. But I wonder if seniority is doomed to extinction.

As Tom points out, the very forces which Ben Aaron describes will make seniority more valuable to workers who hold it, even though under certain eventualities they may lose any value they thought they held. The property right in the job, if we may use such a phrase, will be considered even more valuable. Of all issues in labor and management relations, seniority partakes more of the spirit our society manifests in the drive to hold and protect property than, perhaps, any other.

The point is underscored in the substance of a conversation I once had with an employer I met at a social dance. He was beset with negotiating a contract for the first time with a union and he was not exactly happy. When I was introduced to him as a professor of industrial and labor relations, he at once tried to unburden himself and load me with his problems. Being polite, yet trying to keep him from mixing his business too much with the festivities of the evening, I tried to head him off and console him by saying that he would not find it too difficult to live with the union, although life would be different and he might have to concede some points on which he would prefer not to. Whereupon, he retorted, "One thing I'll never concede is to that communistic principle of seniority."

Being a professor I could not let the opportunity pass to further the man's education. I asked him if he knew the common rule which the communists profess, but he did not know it and so I told him that it was "From each according to his ability." I assured him that seniority was anything but communistic for it is based upon a capitalistic theory of private job rights.

The District 65, Retail, Wholesale and Department Store work-

ers in *Livingston* v. *Wiley,* a case to which I will refer later, has argued that seniority rights are a vested property right. If seniority is not exactly equivalent to property, I think it must be because the lawyers are not ingenious enough to envelope it within its scope. Workers look upon it as a thing of value. That it has value to men who hold it and can use it no one will deny. All the controversy in seniority grievances and arbitrations revolves around this reality.

Seniority might prove delusive to workers, as Ben Aaron has predicted; it may lose its value right before the workers' eyes, but it will be with us, as Tom says, for a long time to come. As a matter of fact, I am not sure we will ever lose it because the notion is firmly imbedded in much of human society. I'll bet that seniority will be with us for about as long as anything else lasts. Technological change will only cause problems.

The problems to which Tom has addressed himself are a product of the dynamism of our industrial society. They will be more frequent, not less. The approaches to the problems do not seek to eliminate seniority, only to apply it or adapt it to the needs of the situation.

I suspect that one of the reasons I was asked to participate in this discussion, although I do not see why it qualifies me nor do I claim any other special qualifications, is that I arbitrated the seniority dispute between the New York Shipping Association and the International Longshoremen's Association in the Port of New York.

I could go into a detailed discussion of the development and application of this seniority plan—and the limits and limitations of its application—but this is hardly the time or the place for it. Nor do I suggest that any specific provisions deal with merging seniority lists, let alone suggest novel approaches. But the problem of merging seniority lists arises in two or three ways. The most obvious one occurs when piers are closed down for modernization—technological change, if you please—and instead of two or three finger piers a consolidated terminal is constructed. Seniority rights, by custom and practice as well as by agreement, are carried in the first instance at the pier, either by a man being a member of a gang which has seniority rights or by a man being

on a pier dock labor list. These rights continue regardless of changes in the employer, although their current worth is related to the volume of business of the employer. When a pier is shut down and a new, modern facility is constructed, there is bound to be a question of merging seniority rights.

It is interesting to speculate on the application of the criteria in Tom's paper. There is, of course, no following of the work. The seniority rights go with the pier not the employer. For example, the Holland-American Line in transferring its operations to a newly constructed facility in Manhattan will not transfer the longshoremen from Hoboken. The company must start with the men who hold claims on the old pier that was demolished, even though the old pier had been in disuse prior to the renovation. Thereafter the agreement gives priority to men in the section but the merger problem is faced when a new facility or terminal occupies the space once occupied by separate piers.

For example, there were three piers originally with one having five regular gangs and the other two having four each, making for a total of thirteen regular gangs. During the period of renovation they have no regular base except as they might be taken on at another pier or get sufficient work by hiring out wherever the demand might take them. Short of this the men in the gang might hire out as individuals. The danger of gang dissolution is rather great. This might help in the final adjustments because when the new terminal opens the new employer—there were three before—might want only ten regular gangs. Which ten gangs get the priorities? How shall the gangs be ranked?

The surviving group principle does not operate as Tom explained it, for no one of the piers takes precedence. Each of the claims on the old piers has survived, yet there is a survival factor. Length of service might apply because each gang has a seniority date on its old pier. Either the absolute rank or ratio rank principle could apply. Of course, the matter could be set on the basis of a deal but it would have to be approved by the Waterfront Commission. Thus far we have been talking about gangs. There is also a problem of dock labor and classified men. Hence the matter is one of fitting individuals into the new lists which determine the men's priorities. The same principles might have validity.

A recent decision of the U. S. Court of Appeals for the 2nd Circuit accentuates the role which arbitrators may be called upon to play in connection with mergers of companies.[1] The Retail, Wholesale and Department Store Union had a collective agreement with Interscience Publishers, running to January 31, 1962. On October 2, 1961, Interscience effected a consolidation with Wiley. Interscience before the consolidation, and Wiley thereafter, took the position that the agreement was automatically terminated for all purposes by the consolidation. The union argued that certain rights, including seniority, had become "vested" and that Wiley had to recognize them.

The District Court held that the agreement survived the consolidation but denied arbitration on the ground that the agreement should be so construed as to exclude from arbitration matters involving the entire collective agreement as distinguished from the individuals comprising it and, even if not so limited, the union had failed to avail itself of the grievance procedure and had thus abandoned any rights it might have had to arbitrate the dispute.

The Court of Appeals holds that the agreement was not necessarily terminated by the consolidation, that Wiley and the Union are proper parties to the arbitration proceeding, and that the terms of the agreement contemplated the arbitration of just such a dispute as the one in the case. It holds that there is a question whether rights exist, yet it stopped short of deciding what those rights are, saying that a determination has been reserved by the parties for the arbitrator. It holds that the Union may arbitrate "the existence and nature of rights which it claims 'vested' during the term of the agreement, although maturing after the termination thereof . . ." Once the court has determined that "the reluctant party has breached his promise to arbitrate, the matter must go to the arbitrator for determination on the merits." Hence, an arbitrator will have to determine whether seniority rights run beyond the consolidation and, if so, what those rights are and how they shall be implemented. Of course, the Court warned, as in *United Steelworkers of America* v. *Enterprise Wheel,* that

> if the arbitrator in deciding the merits should purport to establish and enforce rights accruing subsequent to the termination of

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1 *David Livingston* v. *John Wiley and Sons, Inc.*—decided January 11, 1963, BNA *Daily Labor Report* No. 18, D-1, January 24, 1963 (52 LRRM 2223).

> the agreement, or if, although purporting to define and implement rights accruing under the contract although maturing thereafter, he should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award.[2]

The Court of Appeals also holds that the question of procedures under the agreement are also for the arbitrator to decide, that is, whether the union abandoned its rights by not following proper procedures.

This may not be the place nor the time to raise the troublesome question of the "creative role in the interpretation of collective agreements" which the Supreme Court seems to have given, or to have thrust upon, arbitrators. But the decisions of the courts place upon the arbitrator a responsibility to look into the merits of seniority claims arising under mergers and consolidations. Decisions will be better when arbitrators are well informed. It is my philosophy, and I would hope you all agree with me, that the parties ought to be exploring and charting their own course in "new and important fields as yet largely unexplored." The reality, of course, is that if the parties do not do so the arbitrator may have to find the course within the limits and implications of their agreements.

Discussion—

MARK L. KAHN*

Professor Kennedy is to be congratulated upon his clear exposition of a very complex topic. One can readily see why he is a Harvard professor.

Although arbitrators are being called upon with increasing frequency to resolve disputes involving the merger of seniority lists, I am sure that most of these situations are still being worked out by the parties themselves. In principle, such self-determination is of course to be applauded. Unfortunately, in a high proportion of seniority mergers, the solutions which emerge depart radically from the equities that Tom Kennedy has clarified for us. This is

[2] 46 LRRM 2423.

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because a majority group of employees is characteristically ready and willing to enhance its own selfish interests by submerging the equities of a minority group. The employer, too often, takes a hands-off attitude, declaring that this is a problem for the union to work out.

Permit me to give you one example, not hypothetical, of a case in which one might have reasonably anticipated an equitable outcome. This occurred in 1950, when the Gulf Refining Company expanded its Hamtramck (Michigan) Bulk Plant by acquiring the business and the adjacent facilities of Sohio-Fleetwing, Inc. Both of these bulk plants, henceforth to be operated as one facility, received petroleum products by railroad and pipeline. These products were dispatched by motor trucks to retail outlets throughout the Detroit metropolitan area (Hamtramck is a community located within the city limits of Detroit). Each enterprise was about twenty years old at the time of the merger. No contraction in total employment was anticipated, and in fact a moderate increase took place after the merger.

Both employee groups were represented by the same area-wide local union: Local No. 389 of the Oil Workers International Union, CIO. Gulf employed about 150 workers, Sohio about 50. Most of the men in each group were drivers, and the remainder were chiefly in warehousing and maintenance classifications. All of the employees in each group had been on a single seniority list and (for our purposes here) can be regarded as occupationally interchangeable. About one-third of those in each group, however, held only temporary seniority status, having been hired to meet peak seasonal labor demands associated with fuel oil deliveries during the fall and winter months. Preferential reemployment rights (in either of the respective groups prior to the merger) were not acquired until after six months of accumulated service in temporary employment.

Under these circumstances, full seniority credit with Gulf (the surviving employer) for Sohio Service was favored by both Gulf management and by the leadership of Local No. 389. Consequently, an agreement to this effect was easily reached on December 11, 1950, and the required membership ratification was secured—although not without much debate—about one month later. Opposition then began to mount, however, spearheaded by tem-

porary and low-seniority Gulf employees who sought to displace all of the former Sohio employees in seniority status. One week later, a motion to reconsider led to a withdrawal of the ratification.

Protracted negotiations ensued, primarily intra-union, with much heated controversy. The final settlement, not arrived at for six months, ranked the men in four seniority categories: (1) permanent Gulf employees; (2) former permanent Sohio employees; (3) temporary Gulf employees; and (4) former temporary Sohio employees. Thus, in July 1951, in spite of the position taken by the management, the common local union leadership and the Sohio minority, "democracy" prevailed and all former permanent Sohio employees (with accumulated service dating back to *1930*) were placed below all permanent Gulf employees (with service commencing as recently as *September 1949*). On the other hand, full credit was given for all Sohio service in relation to vacation and other length-of-service benefits—what Tom Kennedy referred to as "benefit seniority rights." Where no conflict of interest was involved, the Gulf employee majority was naturally happy to support benefit payments for the Sohio group at the Company's expense.

In this last connection, I want to make a semantic point, namely: that our use of the term "seniority" should be restricted in its application to its role in defining the *relative* rights of employees to job opportunities or to other benefits. The older term "priority"—still used in some agreements—is a precise synonym. We should, to avoid confusion, discard Tom's "benefit seniority" label, in favor of the established title of "length-of-service benefits," for all benefits that are uniformly conferred within an employee group on the basis of each employee's own length of service and which contain no competitive element in their administration.

I want to give just one more example in order to emphasize the political dimensions of this problem. This arose in a situation of which all of you have heard: the Hudson-Nash merger that produced the American Motors Corporation. In 1955, a decision was made to shut down the Hudson plant in Detroit. About 7,000 employees, most of whom were on layoff, held seniority rights at this plant. Many had seniority dates extending back for several decades. The Hudson and the Nash employees were both represented, of course, by the United Automobile Workers.

The 6,800 Nash workers in Kenosha, Wisconsin, and the 2,850 Nash workers in Milwaukee, did not approve of the idea that Hudson workers should be permitted to take their Hudson seniority with them into either of these Wisconsin plants, and this was understandable. The Hudson workers were therefore invited to apply for preferential employment with American Motors in Wisconsin, but on the understanding that any Hudson employees who moved would rank below all Kenosha or Milwaukee employees (except those with probationary status). On these terms, it was not surprising that only a few hundred Hudson employees applied for Wisconsin jobs.

Within the union, however, there were some feelings of discomfort about this situation, and some internal mediation took place at the UAW's International Convention in March 1955 with interesting results. Those workers who had applied for Wisconsin jobs on the basis that they could not also transfer their Hudson service date for seniority purposes were granted the right to move to Kenosha with full seniority, and to be dovetailed into the Kenosha list on the basis of their Hudson service. *But no other Hudson employee could change his mind and apply for transfer with seniority rights.* Obviously, as a matter of political digestion, several hundred Hudson workers could be absorbed, but several thousand could not.

I am not implying, by the way, that Hudson employees were entitled to transfer with full seniority rights to Kenosha. An arbitrator, if he had been presented with that question, might well have found—on the basis of the follow-the-work criterion—that Hudson was in fact on its way out as a distinguishable product, and that the nominal transfer to Kenosha of Hudson assembly operations was not in fact a significant shift of employment opportunities. But it is certainly clear that *if* several hundred Hudson workers were entitled to transfer to Kenosha with seniority on the basis of the equities involved, it would not likely have been the same employees who in fact did make the transfer only because they had elected, originally, to go without their seniority.

Equitable solutions are most likely to be adopted when the formula can be devised by persons or institutions not immediately caught up in the conflict of vested interests. It is to be

hoped that more unions will follow the example of a few (such as the Air Line Pilots Association) and adopt—at their national level—appropriate criteria and specific procedures for arriving at fair settlements. We can also expect fair solutions to emerge when such issues are submitted to arbitration, provided the arbitrator is not governed by contract language that did not contemplate a merger or which otherwise precludes a proper formula. Ideally, such seniority merger disputes should be submitted to arbitration as disputes over contract terms, not under them. In other words, within the general constraints suited to the goal of a just decision, the arbitrator should be permitted to impose a formula that meets the realities of the case.

I have only one technical criticism of Tom's excellent analysis. This relates to his discussion of the "follow-the-work" criterion. The "follow-the-work" principle is a most significant and pertinent one, but it is of a different order from the others. It is not a formula for integrating seniority lists. Rather, its application comes at the outset to determine whether or not, and if so to what extent, the employees of company A are entitled to share in the seniority rights of the employees in company B. Once this determination has been made, and it is decided that some type of seniority integration is equitable, you then come to the next step: the choice of a specific integration formula for the employees concerned.

I want to close by suggesting a few other aspects of this topic, primarily to remind us about some of the possible complexities that have not been discussed. First, there may be vital differences, and there usually are, between the seniority system of each unit prior to the merger. In such cases, the merger formula must also determine which system is to survive or to what extent particular features of each system are to be retained in the merged unit. Second, I want to suggest that the characteristics of each of the pre-merger systems may properly play a useful role in determining the application of the criteria. For example, if one of the units has had a very departmentalized and restricted system—for example, one in which an employee laid off from department X may not bump into any other department, regardless of his length of service with the company—is not a different merger solution suggested than in the case of units with broadly applicable bump-

ing rights? I am not sure of the answer, but it is an interesting question.

Third, I want to point out that under many seniority systems—as in the airline pilot merger cases cited by Tom Kennedy—seniority means much more than simply a preferential right to a fairly homogeneous job but also provides a bundle of differential advantages to the more senior employed workers, such as the choice of better working conditions, higher earnings opportunities, etc. As in the airline pilot cases cited, these types of seniority systems appear to call for a greater weighting of the ratio-rank principle as against straight length-of-service dovetailing. Finally, we should be aware that there may be many situations in which rival unions are involved. Union rivalries may not change the underlying equities, but they are likely to handicap the achievement of a just formula.

In closing, I want to express the hope that employers will recognize and act upon their moral responsibility to insist upon proper solutions. Some employers have done so. Too many, however, in the cases I have examined, have played only a passive role even in situations where some obvious equities were being sacrificed to the interests of an unchecked majority group.